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—O. 33, R. 1 — Suit instituted in forma pauperis — Court refusing leave — Plaintiff striking off certain reliefs for want of funds — Plaintiff subsequently getting funds — Amendment of plaint to include the reliefs ordered — Striking off reliefs in the case, was not giving up reliefs within the meaning of O. 23, R. 1 — See Civil P. C. (1908), O. 23, R. 1

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—Art. 226 — Writ of certiorari — Existence of alternative remedy, when a bar

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—Art. 227 — Certiorari — Quasi judicial orders — Interference — See Constitution of India, Art. 226

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—Art. 245 — Employees' Provident Funds Act (1952), S. 19-A — Validity — Nature of powers under Section 19-A — Section does not give excessive or uncanalised power to Central Government

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J & K 112 A (C N 21)

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—Art. 311 — Civil servant officiating in post for fixed period — Reversion to substantive post before expiry of term — Has no right to maintain writ petition against Government unless his fundamental right or right under Art. 311 is affected — Claim based on contract — High Court does not enforce contractual rights — Remedy by way of suit against Government is open — See Constitution of India, Art. 226

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—S. 30 — Money advanced by deceased belonging to joint Hindu family — Deceased leaving behind him, among other heirs, two married daughters — Suit by eldest son of deceased for recovery of money without joining the two daughters as parties — Suit, held was not properly represented and was not maintainable — See Hindu Succession Act (1956), S. 6, Explanation 1 Bom 251 B (C N 44)

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- O. 43, R. 1 (r) — 1960 All LJ 124 — Over. AIR 1970 All 376 A (C N 57) (FB).

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—Art. 19(1) (f) — (1950) 339 US 56 —
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—Art. 20(3) — (1947) 331 US 145 — Over.
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—Art. 20(3) — (1950) 339 US 56 — Over.
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—Art. 226 — (1968) C. M. W. P. No. 1744
of 1967, D/- 8-4-1968 (All) — Revers.
AIR 1970 All 357 C (C N 55).

—Art. 245 — AIR 1957 Cal 702 — Diss.
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—S. 528 (1-c) — AIR 1936 Mad 163 —
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—S. 108 — AIR 1965 Mad 440 — Diss.
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—S. 108 — AIR 1967 Orissa 70 — Diss.
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—S. 48 — AIR 1952 Mad 276 — Diss.
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—S. 48 — AIR 1962 Mys 161 — Diss.
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- (1895) ILR 17 All 238 = 1895 All WN 56
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- AIR 1947 Pat 298 = ILR 25 Pat 395, Ramnarain Singh v. Basudeo Singh — Partly Overruled. AIR 1970 Pat 237 (C N 37) (FB).
 (50) Reasoning of Rai, J. in AIR 1950 Pat 354, Bhagwati Prasad Sah v. Radha Kisun Sah — Not Approved. AIR 1970 Pat 237 (C N 37) (FB).
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The following Judgment of the Court was delivered by

AIR 1970 SUPREME COURT 1025
(V 57 C 216)

(From: Bombay)

J. C. SHAH AND K. S. HEGDE, JJ.

M/s. Madhya Pradesh Mines, Appellants v. R. B. Sreeram Durga Prasad Ltd., Respondents.

Civil Appeal No. 1727 of 1966, D/- 9-4-1970.

HEGDE, J.:— These appeals by special leave brought by the State of Mysore raise a common question of law. That question is whether the 1st proviso to Section 3 of Madras Motor Vehicles (Taxation of Passengers and Goods) Act XVI of 1952 is valid. The High Court and the Courts below following certain earlier decisions of the High Courts of Mysore, Madras and Andhra Pradesh have held that that proviso is invalid and consequently the passenger transport operators who have been compelled to pay tax under Section 3 of the aforementioned Act are entitled to the refund of the tax paid by them.

Constitution of India, Article 136 — Appeal by special leave — Question of fact — Appreciation of evidence — Agreement to supply manganese ore of certain specification within specified period — Question whether there was subsequent oral agreement whereby consignee agreeing to modify specifications and accept ore supplied according to modified specifications — Trial Court not accepting plea of subsequent oral agreement and its decision confirmed by High Court — Supreme Court would not reappreciate evidence for determining whether Court erred in reaching finding on question of fact.

(Para 7)

The following Judgment of the Court was delivered by

SHAH, J.:— This is an appeal with special leave by the defendants against the judgment of the High Court of Bombay (Nagpur Bench) confirming the decree of the Additional District Judge in Suit No. 8-B of 1956.

2. The respondents in these appeals were passenger transport operators plying their buses in the District of South Kanara which district till November 1, 1956 was a part of the former State of Madras and thereafter became a part of the new State of Mysore. The State Legislature of Madras enacted Madras Motor Vehicles (Taxation of Passengers and Goods) Act XVI of 1952 and on the strength of the provisions of that Act levied and collected certain taxes from the operators. Thereafter the operators sued the State of Madras for refund of those taxes. After reorganization of the State in 1956, the State of Mysore was substituted for the State of Madras. As mentioned earlier the High Court as well as the Courts below have upheld the claims of the operators.

3. The question of law raised in these appeals has become academic, the impugned provision being no more in operation. The claims involved in these appeals are by no means substantial. They range between Rs. 852.25 P. and Rupees 2652.37 P. Hence we do not think that these are fit cases in which this Court should exercise its special and discretionary jurisdiction under Article 136 of the Constitution. For that reason we decline to go into the merits of the contentions advanced in these cases.

4. In the result these appeals fail and they are dismissed. The respondents are ex parte in these appeals; there will be no order as to costs in these appeals.

Appeals dismissed.

2. The defendants agreed to supply manganese ore of certain specifications to the plaintiffs under two contracts Nos. 65 and 66 both dated May 7, 1953. Under Contract No. 65 the defendants agreed to supply before the end of November 1953, 4,000 tons of Second Grade manganese ore at the rate of Rs. 103/- per ton f.o.r. Sitasaongi and Dattapohar. By the second contract No. 66 the defendants agreed to supply on or before December 31, 1953, 6000 tons of High Grade manganese ore at the rate of Rs. 142/- f.o.r. Sitasaongi and Dattapohar. Under Contract No. 65 the defendants supplied 3,649 tons which were accepted. 320 tons of ore offered by the defendants was not accepted, because it was according to the plaintiffs, not according to the specifications. The defendants thereafter did not supply the balance of 351 tons. Under Contract No. 66 upto December 27, 1953, the defendants supplied 2,873 tons 3 c.w.t. The defendants also offered to supply between 28th & 31st of December, 1953, 3,693 tons in ten lots, but on sampling it was found

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that the contents of silica, phosphorous and iron of the manganese ore were not according to the specifications under the terms of the contract, and the plaintiffs declined to accept the quantity offered.

3. On the allegation that the defendants had committed breach of contract, the plaintiffs commenced an action in the Court of the Additional District Judge, Bhandara, for a decree in which they originally claimed Rs. 1,84,137/5/8 which was later by amendment increased to Rs. 3,56,949/-. Under Contract No. 65 the plaintiffs claimed Rs. 88,596/- and under Contract No. 66 Rs. 2,68,853/-. The plaintiffs claimed that time was the essence of the contracts and the defendants had failed and neglected to deliver manganese ore according to the specifications within the period of the contracts. The defendants contended, *inter alia*, that they had offered 351 tons of manganese ore under Contract No. 65 which the plaintiffs did not accept. They also contended that the contract was acted upon till August 7, 1953, and thereafter the parties agreed to waive the contract. In respect of Contract No. 66 the defendants contended that they had supplied manganese ore to the plaintiffs since January 1953 under several contracts, and that there used to be distinct subsequent oral agreements by which the written terms about the specifications of the various contents of the ore were modified, and the plaintiffs agreed not to enforce the specifications regarding silica, iron and phosphorous contents of the ore but to accept the ore; that there was a distinct subsequent oral agreement after Contract No. 66 was executed by which the plaintiffs agreed that they would not enforce the stipulation about the contents of silica, iron and phosphorous, and even about the manganese contents of each lot it was agreed that the plaintiffs would accept "on the basis of average of grouped lots taken together provided the overall average came to 48.25 per cent. though any one or more lots show the contents less than 48 per cent, but not less than 45.1 per cent;" that in pursuance of the agreement 2,873 tons were not analysed in respect of non-manganese contents; that the stacks of 3,693 tons of ore were prepared and offered but were not accepted by the plaintiffs; that the plaintiffs by their declarations, acts and omissions intentionally caused and permitted the defendants to believe that they will not enforce the terms stipulated in the contract, but will accept the ore under the terms

as modified by the subsequent oral agreement; that the plaintiffs had never informed the defendants that they intended to enforce the original terms of the contract and the plaintiffs having failed to do so in good time before December 31, 1953, the delivery offered to them of 3,693 tons was according to the specifications as agreed after the terms of the contract were originally recorded.

4. The Trial Court held that the stipulation as to time was of the essence of contract under both the contracts, and that the terms of the contracts were not orally modified by the parties subsequent to the execution of the contracts. The Court further held that 3,693 tons of ore offered by the defendants under Contract No. 66 between December 28 to 31, 1953, were below the agreed specifications, and the defendants had committed breach of contract, and were liable in damages. The Trial Court on that view decreed the claim against the defendants for Rupees 1,87,955/- and proportionate costs.

5. In appeal by the defendants the High Court confirmed the decree passed by the Trial Court. The High Court agreed with the view of the Trial Court that the defendants failed to establish the case that there was a subsequent oral agreement varying the terms of the written contract in respect of the specifications relating to the contents of silica, phosphorous and iron.

6. The Trial Court held that the defendants had failed to supply 351 tons of manganese ore under Contract No. 65; at the hearing of the appeal before the High Court counsel abandoned the defendant's plea in respect of Contract No. 65. He conceded that the defendants were unable to establish that the plaintiffs had wrongfully refused to accept 351 tons of ore under Contract No. 65. Before us, counsel for the defendants has not sought to press the appeal in respect of the claim decreed by the Trial Court and confirmed by the High Court in respect of Contract No. 65.

7. In respect of the claim for breach of Contract No. 66 counsel for the defendants sought to urge the contention raised before and negatived by the Trial Court and the High Court in answer to the plaintiffs' claim that there was an oral agreement between the parties whereby the plaintiffs agreed to modify the specifications and to accept the manganese ore supplied by the defendants according to the modified specifications. That plea was

not accepted by the Trial Court and the decision of the Trial Court has been confirmed by the High Court. This is a finding on a question of fact and we see no reason to reappreciate the evidence for determining whether the Courts erred in reaching that finding.

8. The appeal fails and is dismissed. Having regard to the circumstances of the case, there will be no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1027

(V 57 C 217)

(From: Madras)

J. C. SHAH, K. S. HEGDE,
AND A. N. GROVER, JJ.

State of Madras, Appellant v. H. R. Krishnaswami Naidu and others, Respondents.

Civil Appeals Nos. 2282-2287 of 1966.
D/- 14-4-1970.

Sales Tax — Tamil Nadu General Sales Tax Act (1 of 1959), Section 3 (3) Explanation — Levy of taxes on sales or purchase of goods — Component part — Sale of — Right to concessional rate of Sales Tax — Component part capable of identification by chemical or other test of finished product — Sale of component entitled for concessional rate.

The legislature has not provided that before a component part may qualify for the concessional rate of tax under S. 3 (3), it must be capable of visual identification in the finished product. A reference to the entries in the First Schedule clearly indicates that the benefit of S. 3 (3) may not be obtained in respect of any raw material supplied for manufacture of finished products, if the test of visual identification be adopted. If the component is capable of identification by a chemical or other test as a component of a finished product falling within the schedule, it would be an identifiable constituent within the meaning of Section 3 (3) Explanation, and the sale of the component would qualify for the concessional rate of tax. (Sale of groundnut oil intended to be used for manufacturing Vanaspati, held entitled to concessional rate.) (Para 5)

The following Judgment of the Court was delivered by

SHAH, J.:— These appeals raise a common question. The respondents are

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dealers in groundnut oil. In the assessment years 1959-60 and 1960-61 they sold quantities of groundnut oil set out in the table below to the Hindustan Lever Ltd.:

(For Table see page 1028)

The groundnut oil supplied to the Hindustan Lever Ltd. was intended to be and was used for manufacturing vanaspati.

2. In proceedings for assessment to sales-tax, the respondents claimed that they were liable to pay tax at a concessional rate under Section 3 (3) of the Madras General Sales Tax Act, 1959. That contention was rejected by the Additional Commercial Tax Officer and the order was confirmed by the Sales Tax Appellate Tribunal. The High Court set aside the orders holding that the respondents were entitled to claim the concessional rate under Section 3 (3) of the Act. The State of Madras has appealed to this Court with certificate granted by the High Court.

3. The relevant provisions of the Act may first be set out. Section 3 provides, insofar as it is relevant:

"(1) Every dealer x x x whose total turnover for a year is not less than ten thousand rupees x x x shall pay a tax for each year at the rate of two per cent. of this taxable turnover:

Provided that —

xx xx xx xx

(2) Notwithstanding anything contained in sub-section (1) in the case of goods mentioned in the First Schedule, the tax under this Act shall be payable by a dealer, at the rate and only at the point specified therein on the turnover in each year relating to such goods whatever be the quantum of turnover in that year.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), the tax payable by a dealer in respect of any sale of goods mentioned in the First Schedule by such dealer to another for use by the latter as component part of any other goods mentioned in that Schedule, which he intends to manufacture inside the State for sale shall be at the rate of only one and a half per cent. of the turnover relating to such sale:

Provided xx xx xx

Explanation.— For the purposes of this sub-section, component part means an article which forms an identifiable constituent of the finished product and which

C. A. No.	Name of respondent	Period of sale	Value of groundnut oil
2282	R. N. Krishnaswami Naidu & Sons.	1959-60	Rs. 3,73,229.08
2283	A. S. Arunachalam Chettiar	1959-60	Rs. 5,14,106.01
2284	K. Mummudi Chettiar and Co.	1960-61	Rs. 10,27,939.32
2285	K. S. Mohammed Gbani Rowther.	1959-60	Rs. 2,03,709.98
2286	V. Krishna Chettiar and Bros.	1960-61	Rs. 2,48,445.95
2287	V. N. M. A. Rajendra Nadar and Bros. Co.	1959-60	Rs. 1,51,241.24

along with other goods to make up the finished product."

The First Schedule to the Act contains a large number of entries. The entries material at the relevant time were Entry 20 "All vegetable oils", and Entry 45 "Vegetable products, that is to say, any vegetable oil or fat, which whether by itself or in admixture with any other substance, has by hydrogenation or by any other process been hardened for human consumption". Groundnut oil clearly fell within Entry 20, and vanaspati was covered by Entry 45. There is also no dispute that groundnut oil forms the major component of vanaspati.

4. The taxing authorities rejected the claim of the respondents on the ground that groundnut oil is not a component part of vanaspati because it does not form "an identifiable constituent of the finished product" i.e. vanaspati. The High Court held that groundnut oil constitutes a component part of vanaspati. The finding of the High Court is supported by clear evidence on the record. Mr. R. Mahadevan, Factory Manager, Hindustan Lever Ltd., has stated in his affidavit that the vanaspati manufactured by the Hindustan Lever Ltd., contained the following three vegetable oils as component parts:

Percentage of oil used

- (i) Groundnut oil 85 to 85
- (ii) Sesame or Gingelly oil 5
- (iii) Cottonseed oil 0 to 10

According to Mr. Mahadevan the groundnut oil is the major component in the manufacture of vanaspati and vanaspati may be manufactured by using groundnut oil alone without adding any of the other two oils; that the use of 5 per cent. sesame or gingelly oil in the manufacture of vanaspati was made obligatory by the Government of India under the Vegetable Oil Products Control Orders with a view to detect adulteration in other products, such as ghee etc., by the mixture of vanaspati; and that groundnut oil was an identifiable component part of vanaspati

manufactured by the Company. He further stated that the presence of the three oils mixed in the manufacture of vanaspati can be identified by carrying out three tests — (1) Baudouin Test for detecting the presence of sesame oil; (2) Halphen Test for detecting the presence of cottonseed oil; and (3) Bellier Test for detecting the presence of groundnut oil. No evidence contradicting the statements of Mr. Mahadevan was laid before the taxing authorities.

5. It was, however, urged on behalf of the State that an article is a component part within the meaning of the Explanation to Section 3 (3) of the Act only if it is capable of being identified visually in the final product. We are unable to accept that contention. The Legislature has not provided that before a component part may qualify for the concessional rate of tax, it must be capable of visual identification in the finished product. A reference to the entries in the First Schedule clearly indicates that the benefit of Section 3 (3) may not be obtained in respect of any raw material supplied for manufacture of finished products, if the test of visual identification be adopted. In our judgment, if the component is capable of identification by a chemical or other test as a component of a finished product falling within the Schedule, it would be an identifiable constituent within the meaning of Section 3 (3) Explanation, and the sale of the component would qualify for the concessional rate of tax. The High Court was, in our judgment, right in holding that the respondents were liable to tax only under Section 3 (3), and not under Section 3 (1) of the Act.

6. The appeals fail and are dismissed with costs. One hearing fee.

Appeals dismissed.

AIR 1970 SUPREME COURT 1020
(V 57 C 218)

(From: Punjab & Haryana)*

J. M. SHELAT AND I. D. DUA, JJ.

Ram Murti, Appellant v. State of Haryana, Respondent.

Criminal Appeal No. 62 (N) of 1967, D/- 14-4-1970.

(A) Penal Code (1860), Section 366 — Age of prosecutrix — Evidence — Unproved and unexhibited school certificate cannot be relied on. Criminal Appeal No. 913 of 1966 (Punj & Haryana), Reversed. (Para 7)

(B) Evidence Act (1872), Section 35 — Age, proof of — Unproved and unexhibited school certificate cannot be relied upon. Criminal Appeal No. 913 of 1966 (Punj & Haryana), Reversed. (Para 7)

(C) Penal Code (1860), Sections 366 and 376 — Age of prosecutrix is always of importance.

In cases under Sections 366 and 376, age of prosecutrix is always of importance, particularly so where according to medical evidence, she was found to have been used to sexual intercourse and there was old rupture of hymen. Where the accused was acquitted of offence under Section 376, the Court should examine the question of age more closely. (Para 7)

(D) Evidence Act (1872), Section 133 — Case under Section 366, I. P. C. — Prosecutrix used to sexual intercourse — Her case that she was compelled, threatened or otherwise induced to go with accused who was alleged to have raped her without her consent — Her statement, in order to base conviction of accused upon, must be corroborated in some material particulars from independent source. Criminal Appeal No. 913 of 1966 (Punj & Haryana), Reversed. (Para 8)

(E) Penal Code (1860), Section 366 — Prosecutrix found to be used to sexual intercourse — Her statement that she was threatened and induced to go with accused should be corroborated in material particulars from independent source, to base conviction of accused upon. Cri. App. No. 913 of 1966 (Punj & Haryana), Reversed. (Para 8)

The following Judgment of the Court was delivered by

DUA, J.:— This appeal is by special leave from the judgment of the Punjab &

* (Criminal Appeal No. 913 of 1966 — Punj & Har.)

EN/EN/B807/70/RGD/M

Haryana High Court in Criminal Appeal No. 913 of 1966. The appellant, Ram Murti, along with Suresh Kumar, Pratap Singh and Prem Kumar Mittal, was tried in the Court of the Additional Sessions Judge, Ambala on charges under Sections 366, 366-A and 376, Indian Penal Code. Pratap Singh, Suresh and Prem Kumar Mittal were given benefit of doubt and acquitted. According to the Trial Court, the prosecutrix Satnam Kaur, a student of 9th class, Dev Samaj Girls' High School, Ambala City, had improved upon her earliest version in respect of these accused and the possibility of falsely implicating them by herself or at the instance of Shri Hari Ram, Assistant Sub-Inspector, could not be reasonably ruled out. The appellant was, however, held to be the chief and real culprit and was accordingly convicted under Sections 366 and 376, Indian Penal Code and sentenced to 5 years' rigorous imprisonment on each count. The sentences were ordered to be concurrent. It was observed that the appellant did not deserve any leniency because being a medical practitioner and a teacher he had taken undue advantage of his position in both capacities. On appeal the High Court acquitted him of the charge under Section 376, Indian Penal Code but maintained his conviction and sentence under Section 366, Indian Penal Code. On appeal by special leave in this Court the appellant challenges his conviction and sentence. The appellant is not represented by counsel. He is on bail and is not present in Court; but he has submitted written arguments and has requested that they may be considered in his absence.

2. The prosecution story, as given by the prosecutrix, may now be broadly stated. Satnam Kaur, the prosecutrix, daughter of Hans Raj, a refugee from West Pakistan, was a student of 9th class, Dev Samaj High School, Ambala City at the relevant time. One Sumitra Devi was also studying with her in the same class. Ram Murti, appellant, a medical practitioner also used to teach in this school. He used to take three periods a week of the 9th class. The annual examination in the school concluded on March 23, 1965 and on the following day there was some function in the school. After the function, on March 24, 1965, Sumitra Devi took Satnam Kaur to the appellant's house so that he may disclose to them the marks secured by them in the examination. This was pursuant to the appellant's message conveyed through Sumitra Devi. Both

these girls reached the appellant's house at about 6 or 7 p.m. A car was parked in front of that house. The driver was sitting in the car and Pratap Singh was standing near it. The appellant took both the girls inside the house and entertained them to tea. He also disclosed to them the marks secured by them in the examination. As the tea tasted somewhat bitter and Satnam Kaur felt slight headache, she requested the appellant to take her to her house. The appellant promised to do so. As Sumitra Devi went upstairs to talk to the appellant's wife Satnam Kaur was taken by the appellant to the car. Pratap Singh and Suresh Kumar also got into it. Instead of taking her to her own house she was taken to Suresh's house where all of them had sexual intercourse with her against her will and without her consent. Outside that house the driver of the car threatened her that she would be killed if she refused to go in or raised alarm. At midnight they took her to Ambala Cantonment in the same car and in the shop of a tailor behind Nigar Cinema, the key of which was with Suresh, they again raped her under threat of life. In the morning at about 4 or 5 a. m. they took her to the house of Prem Mittal in Prem Nagar. Prem Mittal was in the house. After leaving Satnam Kaur there the appellant and the driver of the car locked the front door of the house and went away. In the evening Ram Murti returned, entering the house by the back door. At night Prem Mittal had sexual intercourse with her against her will and in spite of her resistance. On the following day Pratap and Suresh again raped her in that house. She was also given some bitter liquid to drink twice against her will. On the night of 27th March, Pratap and Suresh took her to Chandigarh in a bus and kept her in the waiting room at the railway station. She was threatened with life if she raised alarm. In the morning she was brought back to Prem Mittal's house in Ambala where Pratap, Suresh and Prem Mittal had again sexual intercourse with her. She was kept in that house till March 29, 1965. She was again taken to Chandigarh by Pratap and Suresh. During these two days Pratap, Suresh and Prem Kumar used to commit rape on her. On the evening of March 29, 1965 Suresh and Pratap took her to Chandigarh and kept her in the waiting room at the Chandigarh railway station. The following morning when they were going from the railway station towards the town near the

crossing of the roads she saw some police officers and raised alarm. Suresh and Pratap left her there and she narrated her story to the police officers. They took her to the police station at Chandigarh and recorded her statement. The police brought her back to Ambala City where Hari Ram, Assistant Sub-Inspector threatened her not to involve Sumitra and Ram Murti in this affair otherwise he would get all the members of her family arrested. She was taken before the Chief Judicial Magistrate, Ambala where she made her statement which, according to her, was in accordance with the directions of A. S. I. Hari Ram. After reaching her parent's house she was taken by her father to the police station Ambala Cantonment and her statement was recorded by the Judicial Magistrate, Ambala City.

3. As the appellant was unrepresented by counsel in this Court we requested the counsel for the State to take us through the evidence. The first point which requires consideration is that of the age of the prosecutrix. In the Trial Court the prosecutrix gave her age as 17 years. In her statement before the Chief Judicial Magistrate made on March 31, 1965 she gave her age as 15 years. In her statement under Section 164, Criminal Procedure Code made before Shri Hiralal Mehra on May 21, 1965 she stated her age to be 15½ years. In our opinion, it is not at all safe to rely on her own statement about her age.

4. Exhibit PA is the certificate given by Dr. Ajmer Kaur, Senior Medical Officer at Chandigarh (P. W. 1) who had examined Satnam Kaur on March 30, 1965. According to this certificate Satnam Kaur appeared to be about 16 or 17 years old but for a correct estimate of age the police was advised to get her bones X-rayed. This certificate further shows that Satnam Kaur was used to sexual intercourse and her hymen was torn, the rupture appearing to the doctor to be old. In her evidence in the committing Court Dr. Ajmer Kaur, when questioned, was unable to say whether the rupture of Satnam Kaur's hymen was three years' old or more. Satnam Kaur's age as 15 years described at the top of Ex. PA was inserted at Satnam Kaur's instance. Exhibit PL is a copy of the entry from the Register of Births maintained by the Municipal Committee, Ambala City. According to this entry, on September 27, 1949 Bhagwanti Dai reported about the birth of a daughter on September 25, 1949 to Hans

Raj, son of Ramkher Jaggi labourer by profession, resident of house No. 393, Kaith Majri. The name of the child was not mentioned. The name of the mother also does not find place in the entry but her age was recorded as 25 years. This report also shows that the parents had three children.

5. Maya Devi, mother of the prosecutrix appeared as P. W. 14 on September 16, 1966. She gave her age to be 40 years. Her statement in regard to her children and their age is:

"My marriage with Hans Raj my husband took place about 27 years back when we were both in West Pakistan. After the partition of the country we settled at Ambala City. Six children were born out of this wedlock, 4 daughters and two sons. The first child was a boy, namely Jagdish Lal who is about 22 years of age. Second child was our daughter Shanta aged 20 years. The third child born was our daughter Satnam Kaur who is about 17 years of age. She was only 15 years old at the time of the occurrence. Satnam Kaur was born at Ambala City. The name of the Dai who had attended this delivery was Bhagwanti."

In cross-examination she stated that all the six children born to her were alive. Bhagwanti Dai was not produced as a witness though she was alive as stated by Maya Devi. Hans Raj appearing as P. W. 18 said on this point:

"I am a displaced person from West Pakistan having settled at Ambala after the partition of the country. Before coming to Ambala I had spent a year at Karnal. My marriage with Maya Devi was solemnized about 27 years back. Maya Devi gave birth to 6 children, 4 daughters and 2 sons. The first was son Jagdish Lal, aged about 22/23 years, the second daughter, Shanta Devi, aged 17/18 years and the third was Satnam Kaur who was born 2½ years after her elder sister Shanta Devi. Satnam Kaur is about 17 years of age now. She was born at Ambala after the partition of the country — after about 2½ years of the partition of the country."

In cross-examination he stated:

"I cannot tell what was the age of my wife at the time of our marriage. I am 50 years of age. She is now 40 years old. Our marriage took place 27 years back. The age of my wife at the time of the marriage may be calculated. My son Jagdish Lal was born within one year of the marriage. Shanta, the eldest daughter

was born 2½ years after the birth of Jagdish. Satnam was born 2½ years after the birth of Shanta..... It is correct that one of my daughters died at Ambala. The birth name of Satnam was Ram Rani but her name was entered as Satnam Kaur when she was admitted in the school. Bhagwanti Dai had given the name Satnam of this girl when her birth was reported by her."

6. The Trial Court, in support of its conclusion on the question of age of the prosecutrix, relied on the birth certificate Ex. PL and the report of Dr. Ajmer Kaur, Ex. PA. The omission on the part of the prosecuting agency to get Satnam Kaur's bones X-rayed as advised by Dr. Ajmer Kaur was not considered by that Court to be very material. Considering that the prosecutrix was only a student of 9th class at the time of the occurrence that Court felt that Dr. Ajmer Kaur's estimate of her age was trustworthy and the prosecutrix was held to be definitely below 18 years of age. That Court also took into consideration an unproved and unexhibited school certificate which appears to have been obtained by the Investigating Officer from the Dev Samaj School. According to this certificate the date of Satnam Kaur's birth is stated by the trial Court to be August 5, 1948. We had a look at this document. It is dated April 9, 1965 and purports to certify the date of Satnam Kaur's birth according to the school register to be November 5, 1948 and is signed by someone describing herself as Head Mistress, Dev Samaj Girls' High School. We fail to understand how the Trial Court felt justified in taking this document into consideration and holding the date of birth as entered in this document to be August 5, 1948. We, however, need not say anything more about the merits of this document because the counsel for the State in this Court has rightly declined to place any reliance on it. In the High Court the learned Single Judge dealt with the question of age in the following manner:

"According to her medical examination by Dr. Ajmer Kaur, mentioned above, she was between 16 and 17, years of age. During the course of investigation, her birth entry PL was obtained showing that a daughter was born to Hans Raj on 25th September, 1949, with the aid of Bhagwanti Dai. This entry was made in the register on 27th September, 1949. There is evidence on the record that Bhagwanti was acting as a Dai at the

time of the birth of Satnam Kaur. Moreover it is also amply clear from the statements of Hans Raj and his wife that she was below 18 years of age. Besides the above, there is the school entry which shows that Satnam Kaur was born on 5th August, 1948. It is true that there is discrepancy between the school certificate and the birth entry PL. But in any case, her age was proved to be below 18 years at the time of the commission of this offence. The learned counsel for the appellant submitted that Dr. Ajmer Kaur advised X-ray examination of the prosecutrix to find out her age, but that was not done. The counsel, therefore, maintained that there was no satisfactory evidence on the record to show that she was below 18 years at the time of this occurrence. As remarked above, I have no doubt in my mind that taking into consideration the statement of Hans Raj, father of Satnam Kaur, and her mother as also the medical examination by Dr. Ajmer Kaur, entry PL, and school certificate, she was definitely below 18 years."

7. It is clear that in the High Court also it was not appreciated that this unproved and unexhibited school certificate could not be treated as evidence in the case. Nor was it noticed that according to this document Satnam Kaur's date of birth was November 5, 1948. The question of age of the prosecutrix in cases under Sections 360 and 376, Indian Penal Code is always of importance. It was particularly so in this case because according to the medical evidence the prosecutrix was found to have been used to sexual intercourse and the rupture of the hymen was old. The High Court having acquitted the appellant for an offence under Section 376, Indian Penal Code because the prosecutrix appeared to be a consenting party not only to the impugned acts of sexual intercourse in question but even on earlier occasions, it was, in our opinion, a fit case in which that Court should have examined the question of her age more closely. On the evidence on the record we are far from satisfied that there is any trustworthy evidence on the record on which the conclusion that Satnam Kaur, prosecutrix, was under 18 years of age in March, 1963 can safely be founded.

8. This takes us to the question whether Satnam Kaur was compelled or induced by deceitful means to accompany the appellant. The High Court has dealt with this aspect in these words:

"It was then argued by the appellant's counsel that it was not Ram Moorti who actually took or enticed her away but it was Satnam Kaur herself who went to his house and from there to various other places as already stated in the earlier part of my judgment. But we have it on the record that Ram Moorti was a teacher in the school and had even before this occurrence, committed sexual intercourse with Satnam Kaur a number of times in the school so much so that she became pregnant and he arranged her abortion from a Dai. Being a medical practitioner, it was not difficult for him to do so. However, it is clear from the statement of Satnam Kaur that the appellant approached Sumitra, asking her to bring Satnam Kaur with her on the day of occurrence on the pretext that he would tell them their marks. If this enticement had not been offered, very likely Satnam Kaur would not have gone to Ram Moorti's house. Ram Moorti had arranged for a car and thereafter took her away to various places and raped her. Therefore, there is enough evidence on the record to show that it was Ram Moorti who enticed her and took away on the day of occurrence. The offence under Section 366 thus stands proved against him." Here again, we are unable to agree. The prosecutrix has made several divergent statements. Keeping in view the medical evidence which shows that the prosecutrix had been used to sexual intercourse, in order to accept her statement that she was compelled, threatened or otherwise induced to go with the appellant, there should, in our opinion, be corroboration of some material particular from some independent source and her bare statement cannot be considered sufficient to sustain the appellant's conviction. It is true that according to the Courts below the appellant has exploited his position both as a medical practitioner and as a teacher and he has been having for some time past illicit intimacy with Satnam Kaur. But the charge in the present case consists of what is stated to have happened between March 24 and March 30, 1963 when she is not shown to be under 18 years of age. In those days we do not find any evidence of inducement, threat or compulsion on the part of the appellant towards the prosecutrix. There is thus no evidence on the record on which the offence under Section 366, Indian Penal Code can be sustained against the appellant. The appeal is, therefore, allowed and the appellant acquitted. He

need not surrender to his bail bond which must be considered to be discharged.

Appeal allowed.

AIR 1970 SUPREME COURT 1033
(V 57 C 219)

(From: Bombay)*

A. N. RAY AND I. D. DUA, JJ.

Govinda Kadtuji Kadam and others,
Appellants v. The State of Maharashtra,
Respondent.

Criminal Appeal No. 188 of 1969, D/-
9-2-1970.

(A) Criminal P. C. (1898), Section 421 — Summary dismissal of appeal filed under Section 410 — High Court should at least give indication of its views on arguable points which are raised — Dismissal of appeal by using word 'rejected' is improper.

When an appeal in the High Court raises a serious and substantial point which is prima facie arguable it is improper for that Court to dismiss it summarily without giving some indication of its view on the point raised. The interest of justice and fairplay require the High Court in such cases to give an indication of its views on the points argued so that the Supreme Court, in the event of an appeal from that order being presented has the benefit of the High Court's opinion on those points. AIR 1953 SC 282 & AIR 1955 SC 287 & AIR 1963 SC 1696 & AIR 1968 SC 609 and Criminal Appeal No. 274 of 1968, D/- 18-12-1968 (SC) & 1969 SCD 892, Rel. on. (Para 2)

(B) Constitution of India, Article 136 — Summary dismissal appeal under S. 410, Cr. P. C. by High Court — Interference by Supreme Court by ordering remand.

Five accused were convicted for rioting on a joint trial held by a Sessions Judge. All of them filed one appeal but the High Court while admitting the appeal of one, dismissed it, in limine so far as the other appellants were concerned. On an appeal under Article 136 of the Constitution against that order.

Held that the order dismissing in limine the appeal on behalf of the four appellants, was unsupportable in the circumstances and the appeal should be remanded for hearing on merits. (Paras 4, 5)

*(Criminal Appeal No. 109 of 1969, D/-
9-6-1969 — Bom at Nagpur.)

Cases Referred: Chronological Paras
(1969) Criminal Appeal No. 258 of
1968, D/- 22-4-1969 = 1969 SCD
892, Sakham v. State of Maha-
rashtra

(1968) AIR 1968 SC 609 (V 55) =
1968 Cri LJ 657, Narayanswami
v. State of Maharashtra

(1968) Criminal Appeal No. 274 of
1968, D/- 18-12-1968 (SC), Jeewan
v. State of Rajasthan

(1963) AIR 1963 SC 1696 (V 50) =
(1964) 3 SCR 237 = 1963 (2) Cri
LJ 534, Chittaranjan Das v. State
of West Bengal

(1955) AIR 1955 SC 287 (V 42) =
1955 SCR 1177 = 1955 Cri LJ
857, Shrikantiah Ramayya Muni-
Palli v. State of Bombay

(1958) AIR 1953 SC 282 (V 40) =
1953 SCR 809, Mushtak Hussain
v. State of Bombay

Dr. W. S. Barlingay, Senior Advocate
(M/s. N. K. Kherdekar and A. G. Ratna-
parkhi, Advocates, with him), for Appel-
lants; M/s. G. L. Sanghi, Badri Das
Sharma and S. P. Nayar, Advocates, for
Respondent.

The following Judgment of the Court
was delivered by

DUA, J.:— The four appellants, along
with Kondu son of Ambu, were jointly
tried in the Court of Additional Sessions
Judge, Akola on the following charges:

"That you all accused Nos. 1 to 5 on
or about 12th day of November, 1967 at
about 5.45 a. m. near Farshi on Risod
Nazambpur Road, formed an unlawful as-
sembly and in prosecution of the common
object of such assembly viz., to commit
murder of complainant Vithalrao Khan-
derao Deshmukh or in order to cause
murder of Vithalrao or grievous hurts to
him committed the offence of rioting and
thereby committed an offence punish-
able under Section 147 of the Indian
Penal Code and within the cognizance of
this Court.

That you all on the same date, time
and place, were members of unlawful as-
sembly, in prosecution of common object
of which viz., to commit murder of
Vithalrao or to cause grievous hurt to
him, one or all you caused grievous hurts
to him which offence you knew to be
likely to be committed in prosecution of
the common object of the said assembly
you are thereby under Section 149 of the
Indian Penal Code guilty of causing of
the said offence punishable under Sec-
tion 307 of the Indian Penal Code and
within the cognizance of this Court.

That you all on the same date, time and place attempted to cause murder of Vithalrao Deshmukh, in furtherance of common intention and thereby committed an offence punishable under Section 307 read with Section 34 of the Indian Penal Code and within the cognizance of this Court."

The order of the trial Court convicting them all concludes thus:

"All the five accused are convicted for the offence of rioting punishable under Section 147, Indian Penal Code and each is sentenced to rigorous imprisonment for the period of six months and to a fine of Rs. 50/, in default, rigorous imprisonment for two weeks for that offence.

..... Substantive sentences shall run concurrently. The accused shall surrender to their bail."

They all jointly appealed to the High Court of Bombay by one memorandum of appeal. Chandurkar J., admitted the appeal only on behalf of Koodu and dismissed in limine the appeal on behalf of the four appellants before us. The only point which concerns this Court in the present appeal by special leave relates to the correctness of the order dismissing in limine the appeal on behalf of the four appellants, when the appeal on behalf of Koodu, co-accused was admitted for hearing on the merits after notice to the State.

2. We may at the outset point out that though on appeal under Section 410, Cr. P. C. by a person convicted at a trial held by a Sessions Judge or an Additional Sessions Judge the appellant is entitled under Section 418 of the Code to challenge the conclusions both on facts and of law and to ask for a re-appraisal of the evidence, the appellate Court has nevertheless full power under Section 421, Cr. P. C. to dismiss the appeal in limine even without sending for the records, if on perusal of the impugned order and the petition of appeal it is satisfied with the correctness of the order appealed against. This power, it may be emphasised, has to be exercised after perusing the petition of appeal and the copy of the order appealed against and after affording to the appellant or his pleader a reasonable opportunity of being heard in support of the appeal. The summary decision is accordingly a judicial decision which vitally affects the convicted appellant and in a fit case it is also open to chal-

lenge on appeal in this Court. An order summarily dismissing an appeal by the word "rejected", as is the case before us, though not violative of any statutory provision removes nearly every opportunity for detection of errors in the order. Such an order does not speak and is inscrutable giving no indication of the reasoning underlying it. It may at times embarrass this Court when the order appealed against *prima facie* gives rise to arguable points which this Court is required to consider without having the benefit of the views of the High Court on those points. In our opinion, therefore, when an appeal in the High Court raises a serious and substantial point which is *prima facie* arguable it is improper for that Court to dismiss it summarily without giving some indication of its view on the points raised. The interest of justice and fairplay require the High Court in such cases to give an indication of its views on the points argued so that this Court, in the event of an appeal from that order being presented here, has the benefit of the High Court's opinion on those points.

3. The question of summary dismissal of criminal appeals has come up for consideration before this Court on several occasions and broad principles have been stated more than once. In *Mushtak Hussain v. State of Bombay*, 1953 SCR 809 = (AIR 1953 SC 282), Mahajan J., (as he then was) speaking for the Court said at p. 820 (of SCR) = (at p. 286 of AIR).

"With great respect we are, however, constrained to observe that it was not right for the High Court to have dismissed the appeal preferred by the appellant to that Court summarily, as it certainly raised some arguable points which required consideration though we have not thought it fit to deal with all of them. In cases which *prima facie* raise no arguable issue that course is, of course, justified, but this Court would appreciate it if in arguable cases the summary rejection order gives some indication of the views of the High Court on the points raised. Without the opinion of the High Court on such points in special leave petitions under Article 136 of the Constitution this Court sometimes feels embarrassed if it has to deal with those matters without the benefit of that opinion." In *Shreekanth Ramayya Munipalli v. The State of Bombay*, 1955 SCR 1177=

(AIR 1955 SC 287) and in Chittaranjan Das v. State of West Bengal, (1964) 3 SCR 237 = (AIR 1963 SC 1696) this Court approved the remarks made in Mushtak Hussein's case, 1953 SCR 809 = (AIR 1953 SC 282). Again, in Narayan Swami v. State of Maharashtra, AIR 1968 SC 609, this Court, after referring to the earlier three decisions of this Court, emphasised that the High Court should not summarily reject criminal appeals if they raise arguable and substantial points. Still more recently in Jeewan v. State of Rajasthan, Criminal Appeal No. 274 of 1968, D/- 18-12-1968 (SC), this Court disapproved summary rejection of the appeal by the High Court and in Sakha Ram v. State of Maharashtra, Criminal Appeal No. 253 of 1968, D/- 22-4-1969 (SC), this Court reiterated the view that it is desirable for the High Court when dismissing the appeals in limine to deal with each point urged before them for holding that it is not necessary to send for the records and to give notice to the State for finally hearing and disposing of the appeal.

4. In the present case the defence of Kondu accused is that Vithalrao, the injured person, has sustained the injury by falling on a stone while chasing him (Kondu) and his other companions. If that defence is upheld then the case against the four appellants in this Court would, in our opinion, also require serious consideration. The evidence on the record would have to be scrutinised at least for determining how far the case of the present appellants is distinguishable from that of Kondu, accused. It was, therefore, an eminently fit case in which, while admitting Kondu's appeal, the appeal on behalf of the present appellants was also admitted so that the appeals of all the five accused could be considered together. It may be recalled that the charge of rioting under Section 147, I. P. C. could only be sustained if an unlawful assembly is held to have been formed. It was, therefore, more appropriate to consider the case of all the accused together on appeal. On this ground also the order of the High Court is open to objection. Even the counsel for the State before us after making a faint attempt to justify the impugned order had, it may be said in fairness to him, to concede that the order of dismissal in limine of the appeal on behalf of the four appellants is, in the circumstances, insupportable.

5. The appeal is allowed and the order dismissing in limine the appeal of the four appellants before us is set aside and the case is sent back to the High Court for hearing their appeal with the record after giving notice to the State, along with the appeal of Kondu, accused. We would perhaps have persuaded ourselves to go into the merits of the case as this Court has sometimes done, but since Kondu's appeal is pending in the High Court it seems to us to be more appropriate and just that the entire appeal is heard by that Court on the merits. As the sentences imposed are short the High Court, we have no doubt, would try to dispose of the appeal as speedily as possible. It may be observed that the counsel for the appellants in this Court made an oral prayer for their release on bail. But as the case is being remitted to the High Court for considering the appeal of all the five accused persons on merits it would be open to the appellants — if so advised — to apply to the High Court for bail which prayer would be considered according to law.

Appeal allowed.

AIR 1970 SUPREME COURT 1035 (V 57 C 220)

(From Patna: ILR 41 Pat 503)

S. M. SIKRI AND G. K. MITTER, JJ.

Garib Das and others, Appellants v. Munshi Abdul Hamid and others, Respondents.

Civil Appeal No. 1158 of 1967, D/- 13-11-1969.

(A) Muhammadan Law — Wakf — Creation of — Requirements.

A wakf inter vivos is completed by a mere declaration of endowment by the owner. Further, the founder of a wakf may constitute himself the first mutawalli and when the founder and the mutawalli are the same person, no transfer of physical possession is necessary. Nor is it necessary that the property should be transferred from the name of the donor as owner into his name as mutawalli. An apparent transaction must be presumed to be real and the onus of proving the contrary is on the person alleging that the wakf was not intended to be acted upon.

The settlor and those claiming under him are however not precluded from showing

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that no wakf had been created and that the deed was not intended to operate as a wakf but was illusory and fictitious. This is a question of intention evidenced by facts and circumstances showing that it was not to be acted upon. For the purpose of such enquiry subsequent conduct, if it is merely a continuation of conduct at the time of execution, is irrelevant. (Paras 8, 9)

(B) Mussalman Wakf Validating Act (1923) — Applicability — The Act of 1923 did not apply to any wakf under which any benefit was, for the time being, claimable by the wakif or any of his family descendants. (Para 11)

(C) Muhammadan Law — Wakf — Whether void for uncertainty — Wakf in favour of mosque in certain mohalla — There being two mosques in Mohalla — Donor by a subsequent document showing that he had particular mosque in mind — Held that donor was best person to know which mosque he had in mind and wakf was not therefore void for uncertainty. (Para 12)

(D) Limitation Act (1908), Article 142 — Suit for recovery of possession after cancellation of sale deeds in favour of defendants on ground that a previous valid wakf had been created — Held Article 142 was not applicable — Suit was filed within six years after death of wakif who died only a few months after the execution of the subsequent sale deeds. (Para 13)

The following Judgment of the Court was delivered by

MITTER, J.: This is an appeal from a judgment of the Patna High Court reversing a judgment of the Subordinate Judge, Bhagalpur and decreeing the plaintiffs' suit for a declaration that a pucca house situated in Mohalla Nathnagar within the Bhagalpur municipality was an endowed property under the deed of wakf dated June 21, 1914 and for recovery of possession of the same with mesne profits from defendants 1 to 3 (the appellants to this court) who had obtained sale deeds in respect of this property on December 27, 1949.

2. One Tassaduk Hussain was the owner of the disputed house and admittedly executed a deed of wakf on June 21, 1914 in respect of the same for the benefit of a mosque and Madrasa at Nathnagar and had the same registered. In terms of the deed the donor was to remain in possession of the house as

Mutawalli and his wife was to be the Mutawalli after his death. The document provided that after the death of both the husband and wife the Mutawalli would be elected by the panchas of the Muslim community of Nathnagar and so long as the donor and his wife were living they would maintain themselves from the income of the property and spend the balance left for the mosque and the Madrasa. Tassaduk Hussain executed and registered three deeds on 10th December, 1949 by one of which he purported to cancel a gift deed dated November 4, 1939 executed in favour of some of his relations in respect of the disputed house. By the second document he cancelled another registered deed of gift dated August 2, 1948 executed in favour of another relation of his in respect of the identical property. And by the third document he purported to cancel the deed of wakf of 1914. Thereafter he executed and registered three separate sale deeds on March 27, 1949 one in favour of the appellant Garib Das, a second in favour of Sham Lal and a third in favour of Gohind Lal. All these three deeds were in respect of portions of the disputed property. Tassaduk Hussain died in July, 1950.

3. The suit was filed by the first plaintiff as the elected Mutawalli of the wakf created by Tassaduk Hussain joining with him plaintiffs 2 and 3 as members of the Sadar Nathnagar Masjid Committee. Garib Das, Shyam Lal and Gobind Lal, the alienees from Tassaduk Hussain were impleaded as defendants first party. There was a number of other defendants also. The first three defendants were described as tenants in the suit properties. The plaintiffs claimed to set aside the deeds in favour of the said persons on the ground that as a valid wakf had already been created in favour of the mosque and Madrasa and had been acted upon, the deed of cancellation of December 10, 1949 and the sale deeds in favour of the first three defendants could not affect the wakf. A prayer was also made that as the said three defendants who were tenants had repudiated their tenancy they had forfeited the same and they had become trespassers and were liable to eviction as such.

4. The Subordinate Judge who tried the suit found the deed of wakf to be invalid holding, inter alia, that there could be no reservation for the benefit of the donor in the case of an endow-

ment purportedly in favour of a mosque. He also held that the endowment was bad for uncertainty on the ground that the mosque and the Madrasa mentioned in the wakf could not be identified and that Tasaduk Hussain never had any intention to create a wakf.

5. The High Court set aside the findings of the Subordinate Judge holding "that there was no evidence to indicate that for at least 25 years before the execution of the document of 1914 Tasaduk Hussain did anything to justify the inference that it was not his intention to create the wakf in question." The High Court held that the inference sought to be drawn by the Subordinate Judge from the fact that the original deed of wakf was not in possession of the panchas but came from the custody of the defendants as showing that no dedication to wakf was ever intended was not justified. According to the High Court as Tasaduk Hussain was the mutawalli for life it was but natural that the original deed should remain in his custody and when he changed his mind he would make over the document to the defendants at the time of the execution of the sale deeds. The High Court also found on the evidence that Tasaduk Hussain himself used to meet directly some of the items of expenditure of the mosque and there never was any occasion for the panchayat or the Muntazim to write up accounts in respect of the expenditure met by Tasaduk. According to the High Court the fact that Tasaduk Hussain did not by his conduct or otherwise express any intention before 1939 to indicate that the deed of wakf was a sham or illusory transaction and that the deed of gift of 1939 in respect of the same property in favour of his distant relations was never acted upon, made the case of the plaintiffs that Tasaduk Hussain spent his savings over the Masjid and Madrasa probable. Further as Tasaduk Hussain had married again in or about 1937 it was probable that thereafter he changed his mind and executed the deed of gift of 1939 having acted in terms of the wakf for 25 years from 1914. The High Court held that the fact that the disputed property was not mutated in his name as mutawalli in the records of the Bhagalpur Municipality was not relevant as he was the founder of the wakf and no transfer of physical possession was necessary.

6. The High Court's conclusions were: (1) that Tasaduk Hussain had created the

the wakf in question in 1914 and he continued to be the mutawalli of the same until his death. (2) the wakf was not a sham or illusory transaction. (3) It was not bad for uncertainty or vagueness. (4) It was not bad or void on account of reservation of some benefit in favour of himself and his wife. On this view the High Court held that the sale deeds in favour of the contesting respondents did not confer any title on them in respect of the disputed property and they were trespassers after 27th December, 1949 though they were tenants of some portion of the house before that date. Consequently they were liable to mesne profits as prayed for by the plaintiffs. The High Court allowed the prayer for declaration of title as against defendants 4 to 31 and held that the plaintiffs are entitled to recover possession of the suit properties with mesne profits.

7. Learned counsel appearing for the defendants-appellants urged four grounds before us. They were as follows:—

1. The High Court had erred in granting a decree for possession and mesne profits when these prayers had been abandoned in the trial court.

2. The High Court should have held that Tasaduk Hussain had no intention to create a wakf inasmuch as the deed of wakf of 1914 was never acted upon.

3. The deed of wakf was void for uncertainty inasmuch as there were at least two mosques in Mohalla Nathnagar and the deed of wakf did not specify which of the mosques the donor wanted to benefit.

4. The suit should fail inasmuch as the plaintiffs had not been in possession within 12 years of the date of the suit or their dispossession.

8. We propose to deal with the first of these points last. On the second point the law seems to be clear that a wakf inter vivos is completed by a mere declaration of endowment by the owner. According to Mulla's Principles of Mahomedan Law, 16th Edition, page 178, Article 186, this view had been adopted by the High Courts of Calcutta, Rangoon, Patna, Lahore, Madras, Bombay, Oudh Chief Court and recently by the Allahabad High Court and the Nagpur High Court. Further, the founder of a wakf may constitute himself the first mutawalli and when the founder and the mutawalli are the same person, no transfer of physical possession is necessary. Nor is it necessary that the property should be transferred from the name of the donor as

owner into his name as mutawalli. An apparent transaction must be presumed to be real and the onus of proving the contrary is on the person alleging that the wakf was not intended to be acted upon.

9. It is also settled law that the settlor and those claiming under him are not precluded from showing that no wakf had been created and that the deed was not intended to operate as a wakf but was illusory and fictitious. This is a question of intention evidenced by facts and circumstances showing that it was not to be acted upon. For the purpose of such enquiry subsequent conduct, if it is merely a continuation of conduct at the time of execution, is irrelevant.

10. On the question of intention, we see no reason to take a view different from that adopted by the High Court, specially as the contesting respondents had failed to discharge the onus which lay heavily on them to prove that Tasaduk Hussain did not intend to create a wakf in respect of the disputed property or that it was not acted upon.

11. Counsel for the appellants relied on the Mussalman Wakf Validating Act, 1923 and specially to Sections 3 and 10 thereof and contended that the non-furnishing of particulars relating to the wakf in terms of Section 3 when it was alleged that account books were written in respect of the income from the mosque went to show that no wakf was really created inasmuch as failure to comply with Section 3 attracted the penalties prescribed in Section 10. This contention had been rejected by the High Court which held that no account books were ever written. Reference may also be made in this connection to a statement of law in Mulla's treatise on Mahomedan Law, 12th Edition, Page 175 under Article 171A that the Act of 1923 did not apply to any wakf under which any benefit was, for the time being, claimable by the wakif or any of his family descendants.

12. On the third point our attention was drawn to the deed of wakf which merely mentions that Tasaduk Hussain had settled the whole and entire property to "the mosque and Madrasa at Mohalla Nathnagar" and the surplus of the usufruct thereof was to be spent over the same. If the document had stood by itself and if there were more than one mosque in Nathnagar there might be scope for contention that the donor had

no particular mosque in mind when he created the wakf. But the doubt, if any, is resolved by the High Court relying on the document dated 10th December 1949 executed by Tasaduk Hussain showing that in the deed of 1914 the mosque referred to was "Barhi Masjid and Madrasa". As the donor was the best person to know which mosque and Madrasa he had in mind and he had identified the same by the document of 1949 we see no reason to take a view different from that of the High Court or hold the deed void for uncertainty.

13. The fourth point has no substance inasmuch as Article 142 of the Limitation Act was not applicable to the facts of the case. The suit was filed in 1955 within six years after the death of Tasaduk Hussain who died only a few months after the execution of the documents relied on by the appellants.

14. We however find that we must remand the matter for determination of the first point raised by the counsel for the appellants. The issues settled by the Subordinate Judge on 30th August, 1957 at page 17 of the printed record include issue 10, namely, "Are the plaintiffs entitled to get a decree for recovery of possession of the properties in the suit?" and issue 12 reading "Are the plaintiffs entitled to get a decree for mesne profits and if so, to what extent?" Our attention was drawn to the judgment of the Subordinate Judge at page 81 of the printed record which shows that the learned Judge only considered nine issues which do not include the above issues 10 and 12. But it may be that in view of issue 8 as finally recast by the learned Judge in delivering his judgment and reading "Are the plaintiffs entitled to any decree as prayed for?" original issues 10 and 12 became superfluous. Besides, the learned Judge did not have to give any decision on issue 8 as he found that the wakf was not valid. In the judgment of the High Court there is no reference to all this and in the concluding paragraph it was recorded that in view of the finding that the sale deed in favour of the contesting respondents did not confer any title on them they were trespassers after 27th December, 1949 though they were tenants of some portions before that date.

15. Reference was made to Sections 11 and 18 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 under which a decree for eviction could only be passed at the relevant time by

the Controller appointed under the Act. As the High Court judgment is not explicit on this point, we think it only proper to remand the matter to the High Court for determination of issue 8 above with special reference to the prayer for eviction and mesne profits. Except as above, the appeal is dismissed and the judgment of the High Court upholding the validity of the wakf and its binding character is affirmed. The costs will abide by the result of the decision of the High Court.

Appeal dismissed.

AIR 1970 SUPREME COURT 1039
(V 57 C 221)

(From Allahabad)*

S. M. SIKRI AND G. K. MITTER, JJ.

The Board of High School and Intermediate Education, U. P. and others, Appellants v. Kumari Chittra Srivastava and others, Respondents.

Civil Appeal No. 1191 of 1967, D/- 20-11-1969.

Constitution of India, Article 226 — Quasi-judicial authority — Infliction of penalty without issuing show cause notice — Violation of rules of natural justice — Intermediate Examination Board — Candidate allowed to appear at examination in spite of shortage in lectures — Cancellation of examination — Opportunity to show cause not given — Order is vitiated.

Whether a duty arises in a particular case to issue a show cause notice before inflicting a penalty does not depend on the authority's satisfaction that the person to be penalised has no defence but on the nature of the order proposed to be passed. (Para 8)

Where the Board of High School and Intermediate examination had cancelled the examination of a Candidate who had been allowed to appear at the examination and had actually answered all the question papers, on the ground that he had been admitted to the examination in spite of shortage in attendance at lectures, without giving any show cause notice to the candidate, the action of Board is vitiated by violation of rules of natural justice. The Board in cancelling the examination was exercising quasi judicial functions and it was incumbent

*(Special Appeal No. 592 of 1961, D/- 23-5-1962—All.)

upon it to issue a show-cause notice to the candidate before inflicting the penalty of cancellation. (The Supreme Court refused to decide the question whether Board had power to condone shortage in lectures.) (Para 9)

Mr. C. B. Agarwala, Senior Counsel (Mr. O. P. Rana, Advocate with him), for Appellant.

The following Judgment of the Court was delivered by

SIKRI, J.: This appeal by special leave is directed against the judgment of the Allahabad High Court whereby it allowed the writ petition filed by the respondent, Kumari Chittra Srivastava, hereinafter referred to as the petitioner, and quashed the impugned order but left it open to the Board of High School and Intermediate Education, hereinafter referred to as the Board, to reconsider the case after giving the petitioner a chance to offer her explanation.

2. The facts are not in dispute and the only question which arises is whether in the circumstances the petitioner was entitled to an opportunity to represent her case before the Board prior to the passing of the impugned order.

3. The relevant facts in brief are these. The petitioner was in 1959-60 session a student of Basant Girls Intermediate College, Varanasi. She appeared at the Intermediate examination in 1960 but failed. She then joined the Government Inter College for Girls at Jaunpur. Her name was sent up for Intermediate examination to be held in 1961 by the Principal. She appeared in the examination but her result was not declared by the Board. On May 24, 1961, the Board addressed a letter to the Principal making enquiries regarding the attendance of the petitioner. According to the regulations framed by the Board no candidate can be presented for the Intermediate examination unless he/she has attended during two academical years 75% of lectures given in each subject in which the candidate is to be examined. In the case of a failed candidate, like the petitioner the percentage shall be calculated for one academical year, but Regulation 5 (xiii) enables the head of a recognized institution to condone the deficiency in certain cases. This regulation reads:

"(xiii) The rule regarding minimum attendance shall be strictly enforced. The head of the recognised institution may condone a deficiency in attendance of not more than:

(a) ten days in the case of a candidate for the High School Examination and

(b) ten lectures (including periods of practical work, if any) given in each subject in the case of a candidate for the Intermediate Examination.

All cases in which this privilege is exercised shall be reported to the Director of Education as the Chairman of the Board.

In the cases of failed or detained candidates whose attendance of one year will be taken into account, the shortage to be condoned shall be reduced to half."

The Principal received the letter when on vacation outside Jaunpur. The Principal replied on June 14, 1961, saying that a proper reply to paragraphs 1 and 2 of the letter will be sent after July 8, 1961. She, however, stated:

"When Km. Chitra Srivastava absented herself for a pretty long period on account of her illness, the position was explained to her, besides informing her guardian also who was even called to the office and acquainted with the circumstances. At that time, it was possible for her to make good this shortage by her regular attendance.

The teacher in Home Science took leave in February, 1961.

Chitra was short in attendance in other subjects also, but she made good the shortage by her regular attendance. When during the days the classes were held, lectures in other subjects were held and the girl attended there, it was not considered proper to detain her from appearing at the examination on account of her absence from lectures in a subject in which the required lectures were not held.

I got the student admitted to the examination as I was confident that the officers of the Board will agree with my view."

4. The substance of the letter was that the shortage in lectures was due to the lecturer taking leave.

5. The Board was, however, impatient. It is not clear whether this letter was received by the Board because no reference to it is made in the letter dated July 6, 1961. The Board wrote:

"In continuation of this office letter No. E. 1/617, dated 24th May, 1961 and telegram dated 24th May, 1961 I have the honour to inform that you have not furnished the desired information about the student Km. Chitra Srivastava, Roll No. 50452. From your previous letter No. 143/E dated 6th May, 1961, it is

learnt that the admission of the student by you to the examination by condoning her absence from seven lectures on the subject of Home Science was contrary to rules. Hence the student's Inter Examination of 1961 is cancelled. Kindly communicate this to the student under intimation to this office."

6. The Principal replied on July 11, 1961, giving details of the lectures attended and requested that the order be cancelled and the severe punishment be not awarded to the petitioner.

7. On October 6, 1961, the petitioner filed a petition under Article 226 of the Constitution challenging the impugned order dated July 6, 1961, Mathur, J. dismissed it summarily. On appeal, Srivastava and Katju, JJ., allowed the petition, as mentioned earlier. They were of the view that the Board, while cancelling the examination, acted in a quasi-judicial capacity. The Board was "by cancelling the examination inflicting a penalty" and if opportunity had been given to the petitioner to present her case she might have persuaded the Board not to cancel the examination.

8. The learned counsel for the appellant, Mr. C. B. Aggarwal, contends that the facts are not in dispute and it is further clear that no useful purpose would have been served if the Board had served a show cause notice on the petitioner. He says that in view of these circumstances it was not necessary for the Board to have issued a show cause notice. We are unable to accept this contention. Whether a duty arises in a particular case to issue a show cause notice before inflicting a penalty does not depend on the authority's satisfaction that the person to be penalised has no defence but on the nature of the order proposed to be passed.

9. We agree with the High Court that the impugned order imposed a penalty. The petitioner had appeared in the examination and answered all the question papers. According to her she had passed. To deny her the fruits of her labour cannot but be called a penalty. We are unable to appreciate the contention that the Board in "cancelling her examination" was not exercising quasi-judicial functions. The learned counsel urges that this would be casting a heavy burden on the Board. Principles of natural justice are to some minds burdensome but this price a small price indeed—has to be paid if we desire a society governed by the rule of law.

We should not be taken to have decided that this rule will also apply when a candidate is refused admission to an examination. We are not concerned with this question and say nothing about it.

10. The learned counsel invites us to hold that the decision of the Board was on the facts correct and that the Board had no power to condone the shortage of 2 lectures. But we decline to go into these questions. We are not sitting as a court of appeal and it is for the Board to decide after giving an opportunity to the petitioner and pass such orders as it thinks fit. Whether it has the power to condone the shortage of lectures is for it, at least in the first instance, to decide.

11. The learned counsel further invites us to say that the possible courses which the petitioner's counsel had outlined before the High Court will not be legal or justified. The petitioner's counsel had pointed out that the Board could have been persuaded to adopt some of the following courses:

"(1) To accept the explanation of the principal as valid.

(2) To condone the shortage of two lectures which the Principal could not condone. The question whether the Board had power to condone shortage was raised in the Board of High School and Intermediate Education Uttar Pradesh Allahabad and others v. G. Vishwanath Nayar but was not decided and was left open. It is urged on behalf of the appellant that the power to admit a candidate to an examination vests in the Board. The Regulations only provide the extent to which shortage in attendance can be condoned by the heads of institutions. There is nothing in the Regulations to limit the power of the Board itself to admit a candidate to an examination after condoning shortage which could not be condoned by the head of the institution.

(3) After noting that a technical breach of rules had been committed the Board or the Chairman may have decided not to take any action.

(4) The Board may have framed a new regulation with retrospective effect either permitting the head of the institution to condone a shortage in a case like that of the appellant or permitting the Board itself to make the necessary condonation in such cases.

(5) The Board could have given an authoritative interpretation of the words "lectures given" in Clause (iii) of regu-

lation 5 of chapter XII and decided whether "the words covered such cases where the students were present to attend the lecture but it could not be arranged because of some unavoidable reason."

But, like the High Court, we are not called upon to pronounce on their legality or appropriateness at this stage.

12. In the result the appeal fails and is dismissed. As the petitioner (now respondent) is not represented there will be no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1041 (V 57 C 222)

(From Bombay: 38 Com Cas 701)

J. M. SHELAT, V. BHARGAVA AND
C. A. VAIDIALINGAM, JJ.

M/s. J. K. (Bombay) Private Ltd., (In all the Appeals), Appellant v. M/s. New Kaiser-I-Hind Spinning and Weaving Co., Ltd., and others, Respondents.

M/s. Juggilal Kamlatpat Bankers, Kanpur and others (In C. A. No. 1899 of 1968), Creditors.

Civil Appeals Nos. 1399 to 1402 of 1968, D/- 22-11-1968.

(A) Companies Act (1956), Sections 391, 392 — Scheme framed by Court for company, to pay off creditors — Scheme to be interpreted in manner as businessmen would do—Group of share-holders undertaking to run business of company by financing — It cannot be made to provide finance from their own pockets — Working of business found commercially unprofitable for reasons beyond control of these share-holders — Court can order winding up of company.

Though a scheme prepared by a Company to pay the creditors is not a mere agreement but has statutory force, it has to be construed as a commercial document that is, in the manner in which businessmen would read it.

Where by a clause in the scheme the Jalans, a group of share-holders, who agreed to take over the management of the Company took the responsibility to provide finance required for running the mills so that from out of their profits the obligation to pay the creditors could be met in the manner therein laid down:

Held that the Jalans were to provide finance either on the credit of the com-

CN/DN/G185/68/RGD/A

pany or on the security of its assets, or if necessary, their own monies for running the mills in the commercial sense, i.e., with a reasonable prospect of making profits. (Paras 23, 24)

Read commercially the clause could not mean that the Jalans had taken upon themselves the liability to put in monies even if the mills could not be run at reasonable profits. Considering the circumstances which existed at the time it could not be said that the conclusion that there was no reasonable prospect to run the mills at profit was not incorrect. (Para 29)

It could not be contended that the Mills did not yield profits because the Jalans had parted with the processing unit which was most profit-making unit to the nominees of Jalans, and that the rent or compensation was a nominal one. It was unsafe from a few figures to jump to the conclusion that had the unit not been parted with the mills would have made profit. (Para 25)

The Jalans could not be blamed, however badly they might have behaved in other respects, for the closure of the mills which was due to reasons beyond their control, viz., the price rise due to devaluation which overtook them only two months after they restarted the mills, the impossibility of getting cotton at reasonable prices, and the imposition of the extra holiday which meant both loss of production and the burden of lay-off compensation. (Para 28)

The company was commercially insolvent when the scheme was sanctioned. It was concurred in by the Jalans in expectation that the company could be resuscitated and the mills worked at reasonable profit. *By the time when the mills were closed and the company filed the winding-up petition, it was commercially insolvent in the sense that its assets and its existing liabilities were such as to make it reasonably certain that existing and probable assets of the company would be insufficient to meet its liabilities.* (Para 30)

Under Section 392 of the Act the High Court which had sanctioned the scheme had the power to supervise the carrying out of it and to give directions in regard to any matter or to make modifications in it as it may consider necessary for its proper working. But if the Court is satisfied that the scheme cannot be worked satisfactorily with or without modifications, it can either suo motu or on an application by any person interested in

the company's affairs order its winding up. If the mills could not be worked except at loss the company would be justified in ceasing to work them. If the mills had to be closed that would mean that the very object for which the company existed ceased to exist. In the absence of any enquiry as to whether the mills could be worked at profit no court would compel a party (the Jalans) to furnish monies without even specifying how much and for how long he should provide. If such a direction was not possible, no direction could also be given under Section 392 (1) to work the scheme as its implementation depended on the mills working at profit. The only course left to the Court was to pronounce that in the circumstances then prevailing the scheme could not be satisfactorily worked and therefore a winding-up order under Section 392 (2) had become inevitable.

(Para 31, 32)

(B) T. P. Act (1882), Sections 58, 100 — Mortgage and charge — Distinction — Agreement to mortgage, is not mortgage.

The distinction between a charge and a mortgage is clear. While in the case of a charge there is no transfer of property or any interest therein, but only the creation of a right of payment out of the specified property, a mortgage effectuates transfer of property or an interest therein. No particular form of words is necessary to create a charge and all that is necessary is that there must be a clear intention to make a property security for payment of money in praesenti. In each case the question which the Court would have to decide would be whether the agreement in question creates a charge in praesenti. AIR 1928 PC 80 & AIR 1922 PC 107, Ref. (Para 33)

Held on facts that there was intention to subject the company's assets to a charge in praesenti. All that the agreement provided was to create a mortgage. The agreement amounted only to an agreement to mortgage which could give rise to an obligation to specifically perform it, a personal obligation, but did not constitute either a mortgage under Sec. 58 or a charge under Section 100. AIR 1930 PC 76, Ref. (Para 34)

(C) Companies Act (1956), S. 391 — Scheme for payment of creditors, has statutory force and is binding on creditors and share-holders — So long as company is carrying out the scheme, no winding up order can be passed — Scheme does not create new debts.

A scheme sanctioned by the Court does not operate as a mere agreement between the parties. It becomes binding on the company, the creditors and the share-holders and has statutory force. A scheme is statutorily binding even on creditors and shareholders who dissented from or opposed to its being sanctioned. It has statutory force in that sense and therefore cannot be altered except with the sanction of the Court even if the share-holders and the creditors acquiesce in such alteration. The effect of the scheme is to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity. The effect, therefore, of a scheme between a company and its creditors is that so long as it is carried out by the company by regular payment in terms of the scheme a creditor who is bound by it cannot maintain a winding-up petition. But if the company commits a default, there is a debt presently due by the company and a petition for winding-up can be sustained at the instance of a creditor. The scheme, however, does not have the effect of creating a new debt; it simply makes the original debt payable in the manner and to the extent provided in the scheme. The proposition that a winding-up order can only be passed after compelling the company to complete the rights which are still incomplete is not correct. (1938) 4 All ER 337 & (1937) 1 All ER 671 & AIR 1966 SC 1631 & AIR 1922 PC 269, Disting. (Para 35)

(D) Companies Act (1956), Section 391 — Sanctioned scheme does not become part of companies constitution.

Sub-section (3) of Section 391 merely lays down a condition precedent to the coming in force of a scheme and does not deal with rights and obligations of parties under such a scheme. Sub-sections (3), (4), (5) do not mean that the scheme becomes part of the constitution of the company. A scheme, is not to be considered for instance, as modifying existing special rights attached to shares unless such modification is provided for the scheme. The contention, therefore that the scheme becomes part of the company's constitution or of its memorandum, and therefore, winding-up order cannot be passed except in conformity with the altered constitution of the company, is not tenable. So long as the

scheme is in operation and is binding on the company and its creditors, the rights and obligations of those on whom it is binding are undoubtedly governed by its provisions. But once the scheme is cancelled under Section 392 (2) on the ground that it cannot be satisfactorily worked and a winding-up order passed such an order is deemed to be for all purposes to be one made under Sec. 433. It is not as if because the scheme has been sanctioned under Section 391 that a winding-up order under Section 392 (2) cannot be made. (1940) 1 All ER 333, Ref. (Para 37)

(E) Companies Act (1956), Sections 392, 528, 529 — Winding-up order — Effect — Properties of company to be applied in satisfaction of liabilities *pari passu*.

The effect of a winding-up order is that except for certain preferential payments provided in the Act the property of the company is to be applied in satisfaction of its liabilities *pari passu*. *Pari passu* distribution is to be made in satisfaction of the liabilities as they exist at the commencement of the winding-up. On a winding-up order the undertaking and the assets of the company pass under the control of the liquidator whose statutory duty is to realise them and to pay from out of the sale-proceeds its creditors. Such creditors acquire on such order being passed the right to have the assets realised and distributed among them *pari passu*. No new rights can thereafter be created and no uncompleted rights can be completed, for, doing so would be contrary to the creditors' right to have the proceeds of the assets distributed among them *pari passu*. 1914 AC 311 & AIR 1931 Bom 2 & (1903) 1 Ch 914, Ref. (Paras 38, 39)

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Mr. A. K. Sen, Sr. Advocate, (Miss Krishna Sen, Advocate and M/s. Rameshwar Nath and Mahinder Narain, Advocates of M/s. Rajinder Narain and Co. with him), for Appellant (In all the Appeals); M/s. S. J. Sorabjee, I. M. Chagla and K. D. Mehta, Advocates, and M/s. Ravinder Narain, J. B. Dadachanji and O. C. Mathur, Advocates of M/s. J. B. Dadachanji and Co., for Respondent No. 1 (In all the Appeals); M/s. F. S. Nariman and I. N. Shroff, Advocates, for Respondents Nos. 2 and 3 (In C. A. No. 1399 of 1963); Mr. A. B. Divan, Advocate and M/s. Rameshwar Nath Mahinder Narain, Advocates of M/s. Rajinder Narain and Co., for Creditors Nos. 1 to 8 (In C. A. No. 1399 of 1963); Mr. C. K. Daphtary, Attorney-General-for-India, (M/s. Rameshwar Nath and Mahinder Narain, Advocates of M/s. Rajinder Narain and Co. with him), for Creditors Nos. 9 and 10 (In C. A. No. 1399 of 1963).

The Judgment of the Court was delivered by

SHELAT, J.:— These appeals, founded on a certificate, are directed against the order of the High Court of Bombay ordering the winding-up of Respondent No. 1 Company.

2. Prior to August 1963, the company was managed by Singhanias, (referred to hereinafter as the J. K. group), who held 25,625 out of 45,000 equity shares of the company. By 1963 the company was in a bad way, its liabilities having exceeded its assets and was not in a position to pay its unsecured creditors. On June 21, 1963 one of its creditors, M/s. Indulal & Co., filed a petition for winding-up. On August 2, 1963 the Court appointed a provisional liquidator. On August 6, 1963 the cotton textile mills of the company stopped working and the provisional liquidator took charge thereof. On August 16, 1963 an agreement was made between the J. K. group and Nandlal Jalan and

two others, (hereinafter referred to as the Jalans), under which the latter agreed to take over the company's management on terms and conditions therein set out. The agreement provided that the J. K. Group should sell to the Jalans at Rs. 10/- per share the said block of shares held by the former, that the J. K. Group thereafter should resign as directors and accept as directors the nominees of the Jalans, that the company should execute a second legal mortgage of its fixed and other assets in favour of the J. K. Group and certain other unsecured creditors named in Sch. 'B' to the agreement in consideration of which those creditors agreed not to claim interest at more than 1/4 per cent and not to demand repayment of their debts except in the manner set out in the agreement and Sch. 'C' thereto, and that the transactions therein contained should be completed within one month from the date when the said petition would be withdrawn. The agreement recorded that the debts due to Sch. 'B' creditors amounted to Rs. 48.28 lacs. Sch. 'C' to the agreement contained the terms to be included in second mortgage to be executed by the company. Term 3 provided that the said Rs. 48.28 lacs were to be repaid two years after the date of the said mortgage by annual instalments of an amount equal to 50 per cent of the profits made by the company or Rs. 650 lacs whichever was lower, provided, however, that in any event the whole debt should be paid off by June 30, 1980. Term 4 (a) provided that in the event of the assets secured under the second mortgage being damaged or impaired or the first mortgagees enforcing their security or the company being wound up, the entire debt due under the second mortgage would immediately become due. Term 4 (d) contemplated the company obtaining loans from certain financial institutions including the Central and the State Governments and securing them by a prior charge over its fixed assets and therefore provided that in such an event "security of the second mortgagees for the fixed assets shall be subject to" such first or prior charge. Term 4 (e) likewise permitted the company to obtain loans from any person, firm or company on a first or prior charge over its liquid assets so that the security of the second mortgagees over the liquid assets "shall be subject to the first or prior charge in favour of such lender". There was already a first mortgage in favour of the Punjab National Bank Ltd., (hereinafter referred

to as the 'Bank') for securing advances made by it to the company.

3. The effect of the said agreement was twofold: (1) that the Jalans by purchasing the said shares could take over the company's management and (2) on the second mortgage being executed Sch. 'B' creditors, who, in respect of the debts due to them, were unsecured creditors, would take precedence over the other unsecured creditors by becoming secured creditors. No doubt, they agreed to accept 1/4 per cent interest and to postpone the date of payment of their debts, nonetheless, in the event of the company being wound up the entire debt due to them would become immediately payable and they would have priority over the rest of the unsecured creditors.

4. On October 18, 1965, an agreement was made between company, the Jalans and the workers' union, which inter alia provided that the new management would employ 2700 out of the total 4200 workers and pay to the rest retrenchment compensation.

5. Agreements with the largest group of unsecured creditors on the one hand and the workers on the other having been thus secured, the company took out on October 19, 1965 a summons submitting a scheme for the sanction of the High Court. It would seem that though the other creditors of the company were willing to accord their consent to the said scheme, the Bank was not, unless two cash credit accounts under which the company owed to it Rs. 19 lacs were paid off and a term loan of Rs. 26.75 lacs secured by a first mortgage of the company's fixed assets was reduced by Rs. 5 lacs. To remove the Bank's objection the Jalans had, therefore, to make an immediate financial arrangement. On February 14, 1966 an agreement between the company, (still under the old management), the Jalans and Sushil Investment (P) Ltd., a company under the control of the Jalans was made whereunder Sushil Company agreed to pay off the said cash credit accounts and also to pay Rs. 5 lacs against the said term loan, in all Rs. 23 lacs. On so doing the Bank was to release the assets hypothecated with it and the company was to hypothecate such assets in favour of Sushil Company. Sushil Company also agreed to finance the company to the extent of Rs. 40 lacs including the said Rs. 23 lacs on the company hypothecating cotton cloth, yarn and other movable assets in its favour, and the

Jalans giving their personal guarantee. This agreement under which the company agreed to hypothecate all its movable assets together with Term 4 (d) and (e) of Sch. 'C' to the agreement of August 16, 1965 shows that it was understood between the parties that the Jalans were entitled to procure finance on the security of the company's assets, both fixed and moveable, and that such security would take priority over the second mortgage to be executed in favour of the J. K. Group and other Sch. 'B' creditors.

6. By his order dated February 17, 1966, Mody, J., gave his sanction to the said scheme making therein two significant observations: (1) that all the concerned parties realised that the company at that stage was commercially insolvent, and (2) that though he appreciated the objection of some of the opposing creditors that the Jalans under the scheme gave no personal guarantee for payments provided thereunder to the unsecured creditors or for providing adequate finance for the working of the mills, he was giving his sanction as the majority of the unsecured creditors were anxious that the company should be allowed to work under the scheme.

7. The preamble of the scheme expressly recites that it was "for the payment of the secured and unsecured creditors". Clause (1) sets out that the secured creditors were the Bank and M/s. R. Rattilal & Co., whose advances to the company were secured by hypothecation and mortgage in favour of the Bank and by a pledge of cotton in favour of R. Rattilal & Co. Clause (2) states that the unsecured debts of the company amounting to Rs. 101.39 lacs were due to four categories of creditors:

8. Category 1: consisted of

(a) J. K. (Bombay) (P) Ltd. for Rs. 8.46 lacs, being the amount advanced by it to the company for purchase of 2000 shares of Bengal Assam investors. The company agreed to get these shares released from the Bank with which they were pledged and hand them over to this creditor within 90 days from the date of the order sanctioning the scheme.

(b) J. K. concerns and others to whom Rs. 48.39 lacs were due and who were mentioned in Sch. 'B' to the agreement dated August 16, 1965. Clause (2) provided that this amount was to be secured by a second mortgage of the company's assets in consideration whereof the creditors would accept payment in

the manner provided by the agreement dated August 16, 1965, annexed as Ex. A to the scheme. Sub-clause (3) of clause (2) provided that if the Controller of Capital Issue gave his sanction the second mortgage should be in the form of a debenture trust deed and the company should issue debentures of the said amount of Rs. 48.13 lacs of Rs. 100 each to these creditors ranking *pari passu*.

9. Category 2: creditors were the Bombay Municipal Corporation, the Collector of Sales Tax, the Commissioner of Income Tax, the Bombay Port Trust, the Collector of Bombay, the Life Insurance Corporation, the Employees' State Insurance Corporation, the workers, their co-operative society, and lastly the Tata Power Company Ltd. These were to be paid off within the time specified against their names.

10. Category 3: creditors were 15 in number and were the suppliers of cotton and to whom Rs. 6.84 lacs were due. These were to be paid off in certain instalments, the first instalment being 37% of the debt, payable within 90 days from the date of sanctioning of the scheme.

11. Category 4: creditors whose claims were Rs. 1000/- or less were to be paid off within 90 days after the sanction of the scheme. Creditors whose claims were above Rs. 1000/-, the total of whose debts amounted to Rs. 33.70 lacs, were to be paid off by 8 equal annual instalments, the first instalment being 12½% payable within 90 days from the sanctioning of the scheme.

12. Clause (3) of the scheme referred to the said agreement dated October 18, 1965. Lastly, clause (4) provided that the Jalans "will provide the necessary finance required for running the mills". Except for clause (4), the scheme thus represented an arrangement between the company and the creditors for repayment of debts due to the creditors. The Jalans were not parties to the scheme for at the date when it was sanctioned they were not either the shareholders or the directors though they appeared before Mody, J., and gave their concurrence.

13. The scheme having been sanctioned, the winding-up petition was withdrawn, the provisional liquidator was discharged and all the assets taken charge of by him were handed over to the company. On February 22, 1966 the nominees of the Jalans were appointed directors and two days later the directors from the J. K. Group, except Gopal Krishna

Singhania, resigned. From and after that date the Jalans, according to the said agreement of August 16, 1965 took over the management of the company.

14. The scheme envisaged the re-starting of the mills which had been closed from August 6, 1965, the repayment to categories II, III and IV of the unsecured creditors, in some cases in full and in the rest by instalments, the execution of the second mortgage by the company in favour of category 1 (b) creditors or issuing of debentures in their favour to secure repayment of Rs. 48.13 lacs from out of the profits which may be made by the company by working the said mills and the handing over of the said investment shares to J. K. (Bombay) (P) Ltd. There can be no dispute that the scheme assumed that the mills would be worked and that from the profits which may accrue the J. K. concerns and other creditors of category 1 (b) would be paid off by 1980 and in the meantime the debts due to them would be secured by a debenture trust deed or a second mortgage. This naturally meant that finance to work the mills had to be procured and that was why clause (4) provided that the Jalans would provide the requisite finance.

15. There is reason to believe, and it so appears from the record also, that in the early stages at any rate, there was a genuine desire on the part of the Jalans to implement the scheme. In March 1966, the company's solicitors were instructed to prepare a draft debenture trust deed, which, after it was ready, was sent to the Singhania's for approval. Likewise, the mills were restarted on April 1, 1966, after spending, it was said, Rs. 5 lacs for setting the machinery into working order. May 17, 1966 was under the scheme the due date for payment in full to category II creditors and for payment of the first instalment to categories III and IV (a) and (b) creditors. It is undisputed that the company made these payments. What remained, therefore, to be implemented were the following: (i) the execution of second mortgage or the debenture trust deed, (ii) the transfer of the said investment shares and (iii) providing finance for working the mills.

16. Regarding the second mortgage, it appears that after the draft was sent for Singhania's approval a dispute arose between the parties regarding interest payable on Rs. 48.13 lacs due to the Sch. 'B' creditors, the Singhania's claiming the original interest chargeable on

advances made by them until the execution of the second mortgage and the Jalans applying that interest at 1/4% only was payable from August 16, 1965, the date of the agreement between them and the J. K. group. Despite the controversy, the company applied on September 27, 1966 to the Controller of Capital Issues for sanctioning the debenture trust deed. It appears that along with the application the company had to send a treasury chalan for Rs. 50/-, that though a chalan was despatched it was under a wrong head, and, therefore, the Controller asked the company to replace it by a proper chalan. This the company did not do and the application remained unattended to. In the meantime, the Singhanias wrote to the company inquiring about the outcome of the company's application and requiring the company to send a copy of the application and the order made thereon. On coming to know that the sanction of the Controller could not be issued because of the technical defect in the chalan they sent Rs. 50/- to the Controller's office asking him to issue the sanction. That, of course, could not be done as the Singhanias had no locus standi in the matter of the said application since the application had to be made by the person desiring to issue debentures and sanction could be given to such applicant only. While this correspondence was going on, the Controller enquired of the company when the requisite chalan could be expected. The company thereupon requested him to keep the matter of sanction in abeyance. Mr. Sen contended that the Controller had already given his consent and that the only thing which remained to be done was to issue it to the company which could not be done by reason of the said defect in the chalan and that that being so, the company could have executed the debenture trust deed and issued the debentures. The correspondence on this subject, however, does not factually support the contention. The Controller did not proceed with the application as the company itself had written to keep the matter in abeyance. There is, however, no doubt that the company if it had so desired, could have obtained the sanction and proceeded with the execution of the debenture trust deed. But it asked the Controller to keep the matter in abeyance as the Jalans, rightly or wrongly, alleged that though Rs. 48.13 lacs were stated in the scheme to be due to the J. K. Group, they were not entitled to that amount by reason of their hav-

ing committed several fraudulent acts during the period of their management. We may mention that in the order made by the Company Judge in the summons for directions taken out later on by the Appellants he held that the affidavit of Goenka in which these allegations were made was not in conformity with Order XIX, Rule 3 of the Code of Civil Procedure, and that therefore, they could not be taken notice of, that assuming that these allegations were true, the said alleged acts were of certain individuals, that the Company's obligation was not affected thereby and that the proper remedy was to take proceedings against those individuals.

17. As regards the said investment shares, the company got those shares released and handed them over to J. K. (Bombay) (P) Ltd., but failed to hand over the transfer deeds therefor. There can, therefore, be no doubt that the company failed to implement this part of its obligation.

18. As regards the implementation of clause (4) of the scheme, the Jalans, as aforesaid, entered into an arrangement with Sushil Co., to which the J. K. Group were parties, under which Sushil Co. gave loans totalling Rs. 43 lacs including Rs. 23 lacs paid to the Bank. This arrangement was evidently made as monies were immediately required to pay to the Bank, without which the Bank's objection to the scheme could not be removed and also because it would not presumably have been possible to have further dealings with the Bank. After the initial difficulties with the Bank were thus got over, fresh negotiations were started with the Bank and an arrangement was made whereunder the Bank agreed to advance Rs. 50 lacs provided the Central and the State Governments gave their guarantees therefor. Both the Governments were prepared to furnish their guarantees on a 50-50 basis for an advance of Rs. 50 lacs by the Bank against a pledge of stocks, stores etc. and a second charge on the company's fixed assets which charge under Term 4 (b) of Sch. 'C' of the agreement of August 16, 1965 would have priority over the second mortgage in favour of Sch. 'B' creditors. The State Government even agreed to issue a provisional letter of intent pending completion of guarantee documents guaranteeing thereby 90 per cent of its share of Rs. 25 lacs, whereupon the Bank advanced Rs. 25 lacs, part of the intended loan

of Rs. 50 lacs. With regard to the remaining Rs. 25 lacs, the Central Government was not prepared, as the State Government did, to give its guarantee until the documents were completed. On November 17, 1966, the Bank gave its consent to the company creating a second charge in favour of the two Governments on its fixed assets which were subject to a first mortgage in its favour. Though the Bank was agreeable to facilitate the said transaction, the J. K. Group were not. By his letter dated July 7, 1966, Singhania contended that such a charge in favour of the two Governments which would have priority over the proposed second mortgage could only be in favour of financial institutions mentioned in the said Term 4 (d) advancing the said loan and not the two Governments who were giving only their guarantee, and therefore, the company could grant to the said Governments only a third and not a second charge. Strictly speaking the company could give such a prior charge to the Bank and not to the two Governments. But the objection was technical and was raised for creating an obstacle in the way of the company getting the said advance from the Bank. It really made no difference to the creditors whether the prior charge was given in favour of the Bank or the two Governments. The result was that the Central Government declined to give its guarantee and the further advance of Rs. 25 lacs became unavailable. Even the provisional guarantee given by the State Government for a year in the first instance expired in July, 1967.

19. The position which ultimately emerged was that the company got advances of Rs. 43 lacs from Sushil Co. of which Rs. 23 lacs were paid to the Bank. Rs. 20 lacs, however, remained with the company presumably for meeting immediate payments under the scheme, the expenses needed to restart the mills and for other urgent purposes. The company obtained from the Bank an advance of Rs. 25 lacs on the provisional guarantee of the State Government and subsequently a further advance of Rs. 20 lacs on a further charge over its fixed assets. It was contended that though the company obtained Rs. 45 lacs from the Bank, none of it except Rs. 2 lacs remained with it for working the Mills as out of Rs. 45 lacs Rs. 43 lacs were paid to Sushil Co. against the loans given by that Company. That no doubt, is true, but as a result of these transactions Rs. 20 lacs out of Rs. 43

lacs advanced by Sushil Co., still remained with the company, Rs. 23 lacs only having been used to pay off the said cash credit accounts and in reducing the said term loan by Rs. 5 lacs. It appears from the record that at this stage the new directors had before them two alternatives: (1) to continue its liability to Sushil Co. in respect of Rs. 43 lacs or (2) to procure from the Bank a loan of Rs. 50 lacs on the guarantee of the two Governments. They obviously could not do both, continue the loan from Sushil Co. and to obtain the advances from the Bank as well, because the two Governments were prepared to furnish their guarantee only on the company hypothecating all its movable assets in their favour and giving a second charge on its fixed assets. Since the moveable assets were already pledged with Sushil Co., unless they were released from that company and pledged with the two Governments, no guarantee would be forthcoming from them. Sushil Co., therefore, had to be paid off and the assets pledged with it released, unless of course that company was prepared to let go its right under the said agreement to have moveable assets of the company hypothecated in its favour. In these circumstances it is difficult to say that the new management did anything palpably wrong in paying off Sushil Company particularly as there was every likelihood of the company obtaining Rs. 50 lacs from the Bank on the guarantee of the said two Governments. There is at the same time no doubt that no further finance was provided by the Jalans over and above these transactions.

20. The learned Company Judge took the view that under clause (4) of the scheme the Jalans were bound not only to procure but to personally bring in the finance sufficient to work the mills, that by paying off Sushil Co., and not bringing in further finance they starved the mills of finance and therefore could not be heard to say that the scheme had become unworkable. Holding that the scheme was workable he directed the Jalans to provide the necessary finance which meant that they must bring in their own finance in addition to any finance which they may or may not procure from elsewhere. He also directed the company to obtain sanction from the Controller of Capital Issues and to execute the debenture trust deed within three weeks. In accordance with this view he dismissed the winding up petitions filed by the

company and others. In the appeals against these orders the Appeal Court held that as Singhanian himself had admitted in his affidavit that the company was commercially insolvent at the date when the scheme was approved and that the scheme could not be worked unless the Jalans provided the necessary finance there was nothing more to decide except as to whether the Jalans had undertaken an obligation to provide finance. The Appeal Court answered that question holding that "there was no binding obligation or duty undertaken by the Jalans to pay anything to the company or to compulsorily provide finance", that the company had become commercially insolvent, that no reasonable or prudent person would invest any of his monies in the company, that its capital and reserves had been wiped out, that its substratum had disappeared inasmuch as its business of manufacturing cotton cloth could no longer be carried on with profit, and lastly, that therefore the scheme which was on the assumption that the mills could work and the company's debts would be paid from out of the profits could not be implemented. The Appeal Court was also of the view that the Company Judge was in error in giving the said directions and in dismissing the petitions for winding-up. Accordingly, it allowed the appeals and ordered winding-up. In doing so it rejected the contention that Sch. 'B' creditors had under the scheme already become secured creditors and had priority over the other unsecured creditors, or that in the alternative, the Court should order winding-up only after directing the company to execute a second mortgage in their favour and thus implement the scheme which the company and the Jalans were bound to do. It also held that even assuming that the Jalans had brought about an impasse due to which the mills could not be run with any prospect of profits, their mala fides were not relevant once the Court came to the conclusion that the company had become commercially insolvent.

21. Mr. Sen, as also the learned Attorney-General, principally relied on two facts in support of their stand that the Appeal Court was in error in setting aside the directions given by the Company Judge and in ordering instead winding-up of the company. These were (1) the failure of the Jalans to provide finance which would include their bringing in their own monies, and (2) giving away the process-

ing unit of the mills which was the most profit yielding part of the mills for a nominal value to Jhunjhunwalas, the nominees of the Jalans. Mr. Sen commended the following propositions for our acceptance: (1) that the scheme when sanctioned by the Court became a statutory bargain and part of the company's constitution, and therefore, all further arrangements of the company's affairs had to be on the basis of the rights and obligations thereunder; (2) that if the company were to be wound up, such winding-up can only be ordered after compelling it to carry out those obligations and it would be opposed to equity and public policy to allow the company to escape its obligations by ordering it to be wound up; (3) that even if the scheme could be ignored by directing winding-up it could only be done by putting the parties in the position they were prior to the scheme, and (4) that the winding-up of the company being at the instance of the Jalans who had failed to carry out their obligation to find the finance, acceding to their prayer for winding-up was tantamount to acceding to their default. He firstly argued that no winding-up order should at all have been passed and the scheme ought to have been ordered to be implemented as the Company Judge did, and secondly, in the alternative, that even if the company were to be wound up, it should be so done subject to the implementation of the rights and obligations of the parties. The learned Attorney-General adopted these contentions and in addition urged that Sch. 'B' creditors were entitled to a charge on the company's assets not merely on the said second mortgage being executed, but irrespective of it and in praesenti under the scheme and the said agreement of August 16, 1965.

22. As regards financing the company, the contention was that under clause (4) of the scheme the Jalans were bound to bring in their own monies required for working the mills and that they could not contend that because they could not procure finance on the credit of or on the security of the assets of the company, their obligation was over. The Company Judge agreed with this view, but the Appeal Court, as aforesaid, took a different view and held that under clause (4) it was not as if the Jalans were bound to provide finance in all circumstances or were bound to bring in their own monies. In our view both the Company Judge and the Appeal Court took

extreme views of clause (4). It is clear from the sanctioning order of Mody, J., that the company at that stage was, and that fact was well known to all concerned, commercially insolvent. A winding-up petition was at that stage pending before the High Court. There were, therefore, two alternatives before the creditors, either to take the company in liquidation, in which event the creditors knew, as Mody, J., has observed, that they could not be paid their dues, or to restart the company under an arrangement whereunder it would work the mills and pay the debts gradually from out of the profits, such debts in the meantime being secured by a second mortgage. The basis of the scheme, therefore, was that a new management would replace the old, the mills would be restarted and the unsecured creditors would be paid gradually from the profits. Every one including the Jalans must have realised that the mills could not be restarted and profits made unless necessary finance for working them was furnished. The scheme which was framed and sanctioned with their concurrence threw the responsibility of bringing finance on the Jalans.

23. It is true, as argued by Mr. Nariman, that the scheme was essentially an arrangement between the company and its creditors and that the Jalans did not give any personal undertaking to the Court. Nevertheless, it was sanctioned by the Court after the Jalans had concurred and given their assent through clause (4) that they would provide the necessary finance. The word 'provide' in clause (4) is of wide import which would mean that they would arrange for the finance, either on the credit of and security of the assets of the company or, if necessary, by bringing in the monies themselves. In view of the language of Cl (4) we cannot agree with Mr. Nariman that the clause meant only finance secured on the assets of the company. At the same time even though the scheme is not a mere agreement but has statutory force, it has to be construed as a commercial document that is, in the manner in which businessmen would read it. There can be no doubt that the Jalans took the responsibility to provide finance required for running the mills so that from out of their profits the obligation to pay the creditors under clause 2 (ii) of the scheme could be met in the manner therein laid down. Therefore, the Jalans were to provide finance either on the credit of

the company or on the security of its assets, or if necessary, their own monies for running the mills in the commercial sense, i. e. with a reasonable prospect of making profits and not in all events and in all circumstances as the Company Judge appears to have thought, even if there was no prospect of running them at reasonable profit. Such a construction would be contrary to the fact that the creditors including the workers and those who had supplied stores and other materials knew that there was hardly any chance of their being paid, and therefore, with few exceptions, were anxious that instead of taking the company into liquidation the mills should be restarted and their dues paid bit by bit. Thus, the assumption on which the scheme was made was that there was a possibility of running the mills successfully and that the creditors would be paid gradually out of the profits which the mills would make.

24. In the events that have happened it is impossible to say that the Jalans had no genuine desire to work the mills or that they did not, in the initial stages at any rate make arrangements for financing the mills. This can be seen from the arrangement made with Sushil Co., their bringing the mills machinery in working order after the mills had remained closed for nearly 8 months and their arrangement with the Bank and the two Governments for a loan of Rs. 50 lacs. It is true, as pointed out by Mr. Sen that out of Rs. 45 lacs received from the Bank Rs. 43 lacs were utilised for paying off Sushil Co. leaving only Rs. 2 lacs therefrom as working capital. But, as already stated, they had to have the assets pledged with Sushil & Co. released in order to procure the guarantee of the two Governments on which alone the Bank was prepared to advance the new loan of Rs. 50 lacs. The two Governments on their part were prepared to stand a guarantee only if the company gave them a second charge on its fixed assets pledged and a hypothecation of all its movable assets. That could only be done by paying off Sushil & Co. and having the assets with it released. Whether what they did in these circumstances was right or wrong, the fact remains that had the deal with the Bank and the two Governments gone through, there would have been a further sum of Rs. 25 lacs over and above Rs. 20 lacs left from the loan by Sushil & Co. available as working capital. Beside; restarting the mills, it

is undisputed that the company, as provided by the scheme, paid off the small creditors and also paid the first instalment due to creditors of categories III and IV (a) and (b). It is, therefore, impossible to say that the Jalans did not make efforts to work the mills or to implement the scheme. There is evidence on record, though the figures given by the Jalans are not admitted by the appellants, that though the working of the mills was at a loss it was continued upto June 1967.

25. But the contention was that the mills did not yield profits because of the Jalans having parted with the processing unit to Jhunjhunwalas. The allegation was that the company should have worked this unit as it was the most profit-yielding department, that Jhunjhunwalas were the nominees of Jalans, and that the rent or compensation, as the case may be, was a nominal one. The Company Judge directed termination of the agreement as he thought that if that unit had not been parted with at a nominal consideration it was possible to run the mills at profit and to implement the scheme. The Appeal Court rightly disagreed with the premises on which the said conclusion was arrived at. There could be no valid objection to the company entering into a lease or a licence agreement, for Singhania himself had in September 1965 asked permission from the Textile Commissioner to separate this unit and either to sell or lease it and the Textile Commissioner had assured him to consider the proposal favourably. The argument, nonetheless, was that in 1964-65 the company had earned Rs. 17.12 lacs from processing work of outsiders after processing its own goods, that after entering into said agreement the company had in 1966-67 paid Rs. 21.77 lacs for processing its own goods and in the bargain got only Rs. 50,000 a month. On these figures it was urged that whereas the company earned a profit of Rs. 17 lacs in 1964-65, it incurred a loss of a like amount in 1966-67 as a result of the aforesaid bargain. On these figures only the Company Judge directed the company to terminate the said agreement. The figures were, however, misleading because Rs. 17.12 lacs were the gross receipts and not net profits. Before arriving at net profits, cost of raw materials, labour, depreciation etc. had to be worked out and then only a true picture of the working of the unit would emerge. Besides, the figure of Rs. 17 lacs does not take into

account the cost of processing of the company's goods and whether that had resulted in profit. This is important when it is remembered that the company paid Rs. 21 lacs in 1966-67 for processing its goods though Jhunjhunwalas were to charge only cost price for processing the company's goods. It was, therefore, unsafe from a few figures to jump to the conclusion that had the unit not been parted with the mills would have made profit. It was said that the Jalans should have produced the company's accounts if they wanted to show that the terms on which they had parted with the said unit were profitable to the company. The Jalans gave several reasons why the accounts could not be produced. Whether they were true or not, even if the accounts had been produced they could not have thrown any light as no separate accounts were kept of the income and expenditure of the unit in 1964-65. But then if the unit was the most profit-yielding unit and had made large profit in 1964-65 one wonders why Singhania should have applied for permission to sell or lease it. It is also difficult to believe that the Jalans would let out the unit at a nominal consideration only a month after they had restarted the mills as in the beginning at any rate they were genuinely interested in working the mills and implementing the scheme unless of course the allegation that Jhunjhunwalas were their nominees was true. But, as the Appeal Court has rightly said, no proof was offered in support of that allegation.

26. The next question is whether the closure of the mills was due to the Jalans having starved them of finance. Having perused the record and after hearing counsel we do not think such a conclusion possible. The correspondence between the Textile Commissioner, the Mills Federation and the company shows that from the middle of 1966 and onwards there was great difficulty in obtaining adequate quantity of cotton and particularly of the type required by the mills, that the supply position was worsening day by day and though the Government had fixed ceiling prices and a little later on enhanced them, dealers in cotton charged prices in excess of the ceiling prices. Even the Textile Commissioner had to acquiesce in the mills purchasing cotton at prices nearly 20% more than even the enhanced ceiling prices. Realising the difficulties in which its member mills were placed, the Federation at first

evolved a policy of voluntary restraint and advised its members not to purchase cotton in excess of their requirements for three months, to purchase only at ceiling prices and to close down the mills or reduce their spindleage if it was not possible for them to get cotton at ceiling prices. The Federation even agreed to reimburse the mills of lay off compensation if they were forced to close down for a while. Not only the prices of cotton but all other stores had spiralled up partly due to devaluation of the rupee on June 6, 1966 and partly due to the stock of cotton being less than the demand and Government's insistence to avoid unemployment that the mills should work at their full quota. As the position worsened after September 1966, the Federation revoked its earlier policy and permitted its members to buy cotton at prices above the ceiling prices as it was realised that on the one hand the mills were not getting cotton at prices fixed by the Government and on the other they were not permitted to restrict their spindleage. Prices of cotton of almost all varieties had by this time gone up by 50% above the ceiling prices. Realising the difficult supply position Government on December 8, 1966 directed the mills to observe one extra holiday per week and to pay lay-off compensation for such extra holiday. On December 7, 1966 the company wrote to the Textile Commissioner that as it was not getting the requisite type of cotton it had reduced its count from 30 to 20, that till that day it had not received a single requisitioned bale, that though the dealers were directed to sell cotton at Rs. 1430 a bale they were charging Rs. 1600 a bale and that lay-off compensation for the extra holiday imposed by Government meant an additional burden of Rs. 80,000 a month. On December 12, 1966 the company demanded of the Textile Commissioner to requisition cotton required by it. No cotton was delivered to the company although the Textile Commissioner promised to requisition it. On December 23, 1966 the Essential Commodities Ordinance, 13 of 1966 was promulgated empowering the Government to direct an employer not to close his establishment without the authorised officer's permission, not to work the establishment for more than the prescribed days and hours and to pay lay-off compensation where the employer obtained permission for closure. The next day Government issued an order directing that no employer should close wholly or

partially his undertaking without the permission of the Textile Commissioner and directed all establishments to observe an extra holiday per week and to pay lay-off compensation for it. On December 23, 1966 Government informed the company that no permission would be given to any mill for not giving the extra holiday. In view of there being no possibility of getting proper cotton the company asked for a quota of terylene fibre as a substitute. That also could not be procured. Meanwhile, the company had deposited with the Federation Rs. 12,500 as advance towards the price of cotton which may be requisitioned for it. In February 1967, some cotton was requisitioned for the company but the sellers could not deliver it as the authorities had sealed their godowns and prohibited removal of cotton therefrom. On February 15, 1967 the company put up a notice of closure owing to want of cotton. A few days later it requested the Textile Commissioner for requisitioning 2000 bales stating that the company was not in a position to buy cotton at excess prices. The reply was that 150 bales were requisitioned for it, that the question of requisitioning 350 bales more was under consideration but that the company should appreciate that it cannot go on, on requisitioned cotton only. The implication was that the company must manage to buy cotton even at exorbitant prices. So far out of 2000 bales demanded only 200 bales had been allotted to the company. Even in respect of these bales the sellers would not permit their sample survey to ascertain their quality. In March 1967, the spinning department was partially closed causing labour unrest. The cotton position in April 1967, as explained by the company in its letter of April 25, 1967 was as follows: 1282 bales were allotted to the company between February 15, 1967 and April 20, 1967 out of which the company took delivery of 200 bales. No survey by sample was allowed in respect of 732 bales. Survey made by the suppliers of 350 bales was challenged by the company. In respect of the balance of 250 bales the company disputed the right of the suppliers to demand clearance charges and that dispute was referred to the Textile Commissioner. From this letter alone and without reading it in the context of the previous correspondence, the Company Judge concluded that though cotton was requisitioned for it the company had declined to lift it. The conclusion was neither fair nor just. It

stands to reason that no purchaser would take delivery of goods unless he is satisfied from their survey that they were of the quality for which he had paid. If the suppliers declined to permit survey the company could not be accused of refusing delivery. Mr. Sen argued that the company could not depend upon getting cotton at ceiling prices or on cotton requisitioned for it and that it should have purchased it even at excess prices just as other mills were doing. If that contention was right there was no point in Government fixing the ceiling prices. It may be that other mills might have purchased cotton at excess prices but if the finances of the company did not permit that luxury it is difficult to hold that the company was guilty of any dereliction. Even apart from having to pay high prices for cotton, the mills had to pay Rs. 80,000 a month because of the compulsory extra holiday.

27. In the meantime several other difficulties were mounting up. The affidavit of Goenka shows that the mills were working at a loss of Rs. 1.5 lacs a month and the total losses by June 1967 had risen to Rs. 28 lacs. These figures were not admitted by the appellants as the company did not produce books of accounts. The precision of the loss could be disputed but not the fact. On May 9, 1967 the guarantee given by the State Government for one year expired and a fresh arrangement with the Bank became necessary. The Government would not renew its guarantee as Singhania had objected to a second charge being made in its favour. On May 17, 1967 the second instalment payable under the scheme to categories III and IV (b) creditors amounting to over Rs. 5 lacs became due. The mills were for the reasons stated above closed on June 4, 1967 with the consequence that the company became liable to pay to 2700 workers retrenchment compensation. By the time the winding-up petitions were heard the company had already become liable to pay a large amount by way of retrenchment compensation. The closure of the mills was followed by workers' unrest culminating in hunger strikes and prevention of the directors from entering the mills and disposal by them of cotton, cloth and other articles. If the scheme were to be worked as directed by the Company Judge it meant paying of the retrenchment compensation, putting the machinery once again in working order

etc., requiring large amounts to meet these claims and expenses.

28. The argument, however, was that the Jalans were to thank themselves for this calamity. But, surely, they could not be blamed, however, badly they might have behaved in other respects, for the closure of the mills which was due to reasons beyond their control, viz., the price rise due to devaluation which overtook them only two months after they restarted the mills, the impossibility of getting cotton at reasonable prices, and the imposition of the extra holiday which meant both loss of production and the burden of lay-off compensation. It is, therefore, not fair to say that the Jalans were responsible for the closure of the mills either on the ground of failure to lift the cotton or by their having given away the processing unit as alleged.

29. As regards Cl. (4) of the scheme, we do not agree with the learned Attorney General that the Jalans had to finance the mills from their own monies only nor with Mr. Nariman that their obligation was confined only to arranging finance on security of the company's assets. Both of them took up extreme positions with which it is not possible to agree. On the one hand sub-clauses (d) and (e) of Term (4) of the said Sch. 'C' clearly contemplate the right of the Jalans to arrange finance on the security of the company's assets. On the other hand it must have been clear to them that as the company's assets were already mortgaged and pledged, further finance would have to be brought in either by them or on their own credit. In cases such as the one before us, the scheme has to be read as a commercial document, that is, in the sense in which businessmen conducting such an establishment would understand. If so read, clause 4 cannot mean that the Jalans had taken upon themselves the liability to put in monies even if the mills could not be run at reasonable profits. No industrial establishment is ordinarily run except in the hope of doing so at profit. Considering the circumstances which existed in 1966-67 we cannot say that the conclusion of the Appeal Court that there was no reasonable prospect to run the mills at profit was incorrect.

30. The company was commercial insolvent when the scheme was sanctioned. It was concurred in by the Jalans in expectation that the company could be resuscitated and the mills worked at reasonable profit. By June 1967, when the mills were closed and the company filed

the winding-up petition, it was commercially insolvent in the sense that its assets and its existing liabilities were such as to make it reasonably certain that existing and probable assets of the company would be insufficient to meet its liabilities. Besides, the very object for which the company was formed, namely, to run the mills commercially, had failed. By November 8, 1967 when the Company Judge delivered his judgment, apart from the company's debts being in excess of its assets, the company's total losses and its liability to pay retrenchment compensation to its workers had run into considerable figures. Although the figure of Rs. 28 lacs for such losses and Rs. 5 lacs a month for compensation were not admitted by the appellants, there can be no doubt that the company had been running the mills at loss and its liability for retrenchment had swelled to a large figure.

31. Under Section 392 of the Act the High Court which has sanctioned the scheme has the power to supervise the carrying out of it and to give directions in regard to any matter or to make modifications in it as it may consider necessary for its proper working. But if the Court is satisfied that the scheme cannot be worked satisfactorily with or without modifications, it can either suo motu or on an application by any person interested in the company's affairs order its winding up. Both Mr. Sen and the learned Attorney General contended that the Company Judge was right in holding that the scheme could have been worked but for the defaults of Jalans, that the Company Judge was right in giving directions was under Section 392 (1) compelling the Jalans and the company to implement their obligations and that no winding-up order in exercise of power under Section 392 (2) should have been passed. We have examined the circumstances in which and the reasons why the company closed the mills and held that their closure was for reasons beyond the control of the company. As Mody, J. had, while sanctioning the scheme, observed, he sanctioned it only because most of the creditors, except a few, were anxious that instead of the company being wound up, it should be given an opportunity under a new management to work so that it may pay off gradually the debts due to them by working its mills. The assumption, therefore, on which the scheme was framed was that the company could work the mills profitably and pay off its creditors from

out of the profits. Therefore, it was not as if the mills had to be worked even if their working resulted in loss. Assuming that the Jalans were under an obligation to bring in finance including their own monies, they could not be said to be under an obligation to bring in finance even if the working of the mills showed no reasonable prospect of profit. If the mills could not be worked except at loss the company would be justified in ceasing to work them. The very object of the company being to manufacture cloth if the mills had to be closed that would mean that the very object for which the company existed and which also was the assumption on which the scheme was framed ceased to exist.

32. The directions of the Company Judge that the Jalans should bring in the necessary finance could only be on the basis that the mills could be successfully worked. But before giving such a direction he did not, and indeed could not, on affidavits only, ascertain whether in the circumstances then existing there was any reasonable prospect of profits. If there was not, it stands to reason that the Court could not compel the Jalans to work the mills at loss and equally could not compel them to pour in their monies in such an undertaking. Besides the direction did not, and in the very nature of things, could not, specify how much finance the Jalans were to bring in. If the Jalans were to bring in the finance, assuming there was a binding obligation on them to do so, they would do so in the expectation that they would be repaid. The words "necessary finance required for running the mills" in Clause 4 of the scheme must necessarily mean the amount which a reasonable and prudent financier would think necessary for working the mills at profit and not unlimited amount in a concern which cannot be expected to work at reasonable profit. The direction did not also specify on what terms the Jalans should bring in their monies nor the terms upon which they would be repaid. It was, therefore, nebulous and vague and impossible of being enforced. In the absence of any enquiry as to whether the mills could be worked at profit no court would compel a party to furnish monies without even specifying how much and for how long he should provide. If such a direction was not possible, no direction could also be given under Section 392 (1) to work the scheme as its implementation depended on the mills working at profit. The only

course left to the court was, as the Appeal Court did, to pronounce that in the circumstances then prevailing the scheme could not be satisfactorily worked and therefore a winding-up order under Section 392 (2) had become inevitable. By the time the Appeal Court passed its order, the mills having been closed since June, 1967, a huge amount had become payable as retrenchment compensation.

33. But it was urged that assuming that a winding-up order in these circumstances could be passed it had to be subject to the rights and obligations of the parties. The contention was that irrespective of the second mortgage which the company had to execute, Schedule 'B' creditors had already become entitled to a charge on the company's assets. It was argued that where an agreement specifies a property out of which a debt is to be payable and is coupled with an intention to subject such property to a charge, the property becomes subject to a charge in praesenti even though a regular mortgage is to be executed at some future date. Such an intention, the learned Attorney General argued, was demonstrated by the agreement that (1) the debts were to be paid out of profits and (2) the engagement by the company not to deal with its assets. The distinction between a charge and a mortgage is clear. While in the case of a charge there is no transfer of property or any interest therein, but only the creation of a right of payment out of the specified property, a mortgage effectuates transfer of property or an interest therein. No particular form of words is necessary to create a charge and all that is necessary is that there must be a clear intention to make a property security for payment of money in praesenti. In *Jewan Lal Daga v. Nilmani Chaudhuri*, 55 Ind App 107 = (AIR 1928 PC 80), a case relied on by him, the question was one relating to an agreement to mortgage. Following on the agreement, a draft mortgage was prepared which was approved by the respondent's solicitors, the mortgage deed was engrossed and even the stamp for it was paid by the respondent. The question was whether specific performance of the agreement compelling the respondent to execute the mortgage could be granted before accounts between the parties were made up and the amount due thereunder was ascertained. The Privy Council disagreeing with the High Court held that that could be done and

observed that "there was a valid agreement charging the property with whatever sum was actually due.... and that a proper mortgage ought to be executed to carry out these terms." In *Khajeh Solehman Quadir v. Salimullah*, 49 Ind App 153 = (AIR 1922 PC 107) certain deeds were executed purporting to make wakfs of certain properties in favour of the members of a Mahomedan family and then for charitable purposes. Later on, agreements were executed, under one of which the members of the family agreed that allowances fixed under the wakfs should be paid out of the income to named persons of the family and upon their death to their heirs, and under the other agreement the mutawalli agreed that he and the future mutawallis would pay the said allowances. The wakfs were held invalid as creating a perpetual succession of estates. The question was whether the agreements to pay allowances also fell along with them. The Privy Council held that they did not, that they were valid and enforceable and that the direction in the agreements to pay the allowances out of the income of the settled properties showed an intention to create a charge. In both these decisions the Board came to the conclusion that there was a clear intention on the part of the parties to create a charge in praesenti. The argument of the learned Attorney General was that if an agreement indicated a property out of which a debt is to be paid and an intention to subject it to a charge in praesenti, the court must find the charge. Certain other decisions were also brought to our notice but it is not necessary to burden this judgment with them because in each case the question which the court would have to decide would be whether the agreement in question creates a charge in praesenti.

34. Clause 2 (ii) of the scheme first sets out Rs. 48.13 lacs as being due to Schedule 'B' creditors and then provides that the said amount would be repaid by annual instalments of an amount equal to 50% of the profits which the company would make, such instalments commencing after two years from the date of the execution of the second mortgage. Clause 3 of the agreement of August 18, 1965 provides for the execution of the second mortgage in consideration of the said creditors agreeing to accept repayment in accordance with the terms in Schedule 'C' thereto. Term 3 in Schedule 'C' provides the said mode of re-

payment and term 4 provides that in the events there set out the debt or the balance thereof remaining unpaid would become immediately payable. In our view, neither the scheme nor the said agreement shows any intention to subject the company's assets to a charge in praesenti. All that they provide is a promise to create a second mortgage which was to contain the terms set out in the said Schedule 'C' in consideration for which the creditors agreed to postpone repayment in the manner therein provided. Thus the scheme merely contains an agreement to mortgage and the mode of repayment and the said agreement provides for (a) the sale of shares and (b) a promise to postpone repayment in consideration of a second mortgage to be executed by the company. Even if term 4 in the said agreement can be construed to mean an engagement not to deal with the assets of the company, that by itself, in the absence of an intention to create a charge under the agreement, would not be enough to hold that it creates a charge. (cf. *Mulla's Transfer of Property Act*, (5th Ed.) 616). In our view the said provisions of the scheme and the agreement amount only to an agreement to mortgage which can give rise to an obligation to specifically perform it, a personal obligation, but do not constitute either a mortgage under Section 53 or a charge under Section 100 of the *Transfer of Property Act*. (cf. *Hukumchand v. Radha Kishan*, AIR 1930 PC 76.) The claim urged on behalf of Schedule 'B' creditors that they had a charge irrespective of the proposed mortgage and were entitled to be treated as secured creditors cannot therefore be upheld.

35. The contention next was that a scheme sanctioned by the court being binding on the company, its shareholders and the creditors, anything done contrary to its provisions is ultra vires the company. Therefore, if the company is wound up it could be so done subject to the rights and obligations under such a scheme. The order of the Appeal Court was, therefore, wrong inasmuch as it could pass a winding up order only after the company had been made to perform its obligations under the scheme, that is, after it had been made to execute the debenture trust deed or the second mortgage. Reliance in this connection was placed upon the decision in *Premila Devi v. Peoples Bank of Northern India Ltd.*, 1938-4 All ER 337 where the res-

pondent bank had issued A & B share of which Rs. 50 on each such share out of the face value of Rs. 100 were called up. The bank being in difficulty, a scheme was prepared which was sanctioned by the court. Later on the scheme was amended and that also was sanctioned by the court. The scheme so amended provided that further calls on A and B shares should not exceed 25% which included 20% already called by the directors between the passing of the original and the amended scheme and provided further that the balance of 5% call should be payable in 5 instalments payable each half year. The directors, however, resolved that the said 5% should be paid on February 26, 1933 ignoring the amended scheme and later passed another resolution forfeiting the shares of those who failed to pay by the aforesaid date. The bank thereafter went into liquidation and the liquidator contended that the forfeitures were ultra vires the bank being contrary to the scheme and that the names of those shareholders should be included in the list of contributories. The Privy Council held (1) that the amended scheme once sanctioned by the court became binding on the company, the creditors and the shareholders and its terms could be varied only by an order of the court after such variation was approved at meetings of the creditors and the shareholders; (2) that, therefore, it was not possible for the bank or the directors or the shareholders whether by resolution or ratification or otherwise, to alter the dates of payments of the call monies fixed by the scheme; (3) that the resolution calling the call money on a date different from those dates was ultra vires the company had the forfeitures in pursuance of the said resolution, even if ratified by the shareholders, were equally ultra vires, and that the liquidator therefore was entitled to include the names of those shareholders in the list of contributories. It is difficult to say how this decision can assist the appellants for neither the company nor the directors have passed any resolution overriding the provisions of the scheme while it was in operation. The problem is whether in relation to the incomplete rights of the appellants the Appeal Court was bound first to call upon the company to complete those rights and then pass a winding-up order. The decision in *Premila Devi's* case had nothing to do with the winding up of the company or the correctness of an order of winding up

and is, therefore, not relevant to the question before us. The case of *Re Garner Motors Ltd.*, 1937-1 All ER 671, relied on by Mr. Sen, lays down that though a joint debtor would ordinarily under the principle of accord and satisfaction be released from his liability if the debt is paid up by the other joint debtor, a release of one of them under a scheme of arrangement is a release by operation of law and not under accord and satisfaction and therefore would not relieve the other joint debtor. The principle is that a scheme sanctioned by the court does not operate as a mere agreement between the parties: it becomes binding on the company, the creditors and the shareholders and has statutory force, and therefore, the joint-debtor could not invoke the principle of accord and satisfaction. By virtue of the provisions of Section 391 of the Act, a scheme is statutorily binding even on creditors and shareholders who dissented from or opposed to its being sanctioned. It has statutory force in that sense and therefore cannot be altered except with the sanction of the Court even if the shareholders and the creditors acquiesce in such alteration. (cf. 1938-4 All ER 337) (supra). The effect of the scheme is "to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity". (Palmer's Company Law, 20th Ed. 664). Sub-section (2) of Section 391 of the Act allows the decision of the majority prescribed therein to bind the minority of creditors and shareholders and it is for that reason that a scheme is said to have statutory operation and cannot be varied by the shareholders or the creditors unless such variation is sanctioned by the court. The effect, therefore, of a scheme between a company and its creditors is that so long as it is carried out by the company by regular payment in terms of the scheme a creditor who is bound by it cannot maintain a winding up petition. But if the company commits a default, there is a debt presently due by the company and a petition for winding up can be sustained at the instance of a creditor. The scheme, however, does not have the effect of creating a new debt; it simply makes the original debt payable in the manner and to the extent provided in the scheme. The proposition that a winding up order can only be passed after com-

pleting the company to complete the rights which are still incomplete is not borne out by the decisions relied on by Mr. Sen.

36. Reliance was also placed on the principle that no act of a court, (in the present case the sanctioning of the scheme) should be permitted to harm a litigant who has acted on the faith of such an act and that such a person should be restored to the position he would have occupied but for that act. (cf. *Jang Singh v. Brijlal*, 1964-2 SCR 145 = (AIR 1966 SC 1631) and *Jai Behram v. Kedar Nath*, 49 Ind App 351 at p. 356 = (AIR 1922 PC 269 at p. 271)). We do not see how this principle can be invoked for the purpose of completion of rights where such rights are incomplete at the date when a winding-up order is made. There is no question of the appellants having done something on the faith of an act of the court, the appellants and the other Schedule 'B' creditors having agreed to a postponement of repayment to them in consideration of an agreement between them and the company providing for a second mortgage in their favour.

37. Next, it was said that by reason of sub-sections (3) and (4) of Section 391 a scheme once sanctioned becomes part of the company's constitution. Therefore, the company cannot be ordered to be wound up except in conformity with the rights and obligations of the parties under such a scheme. But sub-section (3) only provides that an order sanctioning a scheme begins to operate only when a certified copy of such order is filed with the Registrar. Thus, the sub-section merely lays down a condition precedent to the coming in force of a scheme and does not deal with rights and obligations of parties under such a scheme. Sub-section (4) requires a copy of such order to be annexed to every copy of the memorandum of the company issued after the certified copy of the order has been filed with the Registrar, and sub-sec. (5) provides penalty for default of this requirement. These sub-sections were presumably introduced to ensure notice of the order sanctioning the scheme to persons dealing with the company so that they may deal with the company henceforth with the knowledge of the scheme. But the sub-sections do not mean that the scheme becomes part of the constitution of the company. Sub-section (4) clearly lays down that a copy of the order is to be annexed to a copy of the

memorandum issued after its certified copy has been filed with the Registrar, that is, after the operation of the scheme commences. A scheme, therefore, is not to be considered for instance, as modifying existing special rights attached to shares unless such modification is provided for the scheme. (cf. *Re Downing T. H. and Co.*, (1940) 1 All ER 333; also *Buckley on the Companies Acts* (13th Ed.) 411). The contention, therefore, that the scheme becomes part of the company's constitution or of its memorandum, and therefore, winding up order cannot be passed except in conformity with the altered constitution of the company, is not tenable. So long as the scheme is in operation and is binding on the company and its creditors, the rights and obligations of those on whom it is binding are undoubtedly governed by its provisions. But once the scheme is cancelled under Section 392 (2) on the ground that it cannot be satisfactorily worked and a winding up order passed such an order is deemed to be for all purposes to be one made under Section 433. It is not as if because the scheme has been sanctioned under Section 391 that a winding up order under Section 392 (2) cannot be made. If the appellants' contention, that a winding-up order can only be made subject to the rights and obligations of the parties under the scheme were to be right, it would mean that where a company makes default in paying an instalment on the date prescribed by the scheme and a creditor files a winding-up petition, even though a winding-up order is made on the basis that the debt has become presently payable, still the creditor is bound by the scheme and his debt is to be payable by instalments as provided by the scheme.

38. The effect of a winding-up order is that except for certain preferential payments provided in the Act the property of the company is to be applied in satisfaction of its liabilities *pari passu*. *Pari passu* distribution is to be made in satisfaction of the liabilities as they exist at the commencement of the winding-up. (cf. Sections 528 and 529 of the Act; *Ghosh on Indian Companies Law*, 11th Ed. Vol. 2, p. 1073). The effect of a winding-up order on rights already completed as against rights yet to be completed is succinctly stated by Lord Halsbury in the *Bank of Scotland v. Macleod*, 1914 AC 311 at pp. 317, 318 as follows: "Rights in security which have been effectually completed before the liquida-

tion must still receive the effect which the law gives to them. But the company and its liquidators are just as completely disabled by the winding-up from granting new or completing imperfect rights in security as the individual bankrupt is by his bankruptcy. This, indeed, is the necessary effect of the express provisions of the Companies Act that the estate is to be distributed among the creditors *pari passu*. Every creditor is to have an equal share, unless any one has already a part of the estate in his hands, by virtue of an effectual legal right." (cf. *Tulsidas Jasraj v. Industrial Bank of Western India*, 32 Bom LR 953 at p. 957 = (AIR 1931 Bom 2 at pp. 8-9)). Similarly, in *Re Anglo-Oriental Carpet Manufacturing Co.*, (1903) 1 Ch 914 it was held that even where a company had executed a trust deed and issued debentures creating a charge on its assets but the charge had not been registered as required by the Companies Act by the time the company had passed an extraordinary resolution for voluntary winding-up the debenture holders were not, as against the joint body of creditors, secured creditors.

39. It is thus well established that once a winding-up order is passed the undertaking and the assets of the company pass under the control of the liquidator whose statutory duty is to realise them and to pay from out of the sale-proceeds its creditors. Such creditors acquire on such order being passed the right to have the assets realised and distributed among them *pari passu*. No new rights can thereafter be created and no uncompleted rights can be completed, for doing so would be contrary to the creditors' right to have the proceeds of the assets distributed among them *pari passu*. But Mr. Sen's argument was that the appellants had acquired under the scheme a vested right to have a second mortgage which could not be nullified by the court passing the winding-up order. We cannot accede to this contention for the scheme vested no such right. What it did provide was that in consideration of the company agreeing to execute a second mortgage the appellants and the other Schedule 'B' creditors agreed to receive repayment of debts due to them in the manner provided in the scheme and the agreement of August 18, 1965. On failure of the company to execute the mortgage the consideration for postponement of repayment failed and the monies due to those creditors

became immediately payable. It is also not correct to say that the scheme gave any priority to those creditors. Such a priority could result only on the execution of the mortgage which would make them secured creditors.

40. On the findings by the Appeal Court that the company was commercially insolvent and that the scheme could not satisfactorily be worked with or without modifications, the only alternative for that Court was to pass the winding-up order under Section 392 (2). The Court could not have completed, as contended by the appellants, their rights which were still incomplete or order the company to execute a debenture trust deed or the second mortgage, and thus set up the appellants and the other Schedule 'B' creditors as secured creditors against the rest of the unsecured creditors. Such an order could not be passed as it would be contrary to and in breach of the right of distribution *pari passu* of the joint body of unsecured creditors. The Appeal Court, therefore, correctly followed the principle that the status of creditors which could be recognised was that which existed at the date of the winding-up order, that the second mortgage or the debenture trust deed not having so far been executed, the appellants and the other Schedule 'B' creditors were still unsecured creditors and therefore could not claim any priority over the rest of the unsecured creditors.

41. In the result, we are of the view that the Appeal Court was right in ordering winding-up of the company and we uphold that order. Appeals are dismissed with costs. As there has been one common argument, we think it proper that there should be one set of costs for all the respondents in these appeals. The creditors for whom the learned Attorney General and Mr. A. B. Divan appeared will bear their own costs.

Appeals dismissed.

AIR 1970 SUPREME COURT 1059
(V 57 C 223)

(From: Mysore)

J. C. SHAH, Actg. C. J. AND
K. S. HEGDE, J.

Sidramappa, Appellant v. Rajashetty and others, Respondents.

Civil Appeal No. 1953 of 1969, D/- 9-12-1969.

CN/DN/A119/70/RGD/A

(A) Civil P. C. (1908), Order 2, Rule 2 — Cause of action in subsequent suit different — Relief asked for in subsequent suit not one which could have been asked for in earlier suit — Subsequent suit is not barred.

The requirement of Order 2, Rule 2, is that every suit should include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action. 'Cause of action' means the 'cause of action for which the suit was brought'. Cause of action is a cause of action which gives occasion for and forms the foundation of the suit. If that cause of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings. AIR 1922 PC 23, Ref. (Para 7)

Where the cause of action on the basis of which the previous suit was brought does not form the foundation of the subsequent suit and in the earlier suit the plaintiff could not have claimed the relief which he sought in the subsequent suit, the plaintiff's subsequent suit is not barred by Order 2, Rule 2. (Judgment of Mysore H. C., Reversed). (Para 8)

(B) Civil P. C. (1908), Order 7, Rule 7 — No claim for mesne profits from the date of the suit made in plaint — Mesne profits cannot be awarded in appeal to Supreme Court — Plaintiff's remedy is to take separate steps according to law. (Para 10)

Cases Referred: Chronological Paras
(1922) AIR 1922 PC 23 (V 9) = 49

Ind App 9, Mohd. Hafiz v. Mohd. Zakaria

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The Judgment of the Court was delivered by

HEGDE, J.: This is a plaintiff's appeal by special leave. The plaintiff sued for possession of the suit properties on the basis of his title. The suit properties originally belonged to the family of one Veerbaswanth Rao Deshmukh. He died in 1892 without male issues, leaving behind him his widow Ratnabai and a daughter by name Lakshmibai. Ratnabai succeeded to the estate of her husband. She died in 1924. On her death Lakshmibai became entitled to the suit properties. But one Parwatibai alias Prayag Bai took unlawful possession of the suit properties. Hence Lakshmibai instituted a suit for their possession in the court of Sadar Adalath, Gulbarga against the

said Parvatibai and obtained a decree. In execution of the said decree Lakshmi-bai obtained delivery of the lands described in Schedule II to the plaint. Lakshmi-bai died in 1948. Sometime thereafter Parvatibai also died. The defendant claiming to be the sister's son of Veerhaswanth Rao Deshmukh got himself impleaded as the legal representative of Lakshmi-bai in the execution proceedings and sought delivery of the lands mentioned in Schedule I of the plaint. Meanwhile one Vishwanath alleging to be the legal representative of Parvatibai got himself impleaded in the execution proceedings. Thereafter the defendant and Vishwanath entered into a compromise in pursuance of which Vishwanath delivered possession of the lands included in Schedule I to the defendant. Sometime thereafter the plaintiff applied to the court to reopen the execution proceedings and implead him as the legal representative of Lakshmi-bai claiming that he is the adopted son of Lakshmi-bai. The executing court dismissed his application holding that his remedy was by way of a separate suit. A revision taken against that order to the High Court was rejected. Thereafter the plaintiff filed a suit in the court of subordinate District Judge, Bidar for a declaration that he is entitled to be impleaded in the execution proceedings mentioned earlier as the representative of Lakshmi-bai and to proceed with the execution after setting aside the order made by the executing court on the basis of the compromise entered into between the defendant and Vishwanath. It may be noted that that was the only relief asked for in the plaint. The purported cause of action for the suit was the dismissal of the plaintiff's application for impleading him in the execution proceedings. That suit should have been dismissed on the ground that it was not maintainable in law. But strangely enough it was dismissed on the ground that it was hit by Section 42 of the Specific Relief Act inasmuch as the plaintiff did not sue for possession of the concerned property. Thereafter the suit from which this appeal arises was instituted by the plaintiff on the basis of his title. The trial Court dismissed his suit in respect of the lands mentioned in Schedule I of the plaint on the ground that the relief in question is barred by Order 2 Rule 2, Code of Civil Procedure. It decreed the suit for the possession of the lands mentioned in Schedule II ex-

cept items 3 and 9. It also decreed the plaintiff's claim in respect of the cash amount mentioned in the plaint.

2. Both the plaintiff and the defendant went up in appeal to the High Court of Mysore as against the decision of the trial Court to the extent that decision was against them. The High Court affirmed the decision of the trial Court.

3. Before the trial court and the High Court, there was controversy as regards the truth of adoption pleaded by the plaintiff. Both the courts have upheld the plaintiff's claim that he was adopted by the husband of Lakshmi-bai. That question was not reopened before us.

4. Before the High Court, the learned Counsel for the plaintiff conceded that the plaintiff's suit in respect of items 3 and 9 of Schedule II of the plaint is barred by limitation. Hence that question stands concluded.

5. The only question that remains for consideration is whether the High Court and the trial court were right in their conclusions that the plaintiff's claim in respect of the lands mentioned in Schedule I of the plaint is barred by Order 2, Rule 2, Code of Civil Procedure.

6. We are of the opinion that the trial court and the High Court erred in holding that the plaintiff's suit in respect of the lands mentioned in plaint Schedule I is barred by Order 2, Rule 2, Code of Civil Procedure. The suit instituted by the plaintiff in the court of Subordinate District Judge, Bidar for a declaration that he is entitled to be impleaded in the execution proceedings as legal representative of Lakshmi-bai and to proceed with the execution proceedings, was as mentioned earlier, a misconceived one. It was exercise in futility. His remedy was to file a suit for the possession of the concerned properties on the basis of his title.

7. The High Court and the trial court proceeded on the erroneous basis that the former suit was a suit for a declaration of the plaintiff's title to the lands mentioned in Schedule I of the plaint. The requirement of Order 2, Rule 2, Code of Civil Procedure is that every suit should include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action. 'Cause of action' means the 'cause of action for which the suit was brought'. It cannot be said that the cause of action on which the present suit was brought is the same as that in the previous suit.

Cause of action is a cause of action which gives occasion for and forms the foundation of the suit. If that cause of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings—See Mohd. Hafiz v. Mohd. Zakaria, 49 Ind App 9 = (AIR 1922 PC 23).

8. As seen earlier the cause of action on the basis of which the previous suit was brought does not form the foundation of the present suit. The cause of action mentioned in the earlier suit, assuming the same afforded a basis for a valid claim, did not enable the plaintiff to ask for any relief other than those he prayed for in that suit, in that suit he could not have claimed the relief which he seeks in this suit. Hence the trial court and the High Court were not right in holding that the plaintiff's suit is barred by Order 2, Rule 2, Code of Civil Procedure.

9. In view of our above conclusion, we have not thought it necessary to go into the controversy whether Order 2, Rule 2, Code of Civil Procedure is applicable to a suit under Section 42 of the Specific Relief Act.

10. We are unable to accept the contention of the learned Counsel for the appellant that we should allow to the appellant mesne profits at least from the date of the suit. No claim for mesne profits was made in the plaint. Therefore we cannot go into that question in this appeal. For the mesne profits, if any, due to the plaintiff, he must take separate steps according to law.

11. In the result this appeal is allowed and the trial court's decree is modified by including therein the lands mentioned in Schedule I of the plaint. In other respects the decree of the trial court is sustained. The appellant will be entitled to his costs both in this Court as well as in the High Court.

Appeal allowed.

AIR 1970 SUPREME COURT 1061

(V 57 C 224)

(From: Allahabad)*

S. M. SIKRI, J. M. SHELAT,
V. BHARGAVA, G. K. MITTER AND
C. A. VAIDIALINGAM, JJ.

Prof. Chandra Prakash Agarwal, Appellant v. Chaturbhuj Das Parikh and others, Respondents.

Civil Appeal No. 2331 of 1968, D/- 18-12-1969.

Constitution of India, Art. 217 (2) (b) — "Advocate of a High Court" — Means a person enrolled as advocate of High Court and not necessarily practising in High Court.

The expression "an advocate of a High Court" must mean an advocate whose name has been enrolled as an advocate of a High Court, no matter whether he practised in the High Court itself or in Courts subordinate to it or both. AIR 1967 Mad 344 & AIR 1967 Mad 347, Rel. on. (Paras 4, 6)

Cases Referred: Chronological Paras (1967) AIR 1967 Mad 344 (V 54)=

(1967) 1 Mad LJ 275, Sengalani

Gramani v. Subbayya Nadar 10

(1967) AIR 1967 Mad 347 (V 54)=

1967-1 Mad LJ 10, V. G. Row v.

A. Alagiriswamy 10

M/s. M. P. Bajpai, S. M. Jain and G. N. Wantoo Advocates, for Appellant; Mr. O. P. Rana, Advocate (for Nos. 1, 2 and 5), I. N. Shroff, Advocate (for No. 3), Dr. L. M. Singhvi, Senior Advocate (Mr. S. P. Nayar, Advocate with him), (for No. 4), for Respondents.

The following Judgment of the Court was delivered by

SHELAT, J.—The appellant filed a writ petition in the High Court at Allahabad for a quo warranto against respondent 1, challenging therein his appointment as a Judge of that High Court. The ground on which he challenged the appointment was that though respondent 1 was enrolled as an advocate more than 20 years ago, he could not still claim to be one who "has for at least ten years been an advocate of a High Court" within the meaning of Article 217 (2) (b) of the Constitution, as admittedly respondent 1 was all along practising at Benaras and not in the High Court.

2. The writ petition came up for a preliminary hearing before W. Broome

*(Civil Misc. No. 1433 of 1968, D/- 24-7-1968 — All.)

DN/DN/A134/70/DHZ/A

and G. Kumar, JJ., when it was urged that the expression "an advocate of a High Court" in Article 217 (2) (b) meant an advocate practising in the High Court and not one practising in a Court or Courts subordinate to the High Court. In support of that interpretation, the language used in Article 124 (3) on the one hand and that in Article 233 (2) on the other was relied on to show that the Constitution has employed different language in connection with different purposes thereby making a deliberate distinction between "an advocate" and "an advocate of a High Court", the former meaning an advocate practising in a Court or Courts subordinate to the High Court and the latter meaning an advocate practising in a High Court. The contention was that while dealing with the qualifications for the post of a District Judge Article 233 (2) uses the expression "an advocate" as distinguished from the expression "advocate of a High Court" in Articles 217 (2) (b) and 124 (3) which lay down the qualifications for the offices of a Judge of a High Court and a Judge of the Supreme Court. The difference in the language, it was contended, indicated that whereas a person to be appointed a District Judge need be only an advocate of the prescribed standing, the one to be appointed a Judge either of a High Court or the Supreme Court must be an advocate who has practised for the required number of years in a High Court or two or more High Courts in succession. It was further contended that such an indication is also furnished by the language of Article 124 (3) (a) and (b), in the sense that just as the expression "a Judge of a High Court" in sub-clause (a) must mean a Judge who has worked as a Judge in the High Court, the expression "an advocate of a High Court" must similarly mean an advocate who has practised in a High Court.

3. There was a difference of opinion between the two learned Judges. Broome, J., held that "on a plain reading of the relevant clauses" the correct interpretation of the expression "an advocate of a High Court" meant an advocate enrolled as an advocate of a High Court, irrespective of whether on such enrolment he practised in a High Court or a Court or Courts Subordinate to the High Court. G. Kumar, J., on the other hand, accepted the contention urged on behalf of the appellant and held that the expression "an advocate of a High Court" meant one who has practised for the required period in a High Court, and therefore, a person

who has practised only in a Court or Courts Subordinate to the High Court would not answer the qualification required under Article 217 (2) (b). Such a difference of opinion having thus arisen between the two learned Judges, the matter was referred to Mathur, J., who agreed with Broome, J., and thereupon the writ petition was dismissed. The present appeal on certificate granted by the High Court challenges the correctness of the order dismissing the writ petition.

4. Counsel for the appellant repeated before us the same contentions which were urged first before Broome and Kumar, JJ., and later on before Mathur, J. In our opinion the language used in Article 217 (2) (b) is plain and incapable of bearing an interpretation other than the one given by Broome, J., and agreeing with him by Mathur, J.

5. One broad point against the interpretation sought by counsel for the appellant would be that the expression "an advocate of a High Court" in its ordinary plain meaning must mean a person who has by enrolling himself under the relevant provisions of law become an advocate of a High Court. If it is intended that the qualification under Article 217 (2) (b) should be that a person appointed to the office of a Judge of a High Court should have practised in a High Court and that practising in a Court or Courts Subordinate to it would not answer the qualification, the language used in sub-clause (b) of Article 217 (2) would have been as follows:

"A person shall not be qualified for appointment as a Judge of a High Court unless he has for at least ten years practised as an advocate in a High Court or in two or more such Courts in succession".

6. Apart from this aspect, some of the earlier statutes bearing on the same subject have also used the very same or similar expression. The Legal Practitioners Act, 1879 defined by Section 3 a "legal practitioner" as meaning an Advocate, Vakil or Attorney of any High Court, a Pleader, Mulhtar or Revenue-agent. Section 4 of that Act provided:

"Every person now or hereafter entered as an Advocate or Vakil on the roll of any High Court under the Letters Patent constituting such Court, or under Section 41 of this Act, or enrolled as a pleader in the Chief Court of the Punjab under Section 8 of this Act, shall be entitled to practise in all the Courts sub-

ordinate to the Court on the roll of which he is entered — and any person so entered who ordinarily practises in the Court on the roll of which he is entered or some Court subordinate thereto shall, notwithstanding anything herein contained, be entitled, as such, to practise in any Court in the territories to which this Act extends other than a High Court on whose roll he is not entered, or, with the permission of the Court in any High Court on whose roll he is not entered.....”

Section 41 of the Act empowered a High Court to make rules as to the qualifications and admission of proper persons to be “Advocates of the Court” and subject to such rules to enrol such and so many Advocates as it thought fit. These provisions clearly show that advocates enrolled under Section 41 were enrolled as advocates of a High Court and were entitled, once enrolled, to practise either in the High Court or Courts subordinate to such High Court or both. There was thus in the case of advocates so enrolled no distinction between those who practised in the High Court and those who practised in the Courts subordinate to such High Court as they were entitled on enrolment, as aforesaid, to practise either in the High Court or in Court or Courts subordinate thereto or both. The Indian Bar Councils Act, XXXVIII of 1926 also defined an ‘advocate’ meaning one “entered in the roll of advocates of a High Court under the provisions of this Act.” Section 8 laid down that no person would be entitled as of right to practice in any High Court unless his name was entered in the roll of “the advocates of the High Court maintained under this Act.” Under Section 8 (2), the High Court was required to prepare and maintain “a roll of advocates of the High Court” in which should be entered the names of (a) all persons who were, as advocates, vakils or pleaders, entitled as of right to practise in the High Court immediately before the date on which this section came into force in respect thereof; and (b) all other persons who were admitted to be “advocates of the High Court” under this Act. Section 9 empowered the Bar Council to make rules to regulate the admission of persons to be “advocates of the High Court”, and Section 10 gave power to the High Court in the manner therein provided to reprimand, suspend or remove from practice “any advocate of the High Court” whom it found guilty of profession or other misconduct. Section 14 (1) of the

Act provided that an advocate, i.e., one whose name was entered under this Act in the roll of advocates of a High Court, shall be entitled as of right to practise in the High Court of which he is an advocate or in any other Court save as otherwise provided by sub-section (2) or by or under any other law for the time being in force. Once, therefore, the name of an advocate was entered in the roll of advocates of a High Court under one or the other Act, he was entitled to practise in the High Court and in courts subordinate thereto or in any other court subject of course to the provisions aforesaid. He was thus an advocate of the High Court irrespective of whether he practised in the High Court or in the courts subordinate thereto, and as seen from Section 10 of the Bar Councils Act, he became amenable to the disciplinary jurisdiction of the High Court by reason of his being enrolled as an advocate of the High Court. The expression “an advocate of a High Court” must, therefore, mean, in the light of these provisions, an advocate whose name has been enrolled as an advocate of a High Court, no matter whether he practised in the High Court itself or in courts subordinate to it or both. The expression “an advocate or a pleader of a High Court” having thus acquired the meaning as aforesaid, it must be presumed that a similar expression, namely, “a pleader of a High Court for a period of not less than ten years” was used in the same sense in Section 101 (3) (d) of the Government of India Act, 1915, when that section laid down the qualifications for the office of a Judge of a High Court in the case of a pleader. The same phraseology was also repeated in Section 220 (3) (d) of the Government of India Act, 1935, except for one change, namely, that in calculating ten years’ standing his standing as a pleader of two or more High Courts in succession was also to be included.

7. It will be noticed that in the latter part of sub-section (3) of Section 220, which provided that in calculating the period during which a person had been a pleader, the period during which he had held judicial office after he became a pleader shall be included, the expression used is simply a “pleader” and not a pleader of any High Court. But the word “pleader” in this part of Section 220 (3) must obviously mean the same person as “the pleader of any High Court” mentioned earlier in the same sub-section

because the period during which he held any judicial office was to be reckoned for his standing of ten years as a pleader of a High Court. This clearly highlights the point that what Section 220 (3) in the 1935 Act required as a qualification was that a person to be appointed a Judge of a High Court had to have ten years' standing as a pleader of any High Court, which meant that he must have been enrolled as a pleader of any High Court for that period. The question as to where he was practising, whether in the High Court itself or in courts subordinate thereto, does not appear to make any difference. The same phraseology, except for the change from the word 'pleader' to the word 'advocate' has been carried into Article 217 (2) (b). That was because under Section 8 of the Bar Councils Act the roll which the High Court was to prepare and maintain was the roll of the advocates of the High Court which included pleaders entitled as of right to practise in the High Court immediately before the date on which Section 8 of that Act was brought into force.

8. It seems, therefore, indisputable that the expression 'pleader of a High Court' used in the Constitution Acts of 1915 and 1935 and the expression 'an advocate of a High Court' used in Articles 217 (2) (b) and 124 (3) must mean respectively a pleader or an advocate on the roll as such of a High Court and entitled as of right by that reason to practise in the High Court. There is nothing in any of these provisions to indicate that an advocate of a High Court can only be that advocate who has been practising in the High Court. If the meaning of the expression 'an advocate of a High Court' as suggested on behalf of the appellant were to be accepted, a very strange anomaly, as pointed out by Broome, J., would result while construing Article 124 (3), namely, that an advocate who has practised in the Supreme Court for the required period but not in a High Court would not be eligible for the office of a Judge of the Supreme Court. For these reasons we are in agreement with Broome and Mathur, JJ., on the construction placed by them on Article 217 (2) (b). The first contention of counsel for the appellant, therefore, must fail.

9. Counsel next relied on Article 233 (2) in support of the construction sug-

gested by him of Article 217 (2) (b) and pointed out that wherever the Constitution did not wish to insist on an appointee having been an advocate practising in a High Court, it has used a different expression, namely, an advocate simpliciter, as in Article 233 (2). Article 233 deals with appointment of District Judges and clause 2 thereof provides that a person not already in the service of the Union or the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment. It is true that in this clause the word 'advocate' is used without the qualifying words 'of a High Court'. It is difficult, however, to see how the fact that the word 'advocate' only used in connection with the appointment of a District Judge would assist counsel in the construction suggested by him of the expression 'advocate of any High Court' in Article 217, or that that expression must mean an advocate who has had the necessary number of years' practice in the High Court itself. The distinction, if any, between the words 'an advocate' in Article 233 (2) and the words 'an advocate of a High Court' in Article 217 (2) (b) has no significance in any event after the coming into force of the Advocates Act, 1961, as by virtue of Section 18 of that Act there are now only two classes of persons entitled to practice, namely, senior advocates and other advocates.

10. We find that in two of its decisions, in *Sengalani Gramani v. Subbayya Nadar*, AIR 1967 Mad 344 and *V. C. Row v. A. Alagiriswamy*, AIR 1967 Mad 347, the High Court of Madras also has interpreted Article 217 (2) (b) in the same manner as we have done. In our view the construction of Article 217 (2) (b) adopted by Broome, J., and on a reference to him by Mathur, J., is correct. The result is that the appeal fails and is dismissed with costs. One bearing fee only.

Appeal dismissed.

AIR 1970 SUPREME COURT 1065
(V 57 C 225)

(From: Madras)*

J. C. SHAH, V. RAMASWAMI, G. K. MITTER, K. S. HEGDE, AND A. N. GROVER, JJ.

Ilias, Appellant v. The Collector of Customs, Madras, Respondent; Behramji Merwanji Damania, Intervener.

Criminal Appeal No. 45 of 1967, D/- 81-10-1968.

(A) Customs Act (1962), Sec. 104 — "Otherwise" — Meaning.

The word "otherwise" clearly relates to releasing a person who has been arrested and cannot possibly be construed as investing the customs officer with all the powers which an officer-in-charge of a police station can exercise under Chapter XIV of the Criminal Procedure Code.

(Para 8)

(B) Evidence Act (1872), Section 25 — "Police Officer" — Customs Officer is not "police officer" — (Customs Act (1962), Section 104) — (Criminal P. C. (1898), Sections 162, 163).

Even though under the new Customs Act of 1962 a Customs Officer has been invested with many powers which were not to be found in the provisions of the old Sea Customs Act of 1878, he cannot be regarded as a "police officer" within the meaning of Section 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by Section 25 of the Evidence Act. AIR 1970 SC 940 & AIR 1962 SC 276 & AIR 1966 SC 1746 & (1968) 1 SCWR 237, Rel. on; AIR 1964 SC 828, Expl. & disting.

(Para 14)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 940 (V 57) = Criminal Appeal No. 27 of 1967, D/- 18-10-1968, Ramesh Chandra Mehta v. State of West Bengal 14

(1967) Criminal Appeals Nos. 52 and 104 of 1965, D/- 12-12-1967 = (1968) 1 SCWR 237, P. Shankar Lal v. Asst. Collector of Customs, Madras 4

(1966) AIR 1966 SC 1746 (V 53) = (1966) 3 SCR 698 = 1966 Cri LJ 1853, Badku Joti Savant v. State of Mysore 4, 12, 13, 14

*(Cri. Revn. Petn. No. 1850 of 1965, D/- 9-9-1966 — Mad.)

(1964) AIR 1964 SC 828 (V 51) = (1964) 2 SCR 752 = 1964 (1) Cri LJ 705, Raja Ram Jaiswal v. State of Bihar 4, 12, 13
(1962) AIR 1962 SC 276 (V 49) = (1962) 3 SCR 338 = 1962 (1) Cri LJ 217, State of Punjab v. Barkat Ram 4, 9, 11, 12, 13

M/s. N. H. Hingorani, R. Jethamalani and Mrs. K. Hingorani, Advocates, for Appellant; Mr. Niren De, Solicitor-General-of-India, and Mr. N. S. Bindra, Senior Advocate, (M/s. R. H. Dhebar and S. P. Nayar, Advocates, with him), for Respondent; M/s. K. R. Chaudhuri and K. Rajendra Chaudhari, Advocates, for Intervener.

The Judgment of the Court was delivered by

GROVER, J.:— The main point in this appeal, by special leave, is whether the statements of the appellant and other accused persons recorded by the customs authorities under the provisions of the Customs Act 1962 (Act 52 of 1962), hereinafter called the New Act, were admissible in evidence at their trial for the alleged offences under Section 120-B of the Indian Penal Code read with Section 135 of the New Act and Sections 23 (1A) and 23B of the Foreign Exchange Regulation Act 1947 and under Rule 131-B of the Defence of India Rules.

2. The facts need not be stated in great detail. A complaint was laid by the Collector of Customs, Madras, against 10 persons for having committed the above offences. The complaint related to an occurrence which involved transport of 750 bars of gold each weighing 10 tolas valued at more than 7 lacs from Bombay to Madras. The statements of the accused persons were recorded by the Inspector of Customs and other customs authorities before the complaint was filed. After a preliminary enquiry the Second Presidency Magistrate, George Town, Madras committed 9 of the accused persons to stand their trial at the City Sessions Court, the charges being confined to the transaction connected with 700 bars of gold only. Seventeen charges were framed on October 29, 1965, by the learned Sessions Judge against the appellant and eight other accused persons for the various offences mentioned above. When the hearing before the Sessions Court commenced the prosecution sought to file the statements of the accused persons recorded by the customs authorities. Certain preliminary objections were raised

on behalf of the accused to the admissibility of those statements. The first was that the officers of the customs department who had recorded the statements must be deemed to be police officers and the statements being of a confessional nature were not admissible in evidence by virtue of the provisions of Section 25 of the Indian Evidence Act. The second objection was that the investigation conducted by the Customs Officer must be deemed to be under Chapter XIV read with Section 5 (2) of the Criminal Procedure Code and the statements thus became inadmissible under Section 161 read with Section 162 of the Code. The third objection was based on Article 20 (3) of the Constitution involving testimonial compulsion. This objection was not mentioned in the order of the learned Sessions Judge but it was alleged to be raised before the High Court. The matter went up to the High Court on the Revisional Side because the learned Sessions Judge took the view that the statements given by the accused persons to the Customs Officers could not be received in evidence. The learned Single Judge who heard the revision petition, referred the following questions to a full bench owing to their importance:

"Are statements recorded by enquiring officers of the Customs Department under Section 107 (103) of the Customs Act, 1962, inadmissible in evidence in a criminal trial by reason of the bar under: (1) Section 25 of the Indian Evidence Act; (2) Section 162 of the Criminal Procedure Code; and (3) Art. 20 (3) of the Constitution."

The Full Bench answered all the three questions against the accused persons. Only one out of them, *Illias*, has appealed to this Court.

3. Learned Counsel for the appellant has not pressed the second point. As regards the third point, it was conceded before the Full Bench of the High Court that when the statements were recorded the investigation had not reached the stage when the particular persons had been accused of an offence within the meaning of Article 20 (3) of the Constitution. In view of this concession learned counsel for the appellant has submitted that the matter be left undecided so that it may be open to the appellant to make whatever submissions he wishes to make before the Trial Court when any such statement is formally tendered for admission into evidence.

4. Adverting to the first point the main endeavour of the counsel for the appellant has been to demonstrate by reference to various provisions of the new Act that statements recorded by the Customs Authorities of a confessional nature would be hit by the provisions of Section 25 of the Evidence Act. In *State of Punjab v. Barkat Ram*, (1962) 3 SCR 338 = (AIR 1962 SC 276), it was held by the majority that Customs Officers were not police officers for the purpose of Section 25 of the Evidence Act and the statements to Customs Officers were admissible in evidence at the trial of persons accused of offences, *inter alia*, under the Sea Customs Act, 1878, hereinafter called the "old Act." It has been submitted that a later decision of this Court in *Raja Ram Jaiswal v. State of Bihar*, (1964) 2 SCR 752 = (AIR 1964 SC 828) which related to the question whether an Excise Inspector exercising powers under the Bihar & Orissa Excise Act was a police officer for the purposes of Section 25 of the Evidence Act goes a great deal in favour of the appellant particularly when the provisions of the new Act wherein substantial departure has been made from those of the old Act are kept in view. As will be presently seen there is yet a third decision of the constitution bench of this Court in *Badku Joti Savant v. State of Mysore*, (1966) 3 SCR 698 = (AIR 1966 SC 1746) which related to the provisions of the Central Excises and Salt Act which goes against the contention passed by the counsel for the appellant. At any rate it does not appear that the majority view expressed in *Barkat Ram's* case, (1962) 3 SCR 338 = (AIR 1962 SC 276) has been shaken in any manner so far as statements recorded by a Customs Officer under the old Act are concerned. Indeed in a recent decision of this Court *P. Shankar Lal v. Asstt. Collector of Customs, Madras*, Criminal Appeals Nos. 52 and 104 of 1965, D/- 12-12-1967 (SC), it has been reaffirmed that there is no conflict between the cases of *Raja Ram Jaiswal*, 1964-2 SCR 752 = (AIR 1964 SC 828) and *Barkat Ram*, (1962) 3 SCR 338 = (AIR 1962 SC 276), the former being distinguishable from the latter.

5. Before the previous pronouncements of this Court are discussed it is necessary to compare the relevant provisions of the new Act and the old Act.

6. Under the old Act Section 173 provided that persons reasonably suspected of offences under that Act might be arrested by any officer of Customs or other

persons duly employed for the prevention of smuggling. Under the new Act according to Section 104 if an officer of customs empowered in this behalf by general or special order of the Collector of Customs has reason to believe that any person has been guilty of an offence punishable under Section 135, he may arrest such person. As regards the power to search, Chapter XVII of the old Act contained the relevant provisions. Section 169 conferred the power on a Customs Officer to search, on a reasonable suspicion. Under Section 170 when an officer of customs was about to search any person under the provisions of Section 169 such person could require that officer to take him, previous to search, before the nearest magistrate or customs-collector. Section 172 conferred power on a Magistrate to issue search warrants on an application by the customs-collector. In the new Act Section 100 confers the power to search suspected persons entering or leaving India. Section 102 contains provision analogous to Sec. 170 of the old Act with some minor differences. Under the old Act every person arrested on the ground that he had been guilty of an offence under that Act had to be forthwith taken to the nearest Magistrate or customs-collector, (Section 174). Under the new Act Section 104 (2) provides that every person arrested shall, without unnecessary delay, be taken to a Magistrate. Lastly Section 171A of the old Act conferred power on Customs Officer to summon persons to give evidence and produce documents. Under the new Act Section 107 gives the power to Customs Officers empowered by general or special order of collector of customs to examine persons acquainted with the facts and circumstances of the case or to require any person to produce or deliver any document. Section 108 confers power on a gazetted officer of customs to summon persons for giving evidence or producing documents.

7. The substantial difference, however, between the two enactments as has been pointed out by the High Court relates to (1) the procedure after arrest; (2) the procedure for enquiry or investigation and (3) the procedure for search.

8. As regards the procedure after arrest a significant change which has been made in the new Act is contained in sub-section (3) of Section 104. It is provided thereby that where an officer of customs has arrested any person under sub-section

(1) he shall, for the purpose of releasing such person, on bail or otherwise have the same power and be subject to the same provisions as the officer-in-charge of a police station has and is subject to under the Code of Criminal Procedure. Sub-section (4), however, makes an offence under the new Act non-cognizable notwithstanding anything contained in the Code of Criminal Procedure (the offences under the old Act were also non-cognizable). In the old Act there was no provision conferring the power of releasing a person on bail or otherwise on a Customs Officer and only a Magistrate could grant bail. A great deal of emphasis has been laid by the counsel for the appellant on the power of granting bail which has now been given to a Customs Officer under the new Act. It is pointed out that such a power goes a long way and assists a great deal in extortion of confessions against which Section 25 of the Evidence Act contains the main safeguards. It has also been contended that all the powers of an officer-in-charge of the police station under the Code of Criminal Procedure have been conferred on an officer of Customs in the matter of releasing an arrested person on bail or otherwise. It has even been suggested by the appellant's counsel that the word "otherwise" invests the Customs Officer with all the powers which an officer-in-charge of a police station can exercise under Chapter XIV of the Code. It may be observed at once that the word "otherwise" clearly relates to releasing a person who has been arrested and cannot possibly be construed in the manner suggested by the learned counsel.

9. In the old Act the provisions containing the procedure for enquiry were to be found in Section 171A. As stated before, any Officer of Customs duly employed in the prevention of smuggling had the power to summon any person whose attendance he considered necessary either to tender evidence or to produce a document in any enquiry which such officer was making in connection with smuggling of goods. Any person so summoned was bound to attend either in person or by an authorised agent and he was also bound to state the truth upon any subject respecting which he was examined or make a statement and to produce such documents and other things as might be required. Every such enquiry was by a deeming provision to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal

Code. Under the new Act the enquiry can be of two kinds. Under Section 107 any Officer of Customs empowered by the Collector of Customs can require any person to produce or deliver any document etc., or he can examine any person acquainted with the facts and circumstances of the case. Section 108 contains the second set of powers which are analogous to Section 171A of the old Act, the two sections being almost similar in language. The contention on behalf of the appellant is that Section 107 of the new Act gives power of investigation to officers of customs similar to those exercisable by a police officer under Chapter XIV of the Criminal Procedure Code. Now a Police officer under Section 160 of the Code can, by an order in writing, require the attendance of any person within the limits of his own or any adjoining station and be can under Section 161 examine orally any person supposed to be acquainted with the facts and circumstances of the case. The submission of the appellant's counsel therefore is that Section 107 is similar to Sections 160 and 161 and the Customs Officer conducting an enquiry or investigation relating to offences under the new Act enjoys the same power as a police officer making an investigation under Chapter XIV of the Code of Criminal Procedure. It is pointed out that under the old Act no such powers were conferred on the Customs Officer and it was with reference to Section 171A of the old Act that this Court in *Barkat Ram's case*, (1962) 3 SCR 838= (AIR 1962 SC 276) laid emphasis on the judicial nature of the proceedings held under that section. The distinction, it is said, no longer obtains owing to the provisions of Section 107 of the new Act.

10. As regards the procedure for search the important change which has been made in the new Act is that under Section 105 if the Assistant Collector of Customs has reason to believe that any goods liable to confiscation or any documents or things are secreted in any place, he may authorise any Officer of Customs to search or may himself search for such goods, documents or things. Under the old Act it was necessary to obtain a warrant from a Magistrate in accordance with Section 172 and the warrant could be executed in the same way and had the same effect as a search warrant issued under the law relating to criminal procedure.

11. An examination of the previous decisions of this Court may now be made

in order to test the validity of the argument raised on behalf of the appellant that owing to the substantial changes made in the new Act statements of a confessional nature recorded by the Customs Officers should be excluded under Sec. 25 of the Evidence Act on the ground that these officers are police officers within the meaning of that section. In the majority judgment in *Barkat Ram's case*, (1962) 3 SCR 838= (AIR 1962 SC 276) a comparison was made between the duties and powers of police officers and Customs Officers which may be summarised as follows:

(1) The police is the instrument for the prevention and detection of crime which can be said to be the main object of having the police. The powers of Customs Officers are really not for such purpose and are meant for checking the smuggling of goods and due realization of customs duties and for determining the action to be taken in the interest of the revenue of the country by way of confiscation of goods on which no duty had been paid and by imposing penalties and fines.

(2) The customs staff has merely to make a report in relation to offences which are to be dealt with by a Magistrate. The Customs Officer, therefore, is not primarily concerned with the detection and punishment of crime but he is merely interested in the detection and prevention of smuggling of goods and safeguarding the recovery of customs duties.

(3) The powers of search etc., conferred on the Customs Officers are of a limited character and have a limited object of safeguarding the revenues of the State and the statute itself refers to police officers in contradistinction to Customs Officers.

(4) If a Customs Officer takes evidence under Section 171A and there is an admission of guilt, it will be too much to say that that statement is a confession to a police officer as a police officer never acts judicially and no proceeding before him is deemed to be a judicial proceeding for the purpose of Sections 193 and 228 of the Indian Penal Code or for any other purpose.

12. Adverting to *Raja Ram Jaiswal's case*, (1964) 2 SCR 752= (AIR 1964 SC 828) it is significant that by virtue of Section 77 (2) read with Section 78 (3) of the Bihar & Orissa Excise Act, 1915, an Inspector or Sub-Inspector was deemed to be an officer-in-charge of a police

station and was entitled to investigate any offence under the Excise Act. He could exercise all the powers which an officer-in-charge of a police station could exercise under Chapter XIV of the Code. It was therefore held by the majority that a confession recorded by an Excise Officer during an investigation into an excise offence could not reasonably be regarded as anything different from a confession to a police officer. Barkat Ram's case, (1962) 3 SCR 388= (AIR 1962 SC 276) was distinguished on a number of grounds. One was that the Excise Officer did not exercise any judicial power just as the Customs Officer did under the Sea Customs Act 1878; secondly the Customs Officer was not deemed to be an officer-in-charge of a police station and therefore he could not exercise powers of such an officer under the Code of Criminal Procedure. Further the Customs Officer could make an enquiry but he had no power to investigate into an offence under Section 156 of the Code. Even though some of the powers set out in Chapter XVII of the Sea Customs Act were analogous to those of the police officer under the Code, they were not identical with those of a police officer and were not derived from or by reference to the Code. It was pertinently observed that the Customs Officer was not entitled to submit a report to a Magistrate under Section 190 of the Code with a view that cognizance of the offence be taken by a Magistrate. It was then said at p. 766 (of SCR)= (at p. 833 of AIR):

"The test for determining whether such a person is a "police officer" for the purpose of Section 25 of the Evidence Act would, in our judgment, be whether the powers of a police officer which are conferred on him or which are exercisable by him because he is deemed to be an officer-in-charge of a police station establish a direct or substantial relationship with the prohibition enacted by Section 25, that is, the recording of a confession. In other words, the test would be whether the powers are such as would tend to facilitate the obtaining by him of a confession from a suspect or a delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question as to what other powers he enjoys."

Emphasis was laid on the police officers having such powers which enable them to exercise a kind of authority over the persons arrested which facilitate the obtaining from them statements which may be

of incriminating nature. The case of Raja Ram Jaiswal, (1964) 2 SCR 752= (AIR 1964 SC 828) came up for discussion in the third of series of these cases, namely, (1966) 3 SCR 698= (AIR 1966 SC 1746). The appellant there had been found in possession of contraband gold. He was prosecuted under Section 167 (81) of the Sea Customs Act read with Section 9 of the Land Customs Act. A question arose whether the statement made by the appellant to the Deputy Superintendent of Customs and Excise was admissible in evidence. The contention raised was that the Central Excise Officer under the Central Excises and Salt Act (Act 1 of 1944), hereinafter called the "Central Excise Act", was a police officer within the meaning of those words in Section 25 of the Evidence Act. Therefore even though the Deputy Superintendent of Customs and Central Excise had acted under the power conferred on him by the Sea Customs Act, he was still a police officer and the statement made to him which was in the nature of a confession was inadmissible in evidence. This Court referred to the difference of opinion among the High Courts as to the meaning of the words "police officer" used in Section 25 of the Evidence Act. One view was that those words must be construed in a broad way and all officers would be police officers within the meaning of those words if they had the powers of the police officer with respect to investigation of offences with which they were concerned even if they were police officers properly so called or not. The narrow view was that these words in Section 25 meant a police officer properly so called and did not include officers of other departments of Government who might be charged with the duty to investigate, under special Acts, special crimes like the excise or customs offences etc. The Court proceeded on the assumption that the broad view was correct. After examining the various provisions of the Central Excise Act and in particular Section 21 it was observed that a police officer for the purpose of Clause (b) of Section 190 of the Code of Criminal Procedure could only be one properly so called. A Central Excise Officer had to make a complaint under Cl. (1) of Section 190 of the Code to a magistrate to enable him to take cognizance of an offence committed under the special statute. The argument that a Central Excise Officer under Section 21 (2) of the Central Excise Act had all the powers of an officer-in-charge

of a police station under Chapter XIV of the Code and therefore he must be considered to be a police officer within the meaning of those words in Sec. 25 of the Evidence Act was repelled for the reason that though such officer had the power of an officer-in-charge of a police station he did not have the power to submit a charge-sheet under Section 173 of the Code. Raja Ram Jaiswal's case, (1964) 2 SCR 752 = (AIR 1964 SC 828) was distinguished on the ground that Section 21 of the Central Excise Act was in terms different from Section 78 (3) of the Bihar and Orissa Excise Act 1915 which provided that for the purpose of Section 156 of the Code of Criminal Procedure the Excise Officer empowered under Section 77 (2) of that Act shall be deemed to be the officer-in-charge of a police station. The following observations at page 704 (of SCR) = (at p. 1749 of AIR) are indeed important:

"All that Section 21 provides is that for the purpose of his enquiry, a Central Excise Officer shall have the powers of an officer-in-charge of a police station when investigating a cognizable case. But even so it appears that these powers do not include the power to submit a charge-sheet under Section 173 of the Code of Criminal Procedure, for unlike the Bihar and Orissa Excise Act, the Central Excise Officer is not deemed to be an officer-in-charge of a police station."

13. It was reiterated that the appellant could not take advantage of the decision in Raja Ram Jaiswal's case, (1964) 2 SCR 752 = (AIR 1964 SC 828) and that Barkat Ram's case, (1962) 3 SCR 338 = (AIR 1962 SC 276) was more apposite. The ratio of the decision in Badku Joti Savant's case, (1966) 3 SCR 698 = (AIR 1966 SC 1746) is that even if an officer under the special Act has been invested with most of the powers which an officer-in-charge of a police station exercises when investigating a cognizable offence he does not thereby become a police officer within the meaning of Section 25 of the Evidence Act unless he is empowered to file a charge-sheet under Section 173 of the Code of Criminal Procedure.

14. Learned Counsel for the appellant when faced with the above difficulty has gone to the extent of suggesting that by necessary implication the power to file a charge-sheet flows from some of the powers which have already been discussed under the new Act and that a Customs Officer is entitled to exercise even this power. It is difficult and indeed it

would be contrary to all rules of interpretation to spell out any such special power from any of the provisions contained in the new Act. In this view of the matter even though under the new Act a Customs Officer has been invested with many powers which were not to be found in the provisions of the old Act, he cannot be regarded as a police officer within the meaning of Section 25 of the Evidence Act. In two recent decisions of this Court in which the judgments were delivered only on October 18, 1968, i.e., Ramesh Chandra Mehta v. State of West Bengal, Criminal Appeal No. 27 of 1967, (reported in AIR 1970 SC 940) and Dady Advaji Fatakia v. K. K. Canguli, Asstt. Collector of Customs, Cri. Appeal No. 46 of 1968 (since reported in AIR 1970 SC 940) the view expressed in Barkat Ram's case, (1962) 3 SCR 338 = (AIR 1962 SC 276) with reference to the old Act has been reaffirmed on the question under consideration and it has been held that under the new Act also the position remains the same. This is what has been said in Dady Advaji Fatakia's case, Cri. Appeal No. 46 of 1968 (reported in AIR 1970 SC 940):

"For reasons set out in the judgment in Cri. Appl. No. 27 of 1967 = (reported in AIR 1970 SC 940) and the judgment of this Court in Badku Joti Savant's case, (1966) 3 SCR 698 = (AIR 1966 SC 1746) we are of the view that a Customs Officer is under the Act of 1962 not a police officer within the meaning of Section 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by Section 25 of the Indian Evidence Act."

This appeal fails and it is dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 1070
(V 57 C 226)

J. C. SHAH AND K. S. HEGDE, JJ.

Oudh Sugar Mills Ltd., etc., Appellants
v. Union of India and others, Respondents.

Civil Appeals No. 1530-1532 of 1969,
D/- 17-10-1969.

Constitution of India, Article 19 (1) (g)
— Right to trade — Restrictions — Even
order made on basis of law should be reasonable — (Judgment of High Court reversed.)

CN/DN/F225/69/DHZ/A

Right to trade is a guaranteed freedom. That right can be restricted only by law, considered by the Courts as reasonable in the circumstances. Not only the law restricting the freedom should be reasonable; the orders made on the basis of that law should also be reasonable.

(Para 6)

Where the order made by the Director in exercise of the powers under CL 5 of the Sugar (Control) Order, 1966 read with the Notification No. 1750/Ess.Com/ Sugar dated 20-11-1967 releasing sugar for sale in open market allowed to the sugar company for disposal of sugar only 26 days.

Held that the period of 26 days could not be considered as reasonable, in view of the fact that the sugar would have to be sent out of States in which it was produced and transported through railway. (Judgement of High Court Reversed.)

(Para 6)

The following Judgment of the Court was delivered by

HEGDE, J.:— In these appeals by certificate just one question arises for decision and that question is whether the Central Government was justified in refusing extension of time to the appellants to clear sugar released for sale in the open market?

2. The Appellants (Companies incorporated under the Indian Companies Act) carry on business inter alia of producing, manufacturing and selling sugar. They have their factories either in Uttar Pradesh or in Bihar. By a notification dated June 10, 1966 the Central Government in exercise of the powers conferred on it by Section 3 of the Essential Commodities Act, 1955 (Act X of 1955) promulgated the Sugar (Control) Order, 1966. Clause 4 of that Order restricted the sale of sugar by producers. It reads:

“No producer shall sell or agree to sell or otherwise dispose of sugar or deliver or agree to deliver sugar, or remove any sugar from the bonded godowns of the factory in which it is produced, except under and in accordance with a direction issued in writing by the Central Government or the Chief Director.”

By order dated November 16, 1967, the Sugar (Control) Order, 1966 was amended and the above-mentioned clause 4 was substituted by the following clause:—

“The Central Government may direct that no producer shall sell or agree to sell or otherwise dispose of, or deliver or agree to deliver any kind of sugar or re-

move any kind of sugar from the bonded godowns of the factory in which it is produced, except under and in accordance with a direction issued in writing by the Central Government.”

On August 16, 1967, the Minister for Food and Agriculture announced the sugar policy for 1967-68. According to that policy quantity equal to 60 per cent of the production achieved in every factory from October 1, 1966 to September 30, 1967 will be procured from each of them at a fixed levy price. Factories will be free to sell the balance of their production at the free market price subject to releases sanctioned by the Government of India. A press note dated October 21, 1967, was issued announcing the above policy. By notification No. 1750/ESS.Com/Sugar dated November 20, 1967 the powers conferred by clauses inter alia 4 and 5 of the Sugar (Control) Order 1966 are made exercisable by the Chief Director or Director in the Directorate of Sugar and Vanaspati Ministry of Food, Agriculture Community Development and Co-operation (Department of Food).

3. In exercise of the powers conferred by clause 5 of the Sugar (Control) Order, 1966 read with aforesaid notification dated 20th November 1966, Respondent No. 2, the Director issued release orders dated December 23, 1967 whereby he permitted the appellants to sell the quantity of sugar mentioned in each one of those orders in the open market. Those orders were received by the appellants on the 27th December, 1967. Thereunder they were required to dispose of sugar released for sale in the open market on or before January 22, 1968. Immediately after receiving the order, the appellants entered into contracts with the dealers for the sale of sugar. They also applied for railway wagons for transport of that sugar to the States outside their own. Most of the Sugar released for open sale was removed from their godowns within the time prescribed but each of the appellants was not able to put into open market a fraction of the sugar released for sale in the open market as the railway wagons were not made available to them in time due to some difficulty or other on the part of the Railways.

4. It is satisfactorily proved that the appellants have taken every possible step to dispose of the sugar released for sale in the open market immediately after they

received the release orders. If they have not been able to dispose of some portion of the sugar released, it is not due to any fault of theirs. It is entirely due to circumstances beyond their control.

5. It is admitted by the respondents that a decision had been taken to give the producers 80 days time for disposal of the sugar released for sale in the open market. It is proved that in the case of the appellants only 28 days had been given for the disposal of that sugar.

6. It must be remembered that right to trade is a guaranteed freedom. That right can be restricted only by law, considered by the Courts as reasonable in the circumstances. Not only the law restricting the freedom should be reasonable, the orders made on the basis of that law should also be reasonable. It is clear that the sugar released for sale in the open market will have to be ordinarily sent out of the States in which they are produced. For doing so, the concerned producers will have to enter into contracts with dealers at far off places. Thereafter the sugar will have to be transported to places of disposal mainly through railways. Taking all the circumstances into consideration, we do not think that the period of 80 days given for disposal of the sugar is in any manner generous. That being so, we are clearly of the opinion that the 28 days time given to the appellants for the disposal of the sugar cannot be considered as reasonable. We think that the second respondent unreasonably rejected the appellants' request to extend the time for the disposal of the sugar released for sale in the open market. He appears to have acted mechanically.

7. For the reasons mentioned above we allow these appeals and direct the respondents (in accordance with the orders made in these appeals on June 8, 1969) to release to the appellants an equivalent quantity of sugar for free sale out of the appellants' quota of levy sugar for the season 1968-69 in lieu of the sugar that they had to surrender from out of the quota released to them for sale in the open market for the year 1967-68. The appellants are entitled to their costs both in this Court as well as in the High Court.

Appeals allowed.

AIR 1970 SUPREME COURT 1072
(V 57 C 227)

(From: AIR 1966 Guj 200)

V. BHARGAVA AND K. S. HEGDE, JJ.

Sayed Rehmanmiya Mustafamiya and others, Appellants v. State of Gujarat and others, Respondents.

Civil Appeals Nos. 2468 and 2470-2479 of 1966, D/- 2-12-1969.

Tenancy Laws — Saurashtra Barkhali Abolition Act (26 of 1951), Section 19 (1) — "Surveyed and settled" — Words refer to survey and settlement under Chapters VIII and VIIIA of Bombay Land Revenue Code and not to Section 52 of the Code — AIR 1966 Guj 200, Reversed.

At the time when the Act was passed, the only manner of survey which was laid down by any law applicable in the State of Saurashtra was that contained in Chapter VIII of the Bombay Land Revenue Code and the only manner of settlement was that contained in Chapter VIII-A. The words "surveyed and settled" used in Section 19 of the Act were intended to refer to the survey and settlement under Chapters VIII and VIII-A of the Code. In using the expression "the village in which such land is situate is surveyed and settled" the legislature ruled out the applicability of the assessment made by the Collector under Section 52 of the Code, because Section 52 of the Code does not anywhere envisage a survey and settlement in any of the words in that section. Therefore under Section 19 of the Act, the assessment made by the Mamlatdar under that section itself must continue in force until there is a survey and settlement in accordance with Chapters VIII and VIII-A of the Code. AIR 1966 Guj 200, Reversed.

(Paras 4, 5, 6)

Mr. R. M. Hazarnavis (Senior Advocate), M/s. K. L. Hathi and K. N. Bhat, Advocates with him, for Appellants (In all Appeals); Mr. N. S. Bindra, Senior Advocate, (M/s. B. D. Sharma and P. P. Nayar, Advocates with him), for Respondents (In all Appeals).

The following Judgment of the Court was delivered by

BHARGAVA, J.—The appellants in all these appeals were holders of barkhali tenure in two villages situated in the State of Gujarat in areas which were formerly part of the Part B State of Saurashtra until Saurashtra was merged in

the State of Bombay. When the State of Saurashtra was formed, it included areas which were ruled by the Indian Prinees in which the tenure systems were different from the systems in British India. In 1948, by Ordinance XXV of 1948 issued by the Raj Pramukh, a number of Acts in force in the Province of Bombay were applied to the State of Saurashtra. That Ordinance was amended by Ordinance XXXIX of 1948. The effect of this amendment was that, under the amended Ordinance XXV of 1948, the Bombay Land Revenue Code V of 1879 (hereinafter referred to as "the Code") with certain adaptations and modifications became applicable to Saurashtra. The main modifications, with which we are concerned, are that Chapters VIII and VIII-A of the Code were not applicable to the State of Saurashtra and Section 52 was made applicable, subject to the omission of the reference to Chapter VIII-A in that section. There was a further amendment of Ordinance XXV of 1948 by Ordinance LXIV of 1949 the result of which was that entry relating to Section 52 of the Code in Ordinance XXV of 1948 was omitted. The consequence of this omission was that Section 52 became applicable to the State of Saurashtra, including the reference to Chapter VIII-A which existed in it in the original Code. Further, Ordinance XXV of 1948 was so amended that Chapters VIII and VIII-A also become applicable to the State of Saurashtra with some slight modifications. Thus, after this ordinance, matters relating to land revenue in the State of Saurashtra were governed by the Bombay Code applied to that State with the modifications laid down in the two Ordinances XXXIX of 1948 and LXIV of 1949 mentioned above.

2. In this state of law, the Saurashtra Legislature passed two Acts for abolishing certain tenure rights. One was the Saurashtra Land Reforms Act No. XXV of 1951 (hereinafter referred to as "the Reforms Act") for abolition of Girasdari tenure, and the second was the Saurashtra Barkhali Abolition Act No. XXVI of 1951 (hereinafter referred to as "the Act") for abolition of Barkhali tenure. As a result of the abolition of the rights of the appellants, they became entitled to compensation under Section 18 of the Act which provided for payment of cash annuity calculated on the basis of the assessment in respect of the land in possession of the tenants of the holders of Barkhali tenure. The assessment in respect of the

land, on the basis of which compensation was to be calculated and annuity paid, was defined in Section 19 of the Act which reads as follows:—

"19. For the purposes of this Act, assessment shall mean in relation to any land, until the village in which such land is situate is surveyed and settled, assessment calculated on an arithmetic average of assessment leviable in the surrounding and adjoining khalsa or assessed non-khalsa lands or villages.

(2) For the purpose of determining the assessment on any land, the Mamlatdar may hold an inquiry in the prescribed manner and fix the assessment on such land, and the assessment so determined shall be published in such manner as may be prescribed:

Provided that where the assessment so calculated is manifestly unfair, the Government may modify it keeping in view the above principle."

In pursuance of the power given to the Mamlatdar under Section 19 (2) read with Section 19 (1) of the Act, the Mamlatdar determined the assessment in accordance with the principle laid down in S. 19 (1), and the initial payment as well as some instalments of the annuity were paid to the appellants on the basis of the assessment so determined. In 1959, however, the Government amended the Saurashtra Land Revenue Rules framed under the Code as it had been adapted and applied to Saurashtra area and substituted R. 17 for the existing Rule 17 as it had been inserted in 1957. This Rule 17 laid down the procedure for the assessment of the amount to be paid as land revenue on all lands in Saurashtra which were not wholly exempt from payment of land revenue and on which the assessment had not been fixed under the provisions of Chapter VIII-A. This Rule, thus, laid down the method to be adopted by the Collector for fixing the assessment under Section 52 of the Code. This amended Rule 17 was brought into force on the 20th May, 1959 and, in pursuance of this Rule, the Collector determined the assessment payable, inter alia, on the lands which were held under Barkhali tenure by the appellants. Consequent on this assessment by the Collector under Section 52 of the Code, the Government started paying annuity under Section 18 of the Act to the appellants on the basis of this assessment instead of continuing payment on the basis of the assessment which had been made by the Mamlatdar

under Section 19 of the Act. This was challenged by the appellants in the High Court of Gujarat, but unsuccessfully. Consequently, the appellants have come up to this Court in these appeals on the basis of certificate of fitness granted by the High Court under Article 133 (1) (c) of the Constitution.

3. In the High Court, various grounds were taken for challenging the validity of the action of the Government in paying annuity on the basis of the Collector's assessment under Section 52 of the Code read with Rule 17 of the Rules and it was urged that the appellants were entitled to continue to receive payment on the basis of the assessment which had been made by the Mamlatdar under Section 19 of the Act. The principal ground which we think has considerable force, was that assessment under Section 19 of the Act has been given a special meaning, and payment has to be made in accordance with the assessment mentioned in Section 19 of the Act and not in accordance with the assessment made by the Collector under Section 52 of the Code. Under Section 19 (1) of the Act, assessment is defined to mean assessment calculated on an arithmetic average of assessment leviable in the surrounding and adjoining khalsa or assessed non khalsa lands or villages which has to be determined by the Mamlatdar after holding an enquiry under Section 19 (2). This meaning continues to apply "until the village in which such land is situate is surveyed and settled". The contention on behalf of the appellants was that the operations carried out by the Collector under Section 52 of the Code did not result in the villages in which the lands of the appellants are situate being surveyed and settled, even though the Collector did make an assessment under Section 52 of the Code. On the other hand, the Government applied the assessment made by the Collector under Section 52 of the Code on the basis that the words "surveyed and settled" as used in Section 19 (1) of the Act are not defined and the requirements of those words must be held to be satisfied when the Collector made the assessment under Section 52 of the Code in accordance with the principles laid down in Rule 17 of the Rules. It was urged that the words "surveyed and settled" were not used in any technical sense and all that was required was that, in substance, there should be a survey and settlement resulting in assessment. Once that is

done, the assessment made by the Mamlatdar becomes ineffective and the new assessment, which is the result of survey and settlement, takes its place for purposes of determination of the compensation payable under Section 18 of the Act.

4. It is true that the words "surveyed and settled" have not been defined in the Act: but, in Clause (v) of Section 2 of the Act, it is laid down that all words and expressions used, but not defined, in the Act shall have the meanings assigned to them in the Reforms Act. Again, in Section 2 (33) of the Reforms Act, it is laid down that all words and expressions used, but not defined, in that Act and defined in the Code shall have the meanings assigned to them in the Code. Since the words "surveyed and settled" were not defined in either of these two Acts, we have to look to the Code to find their meaning. In the Code, the words "survey" and "settlement" are not separately defined in Section 3 which contains the definitions, though the expression "survey settlement" is defined as including a settlement made under the provisions of Chapter VIII-A. The word "settlement" itself has been defined for the limited purpose of Chapter VIII-A in Section 117C (1) as meaning the result of the operations conducted in a zone in order to determine the land revenue assessment. Until the year 1956, instead of the expression "a zone", the words used were "a taluka or part of a taluka". It will, thus, be seen that, even under the Code, the two words "survey" and "settlement" were not fully defined for all purposes. The definition of settlement was limited by laying down that this word was to connote the meaning given to it in the definition only in Chapter VIII-A. However, the procedure for survey was fully indicated in Chapter VIII, while the procedure for settlement was fully laid down in Chapter VIII-A. It was in this state of law that the Saurashtra Legislature passed the Act in 1951. It is, however, clear that, at the time when the Act was passed, the only manner of survey which was laid down by any law applicable in the State of Saurashtra was that contained in Chapter VIII of the Code and the only manner of settlement was that contained in Chapter VIII-A. There was, of course at the same time, provision contained in Section 52 of the Code for assessment of the amount to be paid as land revenue on all lands; but, in that section, nei-

ther the words "survey" nor "settlement" or any of their derivatives was used. In the circumstances, we consider that the submission made by counsel for the appellants that the words "surveyed and settled" used in Section 19 of the Act were intended to refer to the survey and settlement under Chapters VIII & VIII-A of the Code has great force. The Legislature, in Sec. 19, first laid down a convenient method of assessment by the Mamlatdar by a summary procedure and that assessment was to be treated as the assessment for all purposes of the Act until the village in which the land in question may be situate is surveyed and settled. The Legislature envisaged that, in areas in which there had been no survey and settlement in accordance with Chapters VIII and VIII-A of the Code, such operations would be undertaken. But, for the intervening period, until those operations could be completed, summary power was given to the Mamlatdar to fix the assessment on the basis of the guiding principles laid down in that section. In using the expression "the village in which such land is situate is surveyed and settled", the Legislature appears to have ruled out the applicability of the assessment made by the Collector under Section 52 of the Code, because Section 52 of the Code does not anywhere envisage a survey and settlement in any of the words in that section. If the Legislature had intended that the Mamlatdar's assessment made by the summary manner laid down in S. 19 itself be superseded by any assessment made under the Code, including an assessment by the Collector under Section 52 of the Code, the language used in Section 19 would certainly have been different. Instead of saying that the assessment made by the Mamlatdar under Section 19 is to be effective until the village in which such land is situate is surveyed and settled, the Legislature could have easily laid down that that assessment shall remain effective until an assessment is made under the Code. In this connection, reference may be made to Section 16 of the Act in which the Legislature laid down what was to be the land revenue payable on all lands held, on the commencement of the Act, as Barkhali lands including Gharkhed, and land allotted under the Act. The provision made in Section 16 was that the lands were liable to payment of land revenue under the provisions of the Code and the Rules made thereunder. In that section, the

Legislature did not make reference to any survey or settlement. It only laid down that the land revenue payable was to be as determined under the provisions of the Code and the Rules made thereunder. A similar provision could have been made in Section 19 for superseding the assessment made by the Mamlatdar. Instead, the requirement prescribed by the Legislature was that the assessment by the Mamlatdar was to continue in force until the village is surveyed and settled and not merely until an assessment of revenue payable in respect of the land is determined either under Section 52 of the Code or Chapter VIII-A of the Code.

5. This view of ours is further strengthened by a comparison of the language used in Section 19 of the Act and Section 52 of the Code. Section 52 of the Code envisages assessment of amount to be paid as land revenue "on all lands", while Section 19 of the Act refers to survey and settlement of "a village" and not of lands. Obviously, under Sec. 52 of the Code, there could be assessment of revenue on lands without survey or settlement of a village and, when the Legislature, in Section 19 of the Act, used the expression "village is surveyed and settled", it clearly ruled out a mere assessment under Section 52 of the Code which need not follow a survey or settlement of a village. In our opinion, therefore, under Section 19 of the Act, the assessment made by the Mamlatdar under that section itself must continue in force until there is a survey and settlement in accordance with Chapters VIII and VIII-A of the Code.

6. In this connection, we may take notice of one more aspect. Even under Section 52 of the Code and Rule 17 of the Rules made thereunder, there is, in fact, no survey at all. All that Rule 17 requires the Collector to do is to classify land into three classes: (1) dry crop, (2) rice and (3) irrigated. These three classes are then to be divided into three sub-classes, good, medium and inferior. Assessment is then to be made on each parcel of land by comparison of similar class and sub-class of land with land of the same class and sub-class situated in the Bombay area apart from areas transferred to Bombay State at the time of Reorganisation of the States in 1956. This procedure does not involve any survey. Survey, as indicated by Chapter III-A of the Land Revenue Rules framed under the Code, requires the settlement officer

to examine physical configuration, climate and rainfall, markets, communications, standard of husbandry, population and supply of labour, agricultural resources, the variations in the area of occupied and cultivated lands during the period of previous settlement, wages, prices, yield of the principal crop, ordinary expenses of cultivating each crop, and rental values of lands used for purposes of agriculture. No such survey of any of these factors was required to be done by the Collector when making the assessment of land revenue payable under Section 52 of the Code read with Rule 17. In fact, the provisions of Rule 17 require very limited action by the Collector in classifying lands and comparing lands to be assessed with lands in untransferred area of the Bombay State. Fixing of land revenue payable, on this principle, is also clearly exercise of a summary power which appears to have been conferred on the Collector by Section 52 as a temporary measure until there could be a proper settlement of land revenue after survey in accordance with Chapters VIII and VIII-A of the Code. If such assessment made by the Collector by a more or less summary procedure were intended to be given effect to by the Legislature in the Act, there was no need at all to create another authority in the Mamlatdar to fix assessment by a slightly different summary procedure. It seems to us that the Saurashtra Legislature, in passing the Act, for the temporary period until there could be a regular survey and settlement, created a machinery by granting power to the Mamlatdar to make a summary assessment and that was clearly intended not to be superseded by another summary fixation of assessment by the Collector under Section 52 of the Code.

7. The High Court has held that, in substance and in effect, the Collector, in acting under Section 52 of the Code and Rule 17, did make the assessment after survey and settlement. Nowhere did the High Court examine whether any of the steps which are taken in a survey were required to be taken by the Collector at all. The High Court seems to have assumed that the procedure laid down in Rule 17 amounted to survey and settlement. Further, the High Court lost sight of the fact that, under Sec. 52 of the Code and Rule 17 the assessment of land revenue payable was in respect of lands, while Section 19 of the Act envisaged survey and settlement not of in-

dividual lands but of a village. We are, therefore, unable to agree with the view of the High Court that what the Collector did in 1959 in making the assessment under Section 52 of the Code and Rule 17 amounted to survey and settlement of villages as envisaged in Sec. 19 of the Act. There having been no survey and settlement of the village, the assessment made by the Mamlatdar continued to be assessment for purposes of the Act and the Government was, therefore, not justified in varying the payment of annuity under Section 18 of the Act which should have been continued to be paid in accordance with that assessment.

8. The appeals are, consequently, allowed with costs in both Courts and the orders of the High Court are set aside. As prayed by the appellants in their writ petitions, writs of mandamus shall issue to the Government to pay cash annuity to the appellants on the basis of the assessments made by the Mamlatdar under Section 19 of the Act and not in accordance with the assessments made by the Collector under Section 52 of the Code read with Rule 17 of the Rules framed thereunder.

Appeals allowed.

AIR 1970 SUPREME COURT 1076
(V 57 C 228)

(From Calcutta: 1965-2 ITJ 519)

J. C. SHAH, Ag. C. J. AND
K. S. HEGDE, JJ.

M/s. Bengal Enamel Works Ltd., Appellant v. Commissioner of Income-tax, West Bengal, Respondent.

Civil Appeals Nos. 2143 to 2145 of 1963, D/- 9-12-1969.

Income Tax Act (1922), Section 10 (2) (xv) — "Laid out or expended wholly and exclusively for the purpose of such business" — Powers of Tax Officers and High Court — Payment to employee made for extra-commercial considerations.

Resolution of the assessee Company fixing the remuneration to be paid to an employee and production of vouchers for payment together with proof of rendering service do not exclude an enquiry whether the expenditure was laid out wholly and exclusively for the purpose of the assessee's business. It is open to the Tax Officers to hold, agreement to pay and payment notwithstanding, that the expenditure was not laid down wholly

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and exclusively for the purpose of the business. But an inference from the facts found that the expenditure was wholly and exclusively laid out for the purpose of the business is one of law and not of fact, and the High Court in a reference under Section 66 of the Income-tax Act is competent to decide that the inference raised by the Tribunal is erroneous in law. (Para 5)

Indisputably an employer in fixing the remuneration of his employee is entitled to take into consideration the extent of his business, the nature of duties to be performed, the special aptitude of the employee, the future prospects of the business and other related circumstances and the taxing authorities cannot substitute their own view as to the reasonable remuneration which should have been agreed to be paid to the employee. But the taxing authority may disallow an expenditure claimed on the ground that the payment is not real or is not incurred by the assessee in the course of his business or that it is not laid out wholly and exclusively for the purpose of the business of the assessee. Thereby the authority does not substitute its own view of how the assessee's business affairs should be managed, but proceeds to disallow the expenditure because the condition of its admissibility is absent.

(Para 8)

Where an amount paid to an employee pursuant to an agreement is excessive because of "extra-commercial considerations", the taxing authority has jurisdiction to disallow a part of the amount as expenditure not incurred wholly or exclusively for the purpose of the business.

(Para 9)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 609 (V 56) =

(1969) 2 SCJ 61, J. K. Woollen
Manufacturers v. Commr. of
Income-tax, U. P. 8

(1967) AIR 1967 SC 1435 (V 54) =

(1967) 65 ITR 381, Commr. of
Income-tax, Bombay v. Wal-
chand and Co. Private Ltd. 8

(1967) 63 ITR 57 (SC), Swadeshi

Cotton Mills Co. Ltd. v. Commr.
of Income-tax, U. P. 5

In C. As. Nos. 2143 and 2144 of 1968

Mr. M. C. Chagla, Senior Advocate,
(Mr. P. C. Bhartari, Advocate and Mr.
O. C. Mathur, Advocate of M/s. J. B.
Dadachanji and Co. with him)

In C. As. Nos. 2145 of 1968

Mr. S. Mitra, Senior Advocate (Mr. P.
C. Bhartari, Advocate and Mr. O. C.

Mathur, Advocate of M/s. J. B. Dada-
chanji and Co. with him), for Appellant;
Mr. S. T. Desai, Senior Advocate (M/s.
S. K. Aiyar and B. D. Sharma, Advocates,
with him), for Respondent (In all the ap-
peals).

The Judgment of the Court was deli-
vered by

SHAH (Actg. C. J.): These appeals re-
lated to the assessment to tax of M/s.
Bengal Enamel Works Ltd. — a public
limited company — for the assessment
years 1951-52, 1952-53 and 1953-54.

2. The Company is doing business of
manufacturing "enamelled-ware". It had
originally employed a technician at a
monthly salary of Rs. 500. In June, 1941
the technician was relieved, and one Col.
Bhattacharya who was a director of the
Company was appointed its "Technical
Adviser". He was to receive as remun-
eration 15% of the gross annual profits
of the Company. Col. Bhattacharya re-
signed his office and Dr. Ganguly (son-
in-law of Col. Bhattacharya) was appoint-
ed to that office. The Board of Direc-
tors resolved on May 18, 1950 to pay to
Dr. Ganguly 15% of the gross annual
profits (without deducting depreciation)
as his remuneration.

3. In the assessment years 1951-52,
1952-53 and 1953-54 the Company claim-
ed under Section 10 (2) (xv) of the In-
come-tax Act, 1922, as admissible allow-
ance, in computing its taxable income,
Rs. 52,947, Rs. 64,356 and Rs. 79,227 re-
spectively paid as remuneration to Dr.
Ganguly under the terms of the resolu-
tion dated May 18, 1950. The Income-
tax Officer, Companies District III, Cal-
cutta, allowed for each of the years re-
muneration at the rate of Rs. 42,000 only
as a permissible deduction. The order
was confirmed in appeal to the Appellate
Assistant Commissioner and by the Tri-
bunal.

4. The Tribunal referred in respect
of each of the three years the following
question:

"Whether on the facts and in the cir-
cumstances of the case, the disallowance
of a part of the expenses incurred by the
assessee for payment of remuneration to
its Technical Adviser is permissible under
the provisions of Section 10 (2) (xv) of
the Indian Income-tax Act?"

The High Court answered the question
in the affirmative, and disallowed the
claim of the Company. With certificate
of fitness, these appeals are preferred
against the order of the High Court.

5. In computing the taxable income of an assessee whether an amount claimed as expenditure was laid out or expended wholly and exclusively for the purpose of the business, profession or vocation of the assessee must be decided on the facts and in the light of the circumstances of each case: *Swadeshi Cotton Mills Co. Ltd. v. Commr. of Income-tax, U. P.*, (1967) 63 ITR 57 (SC). Resolution of the assessee fixing the remuneration to be paid to an employee and production of vouchers for payment together with proof of rendering service do not exclude an enquiry whether the expenditure was laid out wholly and exclusively for the purpose of the assessee's business. It is open to the Tax Officers to hold—agreement to pay and payment notwithstanding—that the expenditure was not laid out wholly and exclusively for the purpose of the business: *Swadeshi Cotton Mills Co. Ltd.'s case*, (1967) 63 ITR 57 (SC). But an inference from the facts found that the expenditure was wholly and exclusively laid out for the purpose of the business is one of law and not of fact, and the High Court in a reference under Section 68 of the Income-tax Act is competent to decide that inference raised by the Tribunal is erroneous in law.

6. In the present case, the facts found are these: Col. Bhattacharya and his son-in-law Dr. Ganguly were two of the directors of the Company who between them held on January 1, 1950, 49% of the total number of shares of the Company and the other directors of the Company held only 1% of the shares. Dr. Ganguly had received no training in the technique of enamelling: he was a medical practitioner earning Rs. 20,000 per annum by the exercise of his profession. Apparently no applications were invited for the appointment of a Technical Adviser when Col. Bhattacharya resigned his office. In the resolution passed by the Directors it was recorded that many "personal enquiries" regarding the post were made, but no candidate was found suitable. The Board, it was recorded, considered the applications of S. Urbeneck and J. Schulser but the qualifications of these two candidates did not impress the directors: moreover the terms of service offered by J. Schulser were not acceptable to the Board and therefore only the applicant Dr. Ganguly who was working on probation in the post for some time past and had worked without remuneration upto December 31, 1949

was considered. The applications of S. Urbeneck and J. Schulser though called for by the Income-tax Officer were not produced by the Company. At the relevant time "a good technical expert in enamelling" could be secured for a monthly remuneration of Rs. 1000 or Rs. 1200 provided that appointment was not for a short period.

7. In the view of the Income-tax Officer, Dr. Ganguly came to be appointed to the post of Technical Adviser of the Company as soon as his father-in-law vacated the post and "the generous remuneration offered to him was influenced by factors other than commercial considerations, and considering that Dr. Ganguly was giving up his professional practice in allopathic medicine which yielded him an annual income of Rs. 20,000 to engage himself as a whole-time Adviser attending to the development of the industry a gross remuneration of Rs. 3,500 per month, beside the remuneration of Rs. 1,000 per month that he obtained as Secretary of the Managing Agents of the Company, would be adequate." With that view the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal have substantially agreed. The Tribunal observed that they were inclined to conclude that "extra commercial considerations" had influenced the fixation of remuneration of Dr. Ganguly and that partial disallowance of the remuneration "so influenced seems quite fair."

8. Counsel for the Company urged, relying upon the judgments of this Court in *J. K. Woollen Manufacturers v. Commr. of Income-tax, U. P.*, AIR 1969 SC 609 and *Commr. of Income-tax, Bombay v. Walchand and Co., Private Ltd.*, 65 ITR 331 = (AIR 1967 SC 1435) that in determining the admissibility of an allowance as expenditure laid out and expended wholly and exclusively for the purpose of the business has to be adjudged from the point of view of the employer and not of the revenue, the Taxing authorities had no power to disallow the remuneration paid to its Technical Adviser, merely because they think that the Company may probably have secured the services of another Adviser for a smaller remuneration. But these cases, in our judgment, have no bearing here. The departmental authorities have not attempted to reduce the allowance on the ground that the remuneration paid to Dr. Ganguly was in their view excessive. Indisputably an employer in fixing

the remuneration of his employee is entitled to take into consideration the extent of his business, the nature of duties to be performed, the special aptitude of the employee, the future prospects of the business and other related circumstances and the taxing authorities cannot substitute their own view as to the reasonable remuneration which should have been agreed to be paid to the employee. But the taxing authority may disallow an expenditure claimed on the ground that the payment is not real or is not incurred by the assessee in the course of his business or that it is not laid out wholly and exclusively for the purpose of the business of the assessee. Thereby the authority does not substitute its own view of how the assessee's business affairs should be managed, but proceeds to disallow the expenditure because the condition of its admissibility is absent.

9. It has been uniformly found by all the authorities that the remuneration agreed to be paid to Dr. Ganguly was influenced by "extra-commercial considerations". Dr. Ganguly and Col. Bhattacharya were able to control the voting before the Board of Directors. Dr. Ganguly was not trained in the technique of "enamelled-ware", and had no special qualifications for the post. The remuneration agreed to be paid was much in excess of what was normally payable, and also of what Dr. Ganguly was earning by practising his profession as a doctor of medicine. The criticism that the Tribunal's finding was based on no evidence or was based on irrelevant considerations cannot therefore be accepted. Where an amount paid to an employee pursuant to an agreement is excessive because of "extra-commercial considerations", the taxing authority has jurisdiction to disallow a part of the amount as expenditure not incurred wholly and exclusively for the purpose of the business. (1967) 63 ITR 57 (SC).

10. The appeals fail and are dismissed with costs. One hearing fee.

Appeals dismissed.

AIR 1970 SUPREME COURT 1079
(V 57 C 229)

(From: Andhra Pradesh)

M. HIDAYATULLAH, C. J., A. N. RAY AND I. D. DUA, JJ.

Gottipulla Venkata Siva Subbrayanam and others, Appellants v. The State of Andhra Pradesh and another, Respondents.

Criminal Appeal No. 75 of 1967, D/- 19-1-1970.

Penal Code (1860), Section 97 — Right of private defence — Prosecution party in unauthorised possession of Kunta — Accused party putting up bund on land — Prosecution party going in large number on land to remove bund and beating accused party mercilessly — Accused held had right of private defence.

Certain Kunta was the property of the Government and it was registered as a source of irrigation. The occupiers i.e., the party of the prosecution were cultivating the Kunta in an unauthorised manner. Both sides had secured injunction orders from the Civil Court against their opponents and the orders secured by the accused restrained the prosecution party from cutting any breaches in the bund which the accused had put up as for a couple of years previously there was insufficient rain and there was also no cultivation in the Kunta. The occupiers approached the police authorities for assistance in getting the bund removed but unfortunately the matter was not dealt with by the authorities in an effective manner as they ought to have. Having failed in their attempt to have the bund removed, the occupiers with their Communist help went to the spot on the day of the occurrence in large numbers fully determined to remove the bund by use of force. When this attempt was foiled by the accused persons with show of force the party of the prosecution mercilessly beat up some of the accused persons who were advanced in age:

Held that this conduct on the part of the occupiers and their supporters was sufficient to give rise to a reasonable apprehension in the mind of one of the accused persons that the victims of the assault would have been killed had he not exercised the right of private defence. The use of the gun by the accused against the members of the opposite faction was thus justified. In a situation like this it was not possible for an average person

whose mental excitement could be better imagined than described, to weigh the position in golden scales. The accused did not exceed his right of private defence. The fact that the plea of self-defence was not raised by the accused and that he had on the contrary pleaded alibi did not preclude the Court from giving to him the benefit of the right of private defence, if on proper appraisal of the evidence and other relevant material on the record the Court concluded that the circumstances in which he found himself at the relevant time gave him the right to use his gun in exercise of this right. The analogy of estoppel or of the technical rules of civil pleadings is, in such cases inappropriate and the Courts are expected to administer the law of private defence in a practical way with reasonable liberality so as to effectuate its underlying object, bearing in mind that the essential basic character of this right is preventive and not retributive.

(Paras 5, 6, 13, 18, 19)

- Cases Referred: Chronological Paras
- (1968) AIR 1968 SC 702 (V 55)=
- Criminal Appeal No. 124 of 1965,
- D/- 27-11-1967= 1968 Cri LJ 808,
- Munshi Ram v. Delhi Administration 17
- (1962) Criminal Appeal No. 23 of
- 1960, D/- 30-10-1962 (SC), Kishna
- v. State of Rajasthan 17

The following Judgment of the Court was delivered by

DUA, J.—In this appeal by special leave directed against the order of the Andhra Pradesh High Court, the only question canvassed on behalf of the appellants before us relates to the plea of private defence raised by them at the trial. The appellants who are ten in number were tried on as many as 22 charges by the Court of Additional Sessions Judge, Masulipatam and acquitted of all the charges. On appeal by the State against their acquittal there was a difference of opinion between the two Judges of the High Court constituting the Division Bench hearing the appeal. Whereas Sharfuddin Ahmed, J., upheld the order of acquittal on the basis of the plea of private defence, Mohd. Mirza, J., was of the opinion that the prosecution case was proved by overwhelming evidence. The case was in consequence laid before Basu Reddy, J. as provided by Section 429, Criminal Procedure Code. That learned Judge accepted the prosecution case and convicted the appellants on some of the

charges. He expressed his final conclusion thus:

"I shall now indicate the charges upon which the accused should be convicted and the sentences that should be imposed:

On charge No. 2 I would convict accused 1, 3 and 5 to 9 under Section 147, Indian Penal Code and on charge No. 3 accused No. 2, 4 and 10 and sentence each of accused 1, 2, 3, 4 and 5 to pay a fine of Rs. 500/-, in default each to suffer six months' rigorous imprisonment. I would sentence each of accused 6 to 9 (who are farm servants) to pay a fine of Rs. 100/- in default to suffer two months' rigorous imprisonment. I would sentence accused 10 to suffer rigorous imprisonment for two years.

2. On each of charges Nos. 4, 5 and 6 which pertain to the three counts of murder, I would convict and sentence accused 10 to suffer imprisonment for life under Section 302, Indian Penal Code.

3. On charge No. 11, I would convict and sentence accused No. 10 to suffer two years' rigorous imprisonment under Section 328, Indian Penal Code for having caused grievous hurt to P. W. 6 by shooting at him with the gun.

4. On charge No. 22, I would convict accused 10 under Section 19 (a) of the Indian Arms Act and sentence him to suffer one year's rigorous imprisonment.

I would direct all the sentences of imprisonment passed on accused 10 to run concurrently. I would uphold the order of acquittal on other charges.

The net result will be that accused 10 will have to undergo imprisonment for life; accused 1 to 5 will each have to pay a fine of Rs. 500/-; and accused 6 to 9 will each have to pay a fine of Rs. 100/-. The final order of the High Court on appeal followed the opinion expressed by Basu Reddy, J. The charges on which the appellants were convicted are these:

..... Secondly: that you accused Nos. 1, 3 and 5 to 9 along with accused Nos. 2, 4 and 10 at about 10 a. m. on 10-9-61 at the same place and in the course of the same transaction as set out in charge No. 1 above, formed yourselves into an unlawful assembly, and in prosecution of the common object of such assembly viz., beating and killing the members of the party that came in support of the occupiers of Gabbilalakunta, committed an offence of rioting punishable under Section 147, Indian Penal Code and within my cognizance;

Thirdly: that you accused Nos. 2, 4 and 10 along with accused Nos. 1, 3 and 5 to 9 at the same time and place in the course of the same transaction as set out in charge No. 2 above, were members of an unlawful assembly and did in prosecution of the common object of such assembly, viz., beating and killing the members of the party that came in support of the occupiers of Gabbilalakunta, did commit an offence of rioting and that at that time, the accused Nos. 2 and 4 were armed with deadly weapons to wit, 'spears' and the 10th accused was armed with a D. B. B. L. Gun and thereby committed an offence punishable under Section 148 of the Indian Penal Code and within my cognizance;

Fourthly: that you accused No. 10 at the same time and place and in the course of the same transaction as set out in charge No. 2 above, did commit murder by intentionally or knowingly causing the death of Anne Ramarao, son of Seetha Ramarao of Atkur by shooting him with a D. B. B. L. gun and thereby committed an offence punishable under Section 302 of the Indian Penal Code and within my cognizance;

Fifthly: that you accused No. 10 at the same time and place and in the course of the same transaction as set out in charge No. 2 above, did commit murder by intentionally or knowingly causing the death of Bodapati China Anjaiah S/o Danaiah of Mustabada by shooting him with a D. B. B. L. gun and thereby committed an offence punishable under Section 302 of the Indian Penal Code and within my cognizance;

Sixthly: that you accused No. 10 at the same time and place and in the course of the same transaction as set out in charge No. 2 above, did commit murder by intentionally or knowingly causing the death of Boddapati Lakshmaiah S/o Kotaiah of Medaripalem, hamlet of Verdupavuluru by shooting him with a D. B. B. L. gun and thereby committed an offence punishable under Section 302 of the Indian Penal Code and within my cognizance;

Eleventhly: that you accused No. 10 at the same time and place and in the course of the same transaction as set out in charge No. 2 above, voluntarily caused grievous hurt to Kolli Nagabhushanam, son of Venkaiah of Davajigudem by means of a D. B. B. L. gun an instrument for shooting and thereby committed an

offence punishable under Section 326 of the Indian Penal Code and within my cognizance and that the said act having been done in pursuance of the common object of the unlawful assembly consisting of you all the accused herein, all of you are guilty of the offence under Section 326 of the Indian Penal Code read with Section 149, Indian Penal Code and within my cognizance, or alternatively under Section 326 read with Section 34, Indian Penal Code and within my cognizance;

Twentysecondly: that you accused No. 10 at about the same time and place and in the course of the same transaction as set out in charge No. 2 above, were armed with a D. B. B. L. gun without licence under the Indian Arms Act and thereby committed an offence punishable under Section 19 (e) of the Indian Arms Act and within my cognizance."

2. In this Court, as already observed, the appellants' learned Advocate confined his submission only to the question of right of private defence. According to the prosecution case there is a low lying area covering about 11 acres known as Gabbilalakunta (hereafter to be referred as the Kunta) about one mile away from Surampalli village but within its limits. This Kunta serving as a tank is fed by rain water. The village of Surampalli was a Mokhasa village in the erstwhile zamindari of Mirzapuram. Under the provisions of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, the zamindari of Mirzapuram was taken over by the Government in 1950. As a result thereof the entire estate including Surampalli village and the Kunta became vested in the Government free from all encumbrances. This Kunta thus belonged to the Government. Some poor landless persons like P. Ws. 13 and 14, Shaik Madarsaheb and Kandavalli Anandam, began cultivating a part of this Kunta and started raising wet and dry crops. This started in the year 1953. Their occupation being unauthorised the Revenue Authorities collected penalty cist from the occupants. Accused Nos. 1 to 4, Gottipulla Venkatasiva Subbarayanam, Gottipulla Bapaiah, Gottipulla Seshiah Gottipulla Subba Rao, who are the former Mokhasadars have their lands measuring about 80 acres to the south of the Kunta. There is a big tank called Erracheruvu located about three or four furlongs to the north of the Kunta. There are some channels through which water

flows from this tank to various fields and one such channel serves to irrigate the field of the accused Nos. 1 to 4. According to the prosecution the lands of these accused persons should be irrigated by means of the channel running along the western side of the Kunta. According to the accused persons, however, their fields should receive water from the Kunta through sluices in its southern bund. In 1958 the Settlement Authorities registered the Kunta as a source of irrigation for an ayacut of 34 acres. Prior to that, sometime in August 1957, the occupiers of the Kunta had instituted a suit for injunction restraining accused Nos. 1 to 4 from interfering with the possession of the occupiers and also claiming damages on the allegation that the defendants had spoiled their crops and an interim injunction was actually granted on August 21, 1957.

3. Accused Nos. 1 to 4 also filed an application seeking to injunct the occupiers from opening the sluices (outlets) or making breaches in the bund of the Kunta during the pendency of the suit. On this application also the Court, by an order dated August 29, 1957, granted a temporary injunction in the following terms:

"Pending disposal of this petition, the respondents are restrained from opening the sluices or outlets or cutting any breaches to the bund of the tank situated in S. No. 44 if there is any bund." On February 3, 1960 the Court confirmed both the orders of injunction mentioned above. The land in the Kunta was not cultivated in the years 1958 to 1960 because of failure of rains. In June, 1961 cultivation was resumed by P. W. 13 and P. W. 14, along with four other persons, raising paddy crop in a part of the Kunta. Another part of the Kunta was prepared for raising jonna crop. The suit mentioned above was still pending when on September 4, 1961 it was adjourned to some other date. It rained heavily that night and the rain water collected in the Kunta. On the following morning when P. W. 13 and P. W. 14, along with some other occupiers passed by the side of the Kunta they saw a new bund raised on its western side so as to prevent the rain water collected therein from flowing westwards. This resulted in submerging the crop grown on the eastern portion of the Kunta. The new bund was about 3' high, 2½' wide and 25 yards in length. There being no one pre-

sent at the bund P. Ws. 13 and 14 and their companions made a breach therein to let the water flow westwards. In the evening when they came back to the Kunta they found that the breach in the bund had been repaired and the bund restored to its original position. There were also two improvised butts set up to the south of the bund and all the ten accused were present keeping a watch. The occupiers pleaded with the accused persons to remove the bund pointing out that otherwise their crops would be damaged but the accused persons did not listen to their entreaties and threatened to beat them if they dared to interfere with the bund. The occupiers thereupon went back to their village. On the following day, September 6, 1961, P. W. 12, Yelamanchili Malikharjuna Rao, a medical practitioner at Surampalli and a leading member of the Communist Party was approached by the occupiers to assist them in representing to the authorities against the high-banded action of the Mokbasadars. A report was prepared by P. W. 12 which was addressed to the Sub-Inspector of Police. The Sub-Inspector promised to send his constables to the spot and on this assurance the occupiers went back to their village. On September 7, 1961, under the direction of the Police Sub-Inspector two police constables went to the Kunta with the object of getting the bund removed and if possible to bind over the parties. The Kunta was full of water and the paddy crop was submerged. Six of the occupiers were also present at the spot. The police constables informed the persons present keeping a watch on the bund, which included accused No. 1 Cottipulla Venkatasiva Subbrayanam, accused No. 2 Gottipulla Bapaiah and accused No. 10, Charugulla Vijayaramarao, that the Sub-Inspector had directed the western bund to be removed so that water may flow westwards. Accused Nos. 1, 2 and 10 asked for Government orders to that effect and declined to allow the bund to be removed in the absence of such an order. The police constables asked the parties present to meet the Sub-Inspector on the following day. Neither party, however, went to the police station as required. The Tahsildar also appears to have been approached to get the bund removed but he declined to do so on the ground that it was not his business and that it was for the Revenue Divisional Officer to look into the matter. On September 9, 1961, the Sub-Inspector sent a

head constable along with the constable who had gone there on September 7, to enquire into the complaint made to the police earlier. According to the report prepared by the head constable accused No. 10 was firm and emphatic that the bund could not be removed in the absence of a Government order to that effect. Bonds were, therefore, secured from accused Nos. 2 and 3 and also from the occupiers for appearance before the Sub-Inspector on the following morning. It appears that these steps by the police produced no tangible result. The occupiers realising that their crops were being irreparably damaged made frantic efforts to get the bund removed and with that object they approached some ryots of the surrounding villages to intervene on their behalf and to persuade the Mokhasadars to remove the bund. After the police party had left Surampalli on the evening of September 9, P. W.s 13 and 14 and some other occupiers proceeded to Gannavaram and approached some persons belonging to the Communist Party and apprised them of their plight. The occupiers were assured of their support on the following morning. On the morning of September 10, P. W. 11, Katragadda Pedavenkatarayudu accompanied by P. W. 6, Koli Nagabhushanam, and Anne Rama Rao (deceased No. 1), went to Mustabada on their way to Surampalli. At Mustabada they contacted Chinna Anjayya (deceased No. 2) and P. W. 15, Pendyala Venkateswara Rao, and from there they all proceeded to Surampalli. At the Panchayat Board Office at Surampalli they collected P. W. 1, Madhukuluri Satyanarayana, P. W. 4, Kolampatta Venkata Subbayyachari, P. W. 5, Jasti Ramrao, P. W. 7, Carimella Subbarao, P. W. 8, Carimella Venkataiah, P. W. 9, Mukkala Veeraiah and deceased No. 3, B. Lakshmayya and also the six occupiers of the Kunta and two or three other persons. P. W. 12, Y. Mallikarjuna Rao also arrived there. A message was sent through P. W. 13 to bring accused Nos. 1 to 4 to the Panchayat Board Office but they were reported to be at the Kunta. Then all the persons gathered at the Panchayat Board office numbering about 20 proceeded to the Kunta at about 10 a. m. on September 10. Accused Nos. 1 to 9 were found near the huts whereas accused No. 10 with a gun was standing about 25 yards to the southeast of the huts. Accused Nos. 2 and 4 had spears whereas accused Nos. 3 and 5 to 9 had sticks with them. P.

Ws. 1, 4, deceased No. 1, P. W. 11 and others are stated to have requested accused Nos. 1 to 4 to remove the bund and save the growing crop belonging to the poor men. The accused, declined to do so. Thereupon the six occupiers went towards the bund about 25 yards to the north of the huts and started themselves removing a portion thereof with their hands. Accused Nos. 1 to 9 thereupon rushed at them to beat them. At that stage P. W. 5, Jasti Ramrao, P. W. 7, Carimella Subba Rao and some others who had come to mediate intervened but they were beaten by the accused. The prosecution witnesses in turn snatched the sticks from some of the accused persons and retaliated causing injuries to some of them. At this point of time accused No. 10 who was standing near the huts shouted that the party of the occupiers would not go back unless shot at and asked his companions to come back. Accused Nos. 1 to 9 started retreating towards the huts. Deceased No. 1 and P. W. 1 who was about 10 yards south-east of the huts at that time went towards accused No. 10 challenging him to shoot if he dared and saying that they were prepared to be shot for a just cause. Accused No. 10 then stepped forward and fired at deceased No. 1 from a distance of about 10 yards. Crying out "Abba" deceased No. 1 fell down and died on the spot. A pellet grazed the nose of P. W. 1 who was a couple of yards behind deceased No. 1 and he too fell down. According to the prosecution version accused No. 2 hit P. W. 1 at the back as a result of which P. W. 1 also fell down unconscious. Accused No. 10 is stated to have fired another shot towards the west as a result of which P. W. 6 was injured. Accused No. 10 then re-loaded his gun and fired a shot towards the west and this hit deceased No. 2 who also fell down dead. The fourth shot was fired by accused No. 10 in the northwestern direction which hit deceased No. 3 who was about 25 yards away from the huts and he too fell down dead. P. W.s. 2, 3, 8, 9 and 10 also received pellet injuries in the course of this firing. This, broadly speaking, is the prosecution case.

4. According to the defence version sought to be supported by four defence witnesses the gun used during the occurrence was brought by accused No. 1 who holds the necessary licence for this firearm and it was he who used it in exercise of the right of private defence after

accused Nos. 2 to 4 had received injuries at the hands of about 200 or 300 Communists who had come to the place of occurrence from the house of P. W. 12. They were armed with sticks and spears and were also carrying their flag. They were raising party slogans and shouting that Gottipulla people should be killed. They tried forcibly to remove the bund and on being obstructed by accused Nos. 2 to 4 and their servants working at their farm the occupiers and the Communists gave a severe beating to the latter. Accused No. 1 came to the spot with his gun and fired at the aggressors in exercise of the right of private defence. Accused No. 10, according to this version, was not present at the spot. In his statement under Section 342, Criminal Procedure Code this accused pleaded alibi by stating that he was at Sivapuram, Kadapa district on the fateful day having gone there weeks before and that he knew nothing about this occurrence; according to him he stayed in Sivapuram for about one month and himself surrendered in the Magistrate's Court on hearing that he was named as an accused in this case. The Trial Court did not accept his plea of alibi; nor did the High Court accept it and we do not find any cogent ground for disagreeing with this conclusion.

5. Now, the facts in the background of which the question of right of private defence is to be considered are that the Kunta was the property of the Government and it was registered as a source of irrigation in the year 1953 or 1959. The occupiers were thus cultivating the Kunta in an unauthorised manner. Both sides had also secured injunction orders from the Civil Court against their opponents and the orders secured by the accused restrained the opposite party (plaintiffs in the suit) from cutting any breaches in the bund. The accused no doubt seemed to have put up the present bund after the occupiers had grown their crops but it is clear that for a couple of years previously there was insufficient rain and there was also no cultivation in the Kunta. The present bund was apparently raised on September 4, because it was on the morning of September 5, that the existence of the bund is stated to have been noticed by the occupiers. Thereafter the occupiers approached the police authorities for assistance in getting the bund removed but unfortunately the matter was not dealt with by the authorities in an effective manner as they ought to

have. Having failed in their attempt to have the bund removed, the occupiers with their Communist help seem to have gone to the spot on the day of the occurrence to help themselves. Up to this stage there does not seem to be any controversy. The only difference between the rival versions relates to the question whether or not the party of the occupiers was armed and their number. The prosecution witnesses would have us believe that they (the occupiers) along with some of their friends and supporters had gone to the Kunta unarmed to peacefully persuade the accused persons to remove the bund and that the accused persons beat them up with sticks and spears. The occupiers, acting merely in self-defence, snatched the sticks and spears from some of the accused persons and gave them a beating whereupon accused No. 10 used his gun indiscriminately firing at the party of the occupiers. The accused, on the other hand, claimed that the party of the occupiers helped by prominent Communists which far outnumbered the accused persons were armed with sticks and spears and they forcibly tried to remove the bund and when the accused objected they were beaten up. Approaching danger to their lives, the gun was used on behalf of the party of the accused persons. It was thus in exercise of the right of private defence that this gun was used. It may at this stage be pointed out that the accused persons had also reported the matter to the police but on the plea that the police was siding with the occupiers and favouring them the accused persons filed a complaint in the Court of a Magistrate against 35 persons and both the cases were tried simultaneously.

6. As each side is blaming the other of being the aggressor and the witnesses for the prosecution deposing to the occurrence as eye-witnesses are clearly interested in the occupiers, the nature and extent of the injuries suffered by the men of the two factions would serve as more reliable material for arriving at the truth. It is in this connection noteworthy that even according to the prosecution witnesses the party of the occupiers consisted of not less than 20 persons. We may now turn to the wound certificates of the accused persons. Gottipulla Venkata Siva Subbrayanam, aged 60 years, accused No. 1, had 10 injuries on his person mainly on the head, base of the neck and the shoulders and dying decla-

ration was considered necessary by the Civil Assistant Surgeon. Gottipulla Bapaiah, aged about 50 years, accused No. 2 had the following injuries on his person:

1. A contusion 12" in length $\times \frac{1}{2}$ " with raised edges placed diagonally across the upper $\frac{1}{3}$ of left half of the back, the lower end towards the spine and the upper end towards the shoulder. Brownish red in colour;

2. A contusion brownish red colour 1" in diameter situated on the right shoulder;

3. Whole of the right shoulder joint swollen and brownish red in colour. Movements at right shoulder joint restricted;

4. A contusion bluish in colour 3" in diameter on the outer aspect of upper half of right arm;

5. A contusion 6" $\times \frac{1}{2}$ " with raised edges situated diagonally across the right side back, the outer end towards the axilla and the upper end towards the neck. Brownish in colour;

6. Whole of the right hand swollen and tender brownish red in colour;

7. A lacerated injury 2" $\times \frac{1}{2}$ " scalp deep situated on the left parietal eminence 4" above Pinna of left ear. Clotted blood seen in the wound and is placed transversely;

8. An incised wound transversely placed on the right half of centre of occiput at the back of head $1\frac{1}{2}$ " $\times \frac{1}{4}$ " scalp deep. Clotted blood found in the wound. X-ray report disclosed M. C. dislocation of right acromio clavicular joint.

7. Gottipulla Seshayya, aged 50 years, accused No. 3, had two injuries on his person one of which was incised wound scalp deep situated diagonally on the front half of right parietal bone. Dying declaration was not considered necessary and he was discharged from the hospital on the 16th September, 1961, after six days.

8. Gottipulla Subba Rao, aged 48 years, accused No. 4 had a brownish red contusion with raised edges and small abrasion over it situated transversely on the right forearm, $\frac{1}{3}$ of which was swollen and tender. There was a fracture of the bone below. He also remained in the hospital from September 10, to September 16.

9. Korlagunta Narayana Rao, aged 35 years, accused No. 5 had four injuries on his person including a lacerated injury 2" $\times \frac{1}{2}$ " scalp deep on the front of the

right parietal bone, $\frac{1}{2}$ " to the right of mid line of skull and another similar injury 1" $\times \frac{1}{2}$ " scalp deep on a contusion 3" in diameter, brownish red in colour at the back of junction of both parietal bones in between parietal eminences.

10. Shaik Madarsaheb, aged 25 years, accused No. 6, had five injuries on his person including a contusion. He too remained in the hospital for six days upto September 16, 1961.

11. Thota Seetharamayya, aged 40 years, accused No. 7 had a simple injury on his right hand ring finger.

12. Accused No. 8, Thota Subba Rao, aged 22 years had only a contusion on right buttock.

13. These injuries quite clearly suggest that the party of occupiers did not consist of a few unarmed persons who had no design to forcibly remove the bund. It is the prosecution case that the accused were determined not to allow the bund to be removed without an order from the Government authorities and that they were prepared to use force to protect the bund. The accused were also armed with the gun belonging to accused No. 1 and this was fully known to the occupiers. In this background it is not possible to accept the story that the prosecution witnesses had gone to the Kunta unarmed and it was only when they were beaten by the accused persons that they in self-defence snatched the sticks and spears from some of the accused persons and beat up the others with those sticks and spears. Some of the injuries found on the persons of the prosecution witnesses were of course caused by blunt weapons but most of the injuries were, according to the medical evidence caused by gun shots.

14. According to the trial Court both parties asserted their respective claims, the occupiers to the use of the land in the Kunta for cultivation and the accused to the use of the Kunta as a source of supply of rain water for irrigating their land and these conflicting rights could not co-exist. When the prosecution witnesses attempted forcibly to remove the bund the trouble flared up. The two factions had also affiliations with two different political parties the occupiers had full support of the Communist Party and accused No. 10 was a member of the Mandal Congress. That Court also did not believe the prosecution version that prosecution witnesses had gone to the Kunta to peacefully persuade the accused persons to remove the

bund. It also held the occupation of the Kunta by the occupiers to be unauthorised after its registration as an irrigation tank. It further held that the bund as it existed on September 5, 1961 had been raised by the accused persons but there were sluices and vents in the southern bund. The Court also found that water from Erracheruvu used to flow into the bund of the Kunta from where it passed on to the fields of the accused Nos. 1 to 4 with the result that the accused persons were justified in raising the bund and if there was any contravention of the Civil Court's injunction the occupiers should have approached that Court for appropriate relief. It was on this line of reasoning that the action of the accused in protecting the bund was upheld. On a consideration of the prosecution evidence the trial Court observed that notwithstanding the denial of his presence at the spot by accused No. 10 it was open to him to say that on the prosecution evidence itself he must be held to have acted in exercise of the right of private defence and so observing that Court expressed its conclusion thus:

"The facts and circumstances elicited in the prosecution evidence referred to above clearly establish that the accused Nos. 1 to 9 were maintaining a right at that time, that the bund was being removed by men on the other side and the men on the other side also inflicted simple and grievous injuries on the accused Nos. 1 to 9. In such a situation it was open either to any of the accused Nos. 1 to 9 or even to the 10th accused to do something to avert further beating. The beating to the extent to which it took place resulted in grievous injuries to some of the accused. Under these circumstances it has to be held that the facts disclose a situation in which the 10th accused can well claim to have acted in the exercise of the right of private defence. Charges 4 to 6, 10 to 13, 15 to 17 against the 10th accused, therefore, fail. Consequently, the charges 7, 8 and 9 against the remaining accused also fail."

15. In regard to the other charges, after discussing the evidence in the case and other material on the record and criticising the failure on the part of the police authorities to take effective and timely measures in advance to prevent the occurrence in question the trial Court came to the conclusion that in regard to the actual beating suffered by the members of both parties the evidence was so

conflicting and their respective versions so distorted that no definite finding could safely be arrived at. All that emerged from the material in the Court's view was that the accused wanted to retain the bund which the prosecution party wanted to remove and the fight ensued. On this view the accused were acquitted.

16. On appeal Basi Reddy, J., who disposed of it in the High Court under Section 429, Criminal Procedure Code felt that the case put forward by the prosecution was substantially true and the case set up by the defence palpably false. According to the learned Judge neither the accused had a right to put up the bund nor had the occupiers a right to encroach on the bed of the Kunta. The injunction order in favour of the accused was only based on the existence of a bund at the time of the order and thus did not entitle the accused to raise a new bund whereas the injunction order in favour of the occupiers restrained the accused persons from interfering with the enjoyment of the Kunta by the occupiers. The accused who had raised the bund and who being fully armed were determined to guard and preserve it by use of force were held by the learned Judge to constitute an unlawful assembly. Accused Nos. 2, 4 and 10 were held to be armed with deadly weapons and therefore guilty of Section 148, Indian Penal Code and the other accused were held guilty under Section 147, Indian Penal Code. The right of private defence was also negatived by the learned Judge. It was observed that this right had not been pleaded by accused No. 10 and on the prosecution evidence the accused had first attacked the mediators on their intervention to prevent the occupiers being beaten up and it was thereafter that P. Ws. 5 and 7 and others beat the accused persons in retaliation. The High Court did not consider it material whether the prosecution witnesses and others had brought with them sticks or had snatched the same from the accused persons and sustenance of injuries by Accused Nos. 1 to 8 in this connection was held not to give rise to any right of private defence. Holding the use of the gun by accused No. 10 to be his individual act independent of the object of the assembly he alone was held guilty of the offence of murder.

17. In our opinion the High Court has misconceived the law in regard to the right of private defence and the appeal has, therefore, to be allowed. The

right of private defence of person and property is recognised in all free, civilised, democratic societies within certain reasonable limits. Those limits are dictated by two considerations: (1) that the same right is claimed by all other members of the society and (2) that it is the State which generally undertakes the responsibility for the maintenance of law and order. The citizens, as a general rule, are neither expected to run away for safety when faced with grave and imminent danger to their person or property as a result of unlawful aggression, nor are they expected, by use of force, to right the wrongs done to them or to punish the wrongdoer for commission of offences. The right of private defence serves a social purpose and as observed by this Court more than once there is nothing more degrading to the human spirit than to run away in face of peril; (*Munshi Ram v. Delhi Administration*, Criminal Appeal No. 124 of 1965, D/- 27-11-1967 = (reported in AIR 1968 SC 702) and *Kishna v. State of Rajasthan*, Criminal Appeal No. 23 of 1960, D/- 30-10-1962 (SC)). But this right is basically preventive and not punitive. It is in this background that the provisions of Sections 96 to 106, Indian Penal Code which deal with the right of private defence have to be construed. According to Section 96 nothing is an offence which is done in the exercise of the right of private defence and under Section 97 subject to the restrictions contained in S. 99 every person has a right to defend; (1) his own body and the body of any other person against any offence affecting the human body and (2) the property whether movable or immovable of himself or of any other person against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass or which is an attempt to commit these offences. The right of private defence, according to Section 99, does not extend to an act which does not reasonably cause the apprehension of death or of a grievous hurt if done or attempted to be done by a public servant acting in good faith etc., and there is also no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. Nor does it extend to the inflicting of more harm than is necessary to inflict for the purpose of defence. Section 100 lays down the circumstances in which the right of private defence of the body extends to the voluntary causing of death or of any other harm to the

assailants. They are: (1) if the assault which occasions the exercise of the right reasonably causes the apprehension that death or grievous hurt would otherwise be the consequence thereof and (2) if such assault is inspired by an intention to commit rape or to gratify unnatural lust or to kidnap or abduct or to wrongfully confine a person under circumstances which may reasonably cause apprehension that the victim would be unable to have recourse to public authorities for his release. In case of less serious offences this right extends to causing any harm other than death. The right of private defence to the body commences as soon as reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed and it continues as long as the apprehension of danger to the body continues. The right of private defence of property under Section 103 extends, subject to Section 99, to the voluntary causing of death or of any other harm to the wrongdoer if the offence which occasions the exercise of the right is robbery, house-breaking by night, mischief by fire on any building etc., or if such offence is, theft, mischief or house trespass in such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if the right of private defence is not exercised. This right commences when reasonable apprehension of danger to the property commences and its duration, as prescribed in Section 105, in case of defence against criminal trespass or mischief, continues as long as the offender continues in the commission of such offence. Section 106 extends the right of private defence against deadly assault even when there is risk of harm to innocent persons.

18. In the case in hand it is undoubtedly true that the accused persons are found to have raised the bund after the rainfall of September 4, 1961. But it is indisputable that the occupiers had ample opportunity of approaching the public authorities concerned if they felt that their right had been encroached upon. It is noteworthy that the accused persons had accomplished the raising of the bund long before the occupiers noticed it. A civil suit had already been instituted by them as far back as 1957 in respect of their right to cultivate the Kunta. In that suit a permanent injunction had been sought against the defendants and their

agents etc., restraining them from interfering with the plaintiff's possession and enjoyment of the disputed land. Damages amounting to Rs. 300/- were also claimed in that suit for loss suffered by the plaintiffs as a result of trespass alleged to have been committed by the defendants on the said land. This suit was pending at the time of the occurrence in question and as observed earlier in February, 1960 both sides had secured injunctions in this suit. The police authorities had also been approached by the occupiers with a complaint against the recent raising of the bund by the accused persons a couple of days prior to the present occurrence. If the Sub-Inspector concerned was guilty of grave dereliction of duty (as in our opinion he clearly was) the higher authorities could easily have been approached by the occupiers and their supporters. Even the Civil Court could have been moved with a complaint that the accused persons were interfering with the occupiers' possession and enjoyment of the kumta. But instead of having recourse to these steps the occupiers and their supporters decided to go to the spot in large numbers fully determined to remove the bund by use of force. When this attempt was foiled by the accused persons with show of force the party of the prosecution witnesses mercilessly beat up some of the accused persons who were advanced in age. This conduct on the part of the occupiers and their supporters was, in our opinion, sufficient, on the facts and circumstances of this case, to give rise to a reasonable apprehension in the mind of accused No. 10 that the victims of this assault would have been killed had he not exercised the right of private defence. The use of the gun by accused No. 10 against the members of the opposite faction would thus seem to be justified. It may be recalled that accused No. 1 aged about 60 years, who is the father-in-law of accused No. 10 had received as many as 10 injuries mostly on vital parts of the body and accused No. 2 about 50 years old had also been subjected to severe beating. In a situation like this it is not possible for an average person whose mental excitement can be better imagined than described, to weigh the position in golden scales and it was, in our opinion, well-nigh impossible for the person placed in the position of accused No. 10 to take a calm and objective view expected in the detached atmosphere of a Court, and calculate with

arithmetical precision as to how much force would effectively serve the purpose of self-defence and when to stop. It appears that the persons against whom the gun was used were the real aggressors from whom accused No. 10, agitated in mind as he must be at that time, apprehended grave danger to the lives of the other accused persons and ultimately to himself. We are, therefore, satisfied that accused No. 10 was fully justified in using his gun in exercise of the right of private defence against the party of the prosecution witnesses who had come to the spot in support of the occupiers to use force in removing the bund and who actually did use it and mercilessly beat up the accused persons and that accused No. 10 did not exceed this right.

19. The fact that the plea of self-defence was not raised by accused No. 10 and that he had on the contrary pleaded alibi does not, in our view, preclude the Court from giving to him the benefit of the right of private defence, if, on proper appraisal of the evidence and other relevant material on the record, the Court concludes that the circumstances in which he found himself at the relevant time gave him the right to use his gun in exercise of this right. When there is evidence proving that a person accused of killing or injuring another acted in the exercise of the right of private defence the Court would not be justified in ignoring that evidence and convicting the accused merely because the latter has set up a defence of alibi and set forth a plea different from the right of private defence. The analogy of estoppel or of the technical rules of civil pleadings is, in cases like the present, inappropriate and the Courts are expected to administer the law of private defence in a practical way with reasonable liberality so as to effectuate its underlying object, bearing in mind that the essential basic character of this right is preventive and not retributive. The approach of the High Court in this matter seems to us to be erroneous. We accordingly allow the appeal and acquit the appellants.

Appeal allowed.

AIR 1970 SUPREME COURT 1089
(V. 57 C 230)

(From: Andhra Pradesh)

S. M. SIKRI AND G. K. MITTER, JJ.

Bashir Ahmad and others. Appellants v. Government of Andhra Pradesh, Respondent.

Civil Appeal No. 1159 of 1967, D/- 19-11-1969.

Contract Act (1872), Section 32 — Contingent contract — Government of Hyderabad purchasing plaintiff's book of medicinal prescriptions, with a view to start limited company for manufacture and sale of unani medicine — Part payment for the book made to plaintiff and possession of book taken — Proposal to form company not materialising — Suit by plaintiff for payment of balance of consideration — Contract held not contingent on event of floating company — Plaintiff held had not undertaken to form company. Judgment of Andh. Pra. H. C. Reversed.

Government of H. E. H., the Nizam had decided to purchase the plaintiff's book of unani medicinal prescriptions and start manufacture of medicines. It was ordered by the Nizam that the book of prescriptions be purchased and a public limited company be floated to run the medicinal factory, that the plaintiff be paid Rs. 50,000 in cash and Rs. one and half lakh be invested on behalf of the plaintiff in the capital of the company. In obedience to the firman Rs. 50,000 were paid to the plaintiff and the possession of the book of prescriptions "Tohfa-e-Osmania" obtained. The proposal of floating a company did not materialise and a person who was appointed as managing director of the proposed company was relieved of his post. But it appeared that the managing director had not obtained any formal charge because the company had not taken any separate existence. The plaintiff was continued to be paid an allowance of Rs. 800/- P. M. in accordance with the firman, till 1953 when the payment was stopped. On July 6, 1953 the book was returned to the plaintiff who however, refused to take it. The plaintiff filed a suit against the Government of Andhra Pradesh for recovery of Rs. 1,40,000 on allegation that the defednant Hyderabad State had agreed to take over a concern run by the plaintiff and a book of prescriptions named "Tohfa-e-Osmania" and in pursu-

ance of that agreement Rs. 50,000 had been paid to the plaintiff but the balance had remained outstanding. He further claimed arrears of allowance which was due to him under the agreement. The State Government made a counter claim and prayed for a decree for O. S. Rs. 50,000, the money which had been already paid in pursuance of the alleged agreement, on the ground that the proposal to form a company did not materialise due to the default of the plaintiff who it was alleged had taken the responsibility for floating the company.

Held after going through the circumstances and the various firmans that it was not a part of the agreement that the plaintiff had to float the company. Government had in pursuance of the scheme appointed a Managing Director of the proposed company and had purchased the book "Tohfa-e-Osmania" and the property in it passed to the Government. Though the book was brought for the company to be floated, this did not make the contract contingent. The Government chose to carry out the contract piecemeal and proceeded to buy the book and make an advance of Rs. 50,000. The balance of Rs. 1,50,000 according to the firman had to be invested on his behalf in the capital of the company. But if the company could for some reason not be floated the plaintiff did not lose his right to enforce the contract. As far as the book "Tohfa-e-Osmania" was concerned it was clear that the Government in part performance of the agreement took delivery of the book and accordingly must pay the price mentioned in the agreement. (Para 18)

Held further that there was no material to show that the plaintiff's statement in a letter that he would sell shares for Rs. 5 lakhs was part and parcel of the original agreement. He might have stated this in order to speed up the formation of the company, but it in no way could be said to form part of the agreement which had nearly three years earlier been partly performed. Judgment of Andh. Pra. H. C., Reversed. (Para 20)

The Judgment of the Court was delivered by

SIKRI, J.: This appeal by certificate granted by the High Court of Andhra Pradesh is directed against its judgment and decree setting aside the decree passed by the Trial Court and dismissing the suit filed by the plaintiff, Hakim Mir Anwar Ahmed, now deceased. The ap-

peal is by the plaintiff's legal representatives.

2. The plaintiff filed a suit for the recovery of O. S. Rs. 1,40,000 on the allegation that the defendant, the Hyderabad State Government had agreed to take over a concern being run by the plaintiff and a book of prescriptions named "Tohfa-e-Osmania", and in pursuance of that agreement Rs. 50,000 had been paid to the plaintiff but the balance had remained outstanding. He further claimed arrears of allowance which was due to him under the agreement.

The State Government made a counter-claim and prayed for a decree for O. S. Rs. 50,000, the money which had been already paid in pursuance of the alleged agreement.

3. The Trial Court passed a decree for a sum of O. S. Rs. 70,000 and dismissed the counter-claim preferred by the defendant. The High Court, as mentioned earlier, dismissed the plaintiff's suit in toto and decreed the counter-claim of the defendant.

4. The Trial Court had framed a number of issues but we are only concerned with issues 6, 7 and 8, which are to the following effect:

"6. Was there a completed and concluded contract enforceable under law and has the Plaintiff any cause of action? What is the effect on this case of payment of a lump sum of Rs. 50,000 and a salary of Rs. 500 per month to Anwar Ahmad by the Government?"

7. Is the defendant Government entitled to receive the amounts paid to the Plaintiff. If so to what extent?

8. Is the Plaintiff entitled to any amounts or damages and if so to what extent?"

5. The relevant facts for the determination of these issues are as follows. It is common case that H. E. H. the Nizam visited Delhi in or about 1936 and there he happened to meet the plaintiff and invited him to Hyderabad. The plaintiff had been working with the late famous Hakim Ajmal Khan Sahab. The idea of H. E. H. the Nizam was that the plaintiff would be a great asset in the field of Unani medicine in the State of Hyderabad. The plaintiff accordingly went to Hyderabad and started his Dawakhana. On 1st Safar 1355 H, the Chief Secretary wrote to the plaintiff that H. E. H. the Nizam would inaugurate the plaintiff's factory to be called "Mukzanul Advia Majeediya". It appears that

H. E. H. the Nizam's grand-son was known as Majeedi Pasha. H. E. H. the Nizam also promised to give sufficient grant to the Dawakhana when the question of reorganisation of Dawakhana was decided. Arrangements were made for the inauguration and the list of persons to be invited settled.

6. On 26th H. Jami 1361 H, H. E. H. the Nizam issued an order suggesting that something be done for Hakeem Anwar Ahmed who had suffered loss on account of dearness of articles etc. H. E. H. finally concluded:

"Finally I think it necessary to say some thing more that is, this person is an expert in the art of medicine from the period of the late Hakim Ajmal Khan who had full confidence in his work and no doubt the medicines prepared by him are rare and unavailable in our days which were prepared in specified medical way."

In this order H. E. H. the Nizam also suggested that a Committee be appointed constituting one member of the Finance Department, the other from the Military Department and the third from the Nazim Medical Service and this Committee be ordered to submit its report within one month to the concerned department in the Council considering all the aspects now to save this Makhyan from the devastations of time.

7. In pursuance of this directive the Committee met on July 29, 1942, and suggested a certain scheme. These suggestions were further modified in a meeting dated July 31, 1942. The suggestions were conveyed to the plaintiff and he was asked to submit his own proposals for the consideration of the Committee. In a meeting on August 19, 1942, the Committee decided that a company should be floated and the name of the proposed company would be "Magzen Majeedia Advia Limited". We may reproduce para 2 of this proposal:

"The issued capital of the concern shall be rupees two lakhs, out of which the Government shall purchase 55% of the shares and the remaining 45% of the shares shall be earmarked for the public and out of latter shares for Rs. 10,000 shall be allotted to Moulvi Anwar Ahmed Sahab which shall be deemed to be the compensation for the technical services which he may render and he shall give all his medical formulas to the company." We need not mention the other details regarding the management. It was also

suggested that the samans (articles) present in the Dawakhana of the plaintiff would be taken into possession after ascertaining their value and the shares of the same value would be allotted to him which shall be in addition to the shares of Rs. 10,000. It was also provided that the plaintiff would get a sum of Rs. 375 per mensem towards his remuneration.

8. The plaintiff agreed to these proposals but suggested that experts be consulted in connection with the scheme, and he expressed preference for the Makhasan being nationalised. A memorandum was submitted to H. E. H. the Nizam and he was pleased to issue the following order in September, 1943:

"In view of the opinion of the council the proposals submitted by the committee appointed for the purpose of receiving the Makzan Advia Majeedia which is part and parcel of the Sadar Shafakhana Nizamia from the "Dustburd Zamana" (i. e. from the vicissitudes of time) are hereby approved. Action may be taken accordingly. It is further ordered that the said Dawakhana (Makzan Advia Majeedia Limited) should always be run on commercial lines under the supervision of the Government. Arrangements may be made for the purchase of the medicines prepared by the said Dawakhana, not only by the Government Hospitals but also by the public both in the State and outside the State and all the formulas of Hakim Anwar Ahmed should be obtained for the said Limited Company and I may be informed of the compensation to be paid to the said Hakim Ahmed for the same and the case may be completed after the end of Ramzan because it is highly necessary that this matter be decided during the lifetime of the said Anwar Ahmed since he has been of infirm health most of these days."

9. In compliance with the above orders a committee was appointed for determining the compensation for goodwill, compensation for the formulas and an assessment of the value of the existing assets of the Factory. The Committee, considering that the prescriptions were being purchased for a company, fixed the compensation at Rs. 1,20,000. This compensation was computed by considering the profits which used to be derived annually. The total compensation determined was two lakhs and the method of payment was recommended as follows:

"Out of this amount Hakim Meer Anwar Ahmed will be paid in cash a sum

of rupees forty thousand as per the orders of the H. E. H. the Nizam and the balance of rupees one lakh and sixty thousand will be paid to him in the shape of shares in the proposed company. In view of the circumstances stated above the new company i. e. Magzan Advia Majeedia (Limited) will be started with a proposed capital of rupees ten lakhs. Out of which the issued capital will be rupees five lakhs and out of the same shares worth rupees one lakh and sixty thousand shall be allotted to Hakim Meer Anwar Ahmed and the shares for the balance of the capital shall be allotted to the public."

The Finance Minister remarked that all the payments to Hakim Anwar Ahmed should be made in cash except those representing the purchase price of stock for which shares of the same value will be allotted to him out of the company's share capital. The Council of Ministers suggested that the Government should purchase one-third of the issued capital shares of the proposed company. All these proposals were submitted to H. E. H. the Nizam for orders. H. E. H. the Nizam issued the following Firman, on July 2, 1945:

"In this matter the proposals of the council submitted in the regard are appropriate. Action may be taken accordingly. However Hakeem Anwar Ahmed shall be paid Rs. 500 instead of Rs. 400 per month (from 1st of Sharawar) subject to the condition proposed and out of the compensation agreed to be paid to him a sum of rupees fifty thousand in cash instead of rupees forty thousand may be paid to him and a receipt obtained. The remaining sum of rupees one and half lakh should be invested on his behalf in the capital of the company.

In any way all the matters should be settled within two weeks and the result should be intimated to me. Now-a-days Hakeem Anwar Ahmed is bed-ridden with heart trouble. Hence it is highly necessary to decide these matters in his lifetime since this matter has been pending for a long time."

10. In obedience to this Firman, on August 1, 1945, a cheque for Rs. 50,000 was sent to the plaintiff and he was asked to send the book "Tolifa-e-Osmania". On August 3, 1945, the plaintiff sent the book in a sealed cover. However, nothing further happened regarding the floating of the company.

11. On April 6, 1948, the plaintiff wrote to the Secretary to the Govern-

ment, Medical Department, suggesting that the cash compensation which was to be paid to him be increased. He also wanted the compensation for the medicines and the goodwill to be revised. He suggested that the entire compensation may be paid in cash. In the course of this letter he said:

"Thus there are some practical difficulties in the way of the business of 'Makhzan' which it is impossible to overcome in the near future. Apart from this there is no likelihood of the availability of capital. I had, on the basis of the promises made by my friends assured that at least shares of the value of (5) lakhs would be sold through me and as such I had filed a list of the expected purchasers but I regret to say 'That cup is broken and that cup bearer is no more.'

12. It is on this passage that the defendant rests his alternative case that the whole contract fell through because the plaintiff was not able to fulfil his part of the contract.

13. On June 15, 1943, the Secretary to Government, Medical Department, submitted an Arazdasht to H. E. H. the Nizam for information. In this he submitted that the conditions were not favourable for converting the Magzan Advia Majeedia into a limited factory and the matter may be postponed for the present and the status quo maintained. It appears that one Syed Ahmed Mohiuddin was appointed Managing Director of the proposed limited company and in this Arazdasht it was suggested that he be relieved of the post.

14. On June 15, 1948, the plaintiff wrote saying that Moulvi Syed Ahmed Mohiuddin, Managing Director, Maksan Advitya Majeedia (Limited) had not obtained any formal charge because the Company had not taken any separate existence till then.

15. The defendant continued to pay the allowance of Rs. 500 to the plaintiff till 1953. On June 25, 1953, the Secretary to Government, Medical and Health Department, directed that (1) steps to recover the sum of Rs. 50,000 paid to Hakeem Anwar Ahmed may be dropped; (2) the book of prescriptions and other papers received from him in consideration of the amount of Rs. 1,20,000 proposed to be paid to him may also be returned; and (3) the payment of an allowance of Rs. 500 per month which is now being made may be stopped forthwith. On July 6, 1953, the book was

returned to the plaintiff but the plaintiff refused to receive it.

16. The learned counsel for the appellant, Mr. Danial Latifi, contends that there was an outright sale of the book and the defendant could not unilaterally return the book after the property in the goods had vested in the defendant.

17. The learned counsel for the respondent, Mr. Reddy, contends that (1) there was no contract between the plaintiff and the Government; (2) assuming that there was a contract it was a contingent contract, the contingency being the formation of the company; and (3) the contract was a package deal and the integrated scheme provided for compensation for the book, goodwill and stock on the condition that it would be the business of the plaintiff to float the company and as he failed to sell shares of the company to the extent of Rs. 5 lakhs, the scheme fell through due to plaintiff's default.

18. It seems to us that the Government definitely entered into an agreement with the plaintiff. The terms of the agreement are contained in the proposals as modified by H. E. H. the Nizam in the Firman dated July 2, 1945. In short, the agreement was that the Government would buy the book of prescriptions (Tohfa-e-Osmania), goodwill and existing assets of the factory for Rs. 2 lakhs for a company to be floated by it. It was not a part of the agreement that the plaintiff had to float the company. The Government had in pursuance of the scheme appointed a Managing Director of the proposed company. Further the Government in pursuance of the agreement purchased the book (Tohfa-e-Osmania) and the property in it passed to the Government. It is true that the book was bought for the company to be floated, but we are unable to appreciate how this makes the contract contingent. It is no doubt true that the contract was at one stage a package deal but the Government chose to carry on the contract piecemeal and proceeded to buy the book and make an advance of Rs. 50,000. The balance of Rs. 1,50,000, according to the Firman dated July 2, 1945, had to be "invested on his behalf in the capital of the company". But if the company could for some reason not be floated the plaintiff did not lose his right to enforce the contract. We are not concerned with the value of goodwill and other assets in this case now, but as far as the book "Tohfa-e-Osmania" is concerned it is clear

that the Government in part performance of the agreement took delivery of the book and accordingly must pay the price mentioned in the agreement.

19. Regarding the third point urged on behalf of the respondent, there is no material to show that the statement contained in plaintiff's letter dated April 6, 1948, that he had assured that he would sell shares for Rs. 5 lakhs was part and parcel of the original agreement. He may have stated this in order to speed up the formation of the company, but it in no way can be said to form part of the agreement which had nearly three years earlier been partly performed.

20. In the result the appeal is allowed, the decree of the High Court set aside and the decree of the Trial Court restored. The appellants will have their costs in this Court but the parties will bear their own costs in the High Court.

Appeal allowed.

(D) Penal Code (1860), Section 99 — No right of private defence when there is ample opportunity of having recourse to authorities. (Para 13)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 488 (V 55) =
(1968) 1 SCR 505, Lakshmiratan Engineering Works Ltd. v. Asst. Commr., Sales Tax 10
(1964) AIR 1964 SC 260 (V 51) =
(1964) 4 SCR 982 = 1964 (1) Cri LJ 152, Kaushalya Rani v. Gopal Singh 7
(1961) AIR 1961 Bom 154 (V 48) =
ILR (1961) Bom 135 = 1961 (1) Cri LJ 637 (FB), Anjanabai v. Yeshwantrao Daulatrao 8

The following Judgment of the Court was delivered by

SIKRI, J.: Hari Ram, respondent, filed a complaint against Lala Ram, appellant, alleging that Lala Ram had attacked him with a Kassi on June 10, 1964, at about 6 p. m. Poonaram, who was standing there prevented the blow from falling on Hari Ram by receiving it on his hand. The respondent, however, made a second attack and inflicted an injury on the left shoulder of Hari Ram. Hari Ram and Poonaram got themselves examined by the Civil Assistant Surgeon of the city and the injury report was submitted along with the complaint.

2. The learned Magistrate acquitted the accused. Hari Ram filed an application under Section 417 (3) of the Criminal Procedure Code for leave to appeal against the order of the Magistrate. Leave was granted by the High Court, and thereupon Hari Ram filed the appeal. The High Court accepted the appeal and convicted the appellant, Lala Ram, under Section 324, I. P. C., and sentenced him to four months' rigorous imprisonment.

3. The attention of the High Court was not drawn to the Probation of Offenders Act, 1958, during the hearing of the appeal but subsequent to the delivery of the judgment an application was filed under Section 561-A, Cr. P. C., read with Sections 3, 4 and 6 of the Probation of Offenders Act. It was alleged in the application that the appellant was 20 years old and the High Court should have given him the benefit of the Probation of Offenders Act. The High Court did not accede to this application. The appellant having obtained special leave from this Court, the appeal is now before us.

4. The main contention of law which

AIR 1970 SUPREME COURT 1093 (V 57 C 231)

S. M. SIKRI, G. K. MITTER AND
P. JAGANMOHAN REDDY, JJ.

Lala Ram, Appellant v. Hari Ram, Respondent.

Criminal Appeal No. 191 of 1967, D/-17-10-1969.

(A) Limitation Act (1963), Section 12 (2) — Section 417 (4), Criminal P. C. itself prescribes a period of 60 days limitation for application for special leave under Section 417 (3) — It is a period of limitation within meaning of Section 12 (2) — Legislature could provide for such period in Code itself — Insertion of separate article in Limitation Act was not necessary — AIR 1964 SC 260 and AIR 1961 Bom 154 (FB), Ref. to — (Criminal P. C. (1898), Section 417 (4)). (Para 9)

(B) Criminal P. C. (1898), S. 417 (4) — 'Shall be entertained' — Word 'entertain' means 'file or received by the Court' — It has no reference to actual hearing of application for special leave to appeal. (Para 10)

(C) Constitution of India, Article 136 — High Court holding that Magistrate was not entitled to reject evidence of independent eye-witnesses — No interference with finding of fact by Supreme Court in absence of any reason being shown. (Para 12)

arises before us is whether the appeal to the High Court was filed within limitation. The application for leave to appeal to the High Court under Section 417 (3) against the order of acquittal of the Magistrate, dated August 31, 1965, was filed on November 1, 1965. It was claimed by the applicant that two days were necessary for obtaining the certified copy of the order of the Magistrate and the applicant was entitled to deduct these two days taken for obtaining the certified copy of the order of the Magistrate. There is no doubt that the application would be in time if these two days are deducted. But the learned counsel for the appellant contends that Section 12 (2) of the Indian Limitation Act is not attracted to applications under Sec. 417 (3), Cr. P. C. Section 417 (3) and (4) read as follows:

"417. (1) Subject to the provisions of sub-section (3), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

(3) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(4) No application under sub-sec. (3) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order of acquittal...."

5. It is contended that the period of 60 days mentioned in Section 417 (4) is not a period of limitation within the meaning of Sec. 12 (2) of the Limitation Act. Section 12 (2) of the Limitation Act reads as follows:

"12 (2). In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded."

6. The learned Counsel says that what Section 417 (4) provides is a prohibition and it bars the jurisdiction of the

High Court to deal with the application if a period of 60 days has expired from the date of the order of acquittal.

7. In our opinion there is no force in these contentions. In *Kaushalya Rani v. Gopal Singh*, (1964, 4 SCR 982 at p. 987 = (AIR 1964 SC 260 at p. 262) this Court, while dealing with the question whether Section 5 of the Limitation Act applies to applications under Section 417 (3) described this period of 60 days mentioned in Section 417 (3) as follows:

"In that sense, this rule of 60 days bar is a special law, that is to say, a rule of limitation which is specially provided for in the Code itself, which does not ordinarily provide for a period of limitation for appeals or applications."

This Court further observed:

"Once it is held that the special rule of limitation laid down in sub-section (4) of Section 417 of the Code is a 'special law' of limitation, governing appeals by private prosecutors, there is no difficulty in coming to the conclusion that Sec. 5 of the Limitation Act is wholly out of the way, in view of Section 29 (2) (b) of the Limitation Act."

8. This Court approved the judgment of the Full Bench of the Bombay High Court in *Anjanabai v. Yeshwantrao Daulatrao*, 1LR (1961) Bom 135 at p. 137 = (AIR 1961 Bom 154 at p. 155) (FB). The Full Bench of the Bombay High Court had observed in *Anjanabai's* case, AIR 1961 Bom 154 (FB):

"Sub-section (4) prescribes a period of limitation for such an application. It states that no such application shall be entertained by the High Court after the expiry of sixty days from the date of the order of acquittal. This period of limitation is prescribed not for all appeals under the Criminal Procedure Code, or even for all appeals from the orders of acquittal. It is prescribed only for applications for special leave to appeal from orders of acquittal. It is therefore a special provision for a special subject and is consequently a special law within the meaning of Section 29 (2) of the Limitation Act."

9. It is quite clear that the Full Bench of the Bombay High Court and this Court proceeded on the assumption that Section 417 (4) of the Criminal Procedure Code prescribes a period of limitation. The learned counsel, however, contends that there was no discussion of this aspect. Be that as it may, it seems to us that Section 417 (4) itself prescribes a period of limitation for an application to,

be made under Section 417 (3). It was not necessary for the legislature to have amended the Limitation Act and to have inserted an article dealing with applications under Section 417 (3), Criminal Procedure Code; it was open to it to prescribe a period of limitation in the Code itself.

10. The learned counsel also suggests that the word "entertain" which occurs in Section 417 (4) means "to deal with or hear" and in this connection he relies on the judgment of this Court in *Lakshmi Rattan Engineering Works v. Asst. Commr., Sales Tax*, (1968) 1 SCR 505 = (AIR 1968 SC 488). It seems to us that in this context "entertain" means "file or received by the Court" and it has no reference to the actual hearing of the application for leave to appeal; otherwise the result would be that in many cases applications for leave to appeal would be barred because the applications have not been put up for hearing before the High Court within 60 days of the order of acquittal.

11. In the result we hold that the application under Section 417 (3) to the High Court was within time.

12. The learned counsel then contends that the High Court should not have interfered with the order of acquittal passed by the Magistrate. He has taken us through the evidence of Poonaram who was injured and the statement of P. W. 3, Ananda, who was present and who seems to be an independent witness. We agree with the High Court that the Magistrate was not entitled to reject the evidence of the eye-witnesses. No reason has been shown to us why we should interfere with the finding of fact arrived at by the High Court.

13. The learned counsel further contends that no offence was committed because the accused had a right of private defence of property. Assuming that he had a right of private defence of property he had ample opportunity of having recourse to the authorities and there was no need for the appellant to have taken the law into his own hands.

14. The only question that remains now is the question whether the benefit of Section 6 of the Probation of Offenders Act should be extended to the appellant. In spite of opportunity being given no good proof has been furnished to establish that the appellant was at the relevant time under the age of 21 years.

15. For the aforesaid reasons the appeal fails and is dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 1095
(V 57 C 232)

(From: Calcutta)*

S. M. SIKRI AND G. K. MITTER, JJ.

General Manager, Eastern Railway and another, Appellants v. Jawala Prosad Singh, Respondent.

Civil Appeal No. 1186 (N) of 1967, D/- 20-11-1969.

Indian Railway Establishment Code Vol. I, Rules 1703 to 1713 — Procedure under — No scope in Rules for member being guided by impression formed by him about witness — No principle of natural justice is violated when one member of Committee is substituted by another during enquiry.

The procedure laid down in Rr. 1703 to 1713 does not leave any scope for the guidance of a member of an Inquiry Committee consisting of more than one person by the impression formed by him about the truthfulness or otherwise of a particular witness examined during the inquiry. The oral evidence of all the witnesses tendered during the enquiry is recorded in writing. Where oral evidence is recorded in the presence of three persons constituting the Inquiry Committee, any impression created by the demeanour of a particular witness on the mind of any one member cannot affect the conclusion afterwards arrived at jointly by them. The duty of the Inquiry Committee ends with the making of the report. The Disciplinary Authority has to consider the record of the inquiry and arrive at its own conclusion on each charge. Whatever may be the impression created by a particular witness on the mind of one member of the committee, the same is never translated into writing and the Disciplinary Committee merely goes by the written record after giving a personal hearing to the railway servant if he asks for it. In such a state of affairs a change in the personnel of the Inquiry Committee after the proceedings are begun and some evidence recorded cannot make any difference to the case of the railway servant.

*(Original Order No. 563 of 1964, D/- 13-6-1966 — Cal.)

CN/DN/A71/70/DHZ/A

No known principle of natural justice is violated when one member of the committee is substituted by another. AIR 1959 SC 308, Dist. (Paras 6, 7, 9)

Cases Referred: Chronological Paras (1964) AIR 1964 SC 364 (V 51)=

(1964) 4 SCR 718, Union of India v. M. C. Coel 6

(1959) AIR 1959 SC 308 (V 46)= 1959 Supp (1) SCR 319, Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation 3, 8

Dr. V. A. Savid Muhammad, Senior Advocate (Mr. S. P. Nayar, Advocate, with him), for Appellants; M/s. K. Rajindra Choudhari Kanwal Singh and Mrs. Kausalya, Advocates for Respondent.

The following Judgment of the Court was delivered by

MITTER, J.—The question involved in this appeal is, whether the whole proceedings of the Inquiry Committee constituted to inquire into the charges of misappropriation and handling cash belonging to Government without authority were vitiated by the violation of the principles of natural justice with the result that the order of dismissal passed subsequently on the respondent could not be sustained.

2. The facts necessary for the disposal of the appeal are as follows. The respondent used to serve as treasure guard in the Eastern Railway. A charge-sheet was issued by the Chief Cashier of the Railway on August 3, 1959 wherein allegations of misappropriation of cash belonging to Government were levelled against him. An Inquiry Committee consisting of three persons, namely, A. K. Roy Choudhury, Divisional Accounts Officer, Mani Chakraborty, Divisional Personnel Officer and R. N. Chatterjee, Divisional Engineer, was constituted to inquire into the charges. The charge-sheet had been issued after a fact finding committee of the very same persons had looked into the matter. After the proceedings of the Inquiry Committee had gone on for some time and some witnesses were examined A. K. Roy Choudhury was transferred to some other place and the vacancy in the committee was filled up by R. N. Vakil, his successor in office. It is common ground that the proceedings were not started afresh but were continued from the stage at which A. K. Roy Choudhury had dropped out. The committee submitted a report finding the respondent guilty of all the three charges framed against him. On 1st February,

1961 the Chief Accounts Officer, Eastern Railway issued the second show cause notice and by an order dated March 20, 1961 he was dismissed from service. The respondent's appeal to the General Manager of the Railway was unsuccessful. He thereupon moved the High Court and a learned Single Judge quashed the order of dismissal. A Division Bench of the High Court dismissed the appeal of the Union of India. Hence the present appeal by special leave.

3. The Division Bench of the High Court took the view that where the persons who decided the matter finally were not the identical persons who had heard the witnesses at least in respect of a part of the evidence, the departmental proceedings were vitiated by the violation of the principles of natural justice. Reliance was placed mainly on the decision of this Court in Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation, 1959 Supp (1) SCR 319= (AIR 1959 SC 308). According to the High Court:

"If the enquiring authority has a duty to come to a conclusion as to the guilt of the delinquent upon an evaluation or assessment of the evidence, then it is absolutely necessary that he who should decide the case should hear the evidence. It was impossible to evaluate the evidence of a witness taken on proxy, because one of the salient features of such proceedings is to observe the demeanour of the witness."

The High Court turned down the contention that according to the Discipline and Appeal Rules for railway servants the Disciplinary Authority had to look into the record itself in which case any defect in the Inquiry Committee would not be fatal. The High Court held that if the report of the Inquiry Committee was tainted with illegality then the entire departmental enquiry was vitiated.

4. In our view the judgment of the High Court cannot be supported. Section V of the Indian Railway Establishment Code, Volume I, lays down by several rules the procedure to be followed for imposition of major penalties on railway servants. Under Rule 1708 the inquiry may be held, as far as may be, under Rules 1709 to 1715. Rule 1709 lays down that the Disciplinary Authority must frame definite charges on the basis of the allegations on which the inquiry is proposed to be held and such charges together with a statement of the allegations on which they are based have to be com-

municated in writing to the railway servant who is called upon to submit a written statement of his defence and also to state whether he desires to be heard in person. Such written statement may be submitted either to the Disciplinary Authority or to the Board of Enquiry or inquiring Officer where one has been appointed under Rule 1710. Under the last mentioned rule, the Disciplinary Authority may enquire into the charges itself or it may appoint a Board of Enquiry or an Inquiring Officer for the purpose to be termed the Inquiring Authority. Rule 1711 gives the railway servant the right to inspect and take extracts from official records as he may specify for preparing his defence. The inquiry procedure is set forth in Rule 1712. This rule lays down that an inquiry has to be made into the charges which are not admitted after the filing of the written statement. At the inquiry, a definite charge in writing must be framed and explained to the railway servant in respect of each offence which had not been admitted by him and the evidence in respect of it along with any evidence which he may adduce in defence must be recorded in his presence. The accused railway servant may present his case with the assistance of another railway servant. Sub-rule (3) of the rule provides:

"The Inquiring Authority shall, in the course of the inquiry, consider such documentary evidence and take such oral evidence including cross-examination of the railway servant and witnesses, as may be relevant or material in regard to the charges. The railway servant shall have the opportunity of adducing relevant evidence on which he relies, the evidence of witnesses shall be taken in his presence, he or the person assisting him shall be given the opportunity of cross-examining the witnesses and no materials shall be relied on against him without his being given an opportunity of explaining them." Under sub-rule (4):

"At the conclusion of the inquiry, the Inquiring Authority shall prepare a report of the inquiry, recording its findings on each of the charges, together with the reasons therefor

Under sub-rule (5) the record of the inquiry shall include the charges framed against the railway servant and the statement of allegations furnished to him under Rule 1709, his written statement of defence, if any, the oral evidence taken in the course of the inquiry, the docu-

mentary evidence considered in the course of inquiry, the orders, if any, made by the Disciplinary Authority in regard to the inquiry and a report setting out the findings on each charge and the reasons therefor. Under Rule 1713 the Disciplinary Authority, if it is not the Inquiring Authority, shall consider the record of the inquiry and record its findings on each charge.

5. It is after the observance of all the above formalities that penalty may be imposed under Rule 1704 or Rule 1715.

6. In our opinion, the above procedure does not leave any scope for the guidance of a member of an Inquiry Committee consisting of more than one person by the impression formed by him about the truthfulness or otherwise of a particular witness examined during the inquiry. From the stage antecedent to the framing of the charges everything is recorded in writing: the allegations on which the charges are based are made known to the railway servant and he is called upon to file his written statement after looking into all the relevant records. The oral evidence of all the witnesses tendered during the enquiry is recorded in writing. Where as here the oral evidence is recorded in the presence of three persons constituting the Inquiry Committee, any impression created by the demeanour of a particular witness on the mind of any one member cannot affect the conclusion afterwards arrived at jointly by them. It cannot be suggested that all the three persons would record their impressions separately about the demeanour of a witness and it is quite possible that a particular witness may appear to one member of the committee to be untruthful without his being considered so by the others. The members of the Inquiry Committee cannot record their findings separately but it is their duty to record findings on each of the charges together with the reasons therefor. It is to be noted that the duty of the Inquiry Committee ends with the making of the report. The Disciplinary Authority has to consider the record of the inquiry and arrive at its own conclusion on each charge. Whatever may be the impression created by a particular witness on the mind of one member of the committee, the same is never translated into writing and the Disciplinary Committee merely goes by the written record after giving a personal hearing to the railway servant if he asks for it. Even if the Inquiry Com-

mittee makes a report absolving the railway servant of the charges against him, the Disciplinary Authority may, on considering the entire record come to a different conclusion and impose a penalty. This is amply borne out by a judgment of this Court in *Union of India v. H. C. Goel*, AIR 1964 SC 364 where it was said that neither the findings nor the recommendations of the Inquiry Committee are binding on the Government.

7. In such a state of affairs a change in the personnel of the Inquiry Committee after the proceedings are begun and some evidence recorded cannot make any difference to the case of the railway servant. The record will speak for itself and it is the record consisting of the documents and the oral evidence as recorded which must form the basis of the report of the Inquiry Committee. The Committee is not the punishing authority and the personal impression of a member of the committee cannot possibly affect the decision of the Disciplinary Authority. On a state of affairs like this, we cannot see any reason for holding that any known principles of natural justice is violated when one member of the committee is substituted by another.

8. The observations of this Court in *Cullapalli Nageswara Rao's case*, 1959 Supp (1) SCR 319= (AIR 1959 SC 305) (supra) have no bearing on the facts of the present case. There it was held that if a personal hearing is given by the Secretary of a Department and the Minister of the State has to decide on the notes put up by the Secretary, the procedure defeats the object of personal hearing. The observations at p. 357 (of SCR)= (at p. 327 of AIR) that

"Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear-up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides then personal hearing becomes an empty formality" can have no application to the facts of the case before us. The members of the Inquiry Committee who heard the arguments had the entire record before them and they had to go by the record.

9. In proceedings before ordinary trial Courts of the land both civil and criminal, it is not uncommon to find oral

evidence recorded before more than one Presiding Judge or Magistrate. Common convenience requires it and statutes provide for it. It cannot be suggested that the legislatures have enacted laws in disregard of an elementary principle of natural justice. Besides not unoften witnesses have to be examined on commission. Whenever a witness is so examined, the Judge does not have the benefit of watching his demeanour. The Criminal Procedure Code provides for more than one Magistrate recording the evidence of witnesses. Section 363, Criminal Procedure Code enjoins upon a Sessions Judge or a Magistrate to record such remarks (if any) as he thinks material respecting the demeanour of a witness whilst under examination. Order XVIII, Rule 15 of the Code of Civil Procedure empowers a Judge to treat the evidence recorded by his predecessor in office as if it had been taken down by him or under his direction under the said rule and he may proceed with the suit from the stage at which his predecessor left it, whenever his predecessor-in-office is prevented from concluding the trial of a suit by reason of death or transfer or some other cause. Instances are not rare when such powers have to be used either by a Judge hearing a civil suit or a Magistrate or a Sessions Judge hearing a criminal matter. In the vast majority of cases both civil and criminal, a Judge does not come to any conclusion merely on the impression created by a witness while he is in the witness box. In all matters which go up in appeal, the appellate Court does not have any opportunity of watching the demeanour of the witnesses; it has to go by the record of the case. Of course if any comment is made by the trial Judge about the demeanour of a witness, the Appellate Court takes note of it. But it never guides itself entirely by such comments. The entire evidence has to be looked into and assessed as a whole. Where as here the punishing authority does not hear the evidence but goes by the record of the case the demeanour of a particular witness when giving evidence can have but little meaning and cannot influence the mind of the Disciplinary Authority. In awarding punishment. We therefore hold that the High Court was not right in quashing the order of dismissal on the ground that the report of the Inquiry Committee was vitiated by the violation of any principle of natural justice as stated in the judgment. The appeal is there-

fore allowed and the order of the High Court set aside. There will however be no order as to costs.

Appeal allowed.

AIR 1970 SUPREME COURT 1099
(V 57 C 233)

(From Rajasthan: ILR (1967) 17 Raj 50)
J. M. SHELAT AND C. A. VAIDIALINGAM, JJ.

The State of Rajasthan and another, Appellants v. Fateh Chand and another, Respondents.

Civil Appeals Nos. 1436 and 1437 of 1967, D/- 24-11-1969.

(A) Civil Services — Rajasthan Service Rules (1951), R. 23-A — Interpretation of — Temporary Government servant — Essential qualifications for claiming protection of Rule 23A (2) in matter of termination of his service — Failure to pass examination prescribed under Rule 7, Ministerial Staff Rules — Servant not entitled to benefit of Rule 23A (2) — Termination of service in accordance with Rule 23-A (1) is valid. ILR (1967) 17 Raj 50, Reversed.

Rule 23A dealing with the Government's right of termination of service, must be read along with the relevant rules of recruitment relating to the particular post. So read, Rule 23A (2) protects only those temporary servants who have put in service of more than 3 years, who possess the qualifications for the post and have been appointed in consultation with the Public Service Commission. The expression 'qualifications to the post' in Rule 23A (2) therefore, means qualifications on the satisfaction of which only the person in question could have been recruited to the post. That being so, the term 'qualifications' in that rule must relate to not only academic qualifications in Rule 12 but also other qualifications laid down in the Ministerial Staff Rules. (Para 5)

Rule 23A (2) protects only that class of temporary servants who, due to the exigencies of the service, cannot be made permanent though they have qualified themselves for being so made. It is this class of temporary servants who, due to no fault of theirs and who otherwise would have been made permanent, are equated with permanent servants and whose services can be terminated in the

same manner as those of the permanent servants. (Para 5)

Where a temporary servant of more than three years standing appointed prior to 1957 has failed, in spite of two chances, to pass the examination prescribed by Government Order D/- 5-3-1964 under Rule 7 of the Ministerial Staff Rules, the servant is not entitled to claim the benefit of Rule 23-A (2) and his services can be validly terminated by Government in accordance with Rule 23A (1). ILR (1967) 17 Raj 50, Reversed. (Para 7)

(B) Civil Services — Rajasthan Ministerial Staff Rules (1957), Rules 7 to 12 — Qualifications for recruitment under rules.

Before a person can be recruited, he has to have not only the minimum academic qualifications required under Rule 12, but other qualifications also, namely, nationality, age and the necessity of his having to pass the examination under Rule 7 held on such terms and conditions laid down by Government under that rule. (Para 5)

(C) Civil Services — Rajasthan Ministerial Staff Rules (1957), Rule 7 — Government Order D/- 5-3-1964 — Lower Division Clerks appointed prior to 1957 on temporary basis — Order giving such servants two chances to pass examination under Rule 7 for recruitment — Order directing their services to be terminated in case of their failure — Order is within competence of Government under Rule 7. (Para 6)

(D) Civil Services — Rajasthan Ministerial Staff Rules (1957), Rule 7 Proviso 2 — Amendment of in 1969, dispensing with passing of examination is not retrospective. (Para 7)

The following Judgment of the Court was delivered by

SHELAT, J.— The limited question which arises in these appeals, under special leave, relates to the interpretation of Rule 23A (2) of the Rajasthan Service Rules, 1951.

2. The respondent in C. A. 1436 of 1967 was appointed in 1952 a clerk in the office of the Executive Engineer, Jaipur, on a work-charged basis. In 1955 he was appointed a Lower Division Clerk in the same office temporarily for a period of 6 months but was continued as such even after the expiry of that period. The respondent in C. A. 1437 of 1967 was also appointed on work-charged basis in 1958 and was in 1960 appointed a temporary Lower Division Clerk but was continued as such even after the said period. The

services of both the respondents were terminated under Rule 23A (1) of the said Rules after giving them the requisite one month's notice on the ground that they failed to pass the examination required by Rule 7, Proviso 2, of the Rajasthan Subordinate Offices Ministerial Staff Rules, 1957 and the order dated March 5, 1964 made by the Government in exercise of the power under the said Rule 7, proviso 2 although two chances to appear at the said examination were given to them. The respondents thereupon filed writ petitions in the High Court of Rajasthan challenging the right of the Government to terminate their services on the ground that both of them had the necessary academic qualifications required under the recruitment rules, that they had put in service of more than 3 years as temporary clerks and that therefore their services could only be terminated under Rule 23A (2) in the same manner as the services of a permanent Government servant could be terminated, in other words, by following the procedure laid down in Article 311 (2) of the Constitution.

3. The High Court, on interpretation of Rule 23A of the Rajasthan Service Rules and Rule 7, Proviso 2, of the Ministerial Staff Rules, held (a) that the objects of the two rules were distinct, (b) that Rule 7, proviso 2, did not provide for the consequences of failure of a temporary Government servant to pass the requisite examination, (c) that it would not be proper to indiet into Rule 23A the conditions in and the consequences of Rule 7, proviso 2 and (d) that the term 'qualifications' in Rule 23A (2) meant only the academic qualifications and not any other qualification flowing from Rule 7 of the Ministerial Staff Rules. In this view the High Court held that on account of the respondents having had the academic qualifications as envisaged by Rule 23A (2) and having served as temporary clerks for over 3 years, Clause 2 and not Clause 1 of Rule 23A applied, and therefore, their services could not be terminated except in the manner of a Government servant in permanent service. On this reasoning, the High Court quashed the orders of termination of their services. The result of this order meant that all temporary servants who have put in service for over 3 years would be placed in a position equivalent to that of permanent servants and their services could only be terminated in the same manner as those of the permanent servants, i.e.,

in accordance with the procedure laid down in Article 311 (2).

3A. The question is whether the construction of Rule 23A (2) adopted by the High Court is sustainable.

4. The Rajasthan Service Rules were made in 1951 by the Rajpramukh in exercise of the power under Article 309. A perusal of their contents shows that they are general in character, in that, they apply to all categories of Government servants and deal with their conditions of service. Rule 23A (2) reads:

"The service of a temporary Government servant,

(a) who has been in continuous Government service for more than three years; and

(b) who satisfies the suitability in respect of age and qualifications prescribed for the post and has been appointed in consultation with the Rajasthan Public Service Commission, where such consultation is necessary, shall be liable to termination —

(i) in the same circumstances and in the same manner as a Government servant in permanent service;

xx xx xx xx xx"

These rules clearly do not deal with the classification of Government servants, their recruitment, eligibility or qualifications of recruitment. Obviously, the term 'qualifications' in Rule 23A (2) has to be read and construed in the light of the qualifications relating to the post held by a Government servant as laid down elsewhere. The Ministerial Staff Rules also under Article 309 were first made in 1957 and amended from time to time. Part I of those rules lays down certain general provisions and definitions. Part II consists of Rule 6 only and deals with the strength of the staff and the cadres which are (a) of stenographers, and (b) of different categories of posts therein enumerated which include those of Upper and Lower Division Clerks. Part III deals with recruitment. So far as is relevant, Rule 7 provides that recruitment to the staff shall be made:

"xx xx xx xx xx"

(b) to the general cadre of the Lower Division Clerks from amongst those who pass or have passed the Junior Diploma Course. The remaining vacancies, if any, shall be filled in by a competitive examination to be conducted by Commission."

Proviso 2 of Rule 7 provides:

"that a person who joined service on a temporary basis before 1st January, 1962,

shall be made permanent as a Lower Division Clerk . . . on his/her passing an examination to be held by the Appointing Authority concerned, on such terms and conditions as may be laid down by the Government."

Rule 10 requires that:

"A candidate for appointment to the service must be:—

- (a) a citizen of India, or
- (b) a subject of Sikkim, or
- (c) a subject of Nepal, or of a former French possession in India, or
- (d) a person of Indian origin who has migrated from Pakistan with the intention of permanently settling in India. . . ."

Rule 11 prescribes the minimum and maximum age. Rule 12 deals with academic qualifications and clause 2 thereof lays down that:—

"A candidate for direct recruitment to the category of Lower Division Clerks must have passed the High School or Higher Secondary Examination of the Rajasthan Secondary Education Board, or of a University or Board recognised by the Government for the purpose of this rule, or must possess Hindi or Sanskrit qualifications recognised by the Government as equivalent to that of Matriculation."

Rules 13 and 14 provides for character and physical fitness. Part IV of the rules deals with procedure for direct recruitment and Rule 19 therein provides that the competitive examinations prescribed in Rule 7 shall be held every year at such places as the Commission may decide. Sub-rule (3) of Rule 26 empowers the Government to appoint temporarily Lower Division Clerks from amongst the most suitable candidates available, if no nominee of the Commission is available.

5. Rule 12 thus lays down the minimum academic qualifications required for eligibility to apply for the post of a Lower Division Clerk, while the rules as to passing the examination held under Rule 7, as to nationality, age and physical fitness etc., are other qualifications required for the purpose of recruitment. It follows, therefore, that before a person can be recruited, he has to have not only the minimum academic qualifications required under Rule 12, but other qualifications also, namely, nationality, age and the necessity of his having to pass the examination under Rule 7 held on such terms and conditions laid down by Government under that Rule. These being the different qualifications necessary for a person to be recruited under these

rules, the expression 'qualifications' in Rule 23A (2) of the Rajasthan Service Rules has to be read in the light of the Ministerial Staff Rules, for, it is the latter, and not the former, which provides for the qualifications necessary for recruitment of, among other employees the Lower Division Clerks. The High Court, therefore, was not correct in construing the word 'qualifications' to mean academic qualifications only. Accepting the High Court's interpretation of Rule 23A (2) would mean reading Rule 12 and not the other rules in the Ministerial Staff Rules, which apart from the minimum academic qualifications provide for other necessary qualifications before a person can be recruited. It would furthermore mean that a person having the minimum academic qualifications, without the other qualifications required for recruitment, if only because he is in temporary service for more than 3 years, would be placed under Rule 23A (2) in a position equivalent to that of a permanent servant for purposes of termination of his services. Rule 23A, dealing as it does with the Government's right of termination of service, must be read along with the rules of recruitment relating to the particular post on which the person whose services are sought to be terminated is exercising the power under that rule is serving. So read, Rule 23A (2) protects only those temporary servants who have put in service of more than 3 years, who possess the qualifications for the post and have been appointed in consultation with the Public Service Commission. The expression 'qualifications to the post' in clause 2 of the rule, therefore, means qualifications on the satisfaction of which only the person in question could have been recruited to the post. That being so, the term 'qualifications' in that rule must relate to the qualifications laid down in the Ministerial Staff Rules. There is, therefore, no question, as the High Court believed, of inducting into Rule 23A (2) any additional condition or qualification other than those envisaged by Rule 23A (2). This was the construction canvassed by counsel who appeared before the High Court on behalf of the Government. But the High Court, it would seem, felt difficulty in accepting it because it thought that if that were accepted the result would be that there would be no cases of temporary servants getting the benefit of Rule 23A (2) as all persons temporarily appointed as Lower Division Clerks would have been made permanent once

they had passed the examination prescribed under Rule 7. That reasoning also is not correct. There is no obligation on the Government to make all temporary clerks permanent once they pass the examination prescribed under R. 7. Only those would be made permanent who can be filled into the available permanent vacancies. The rest would have to wait till their turn comes. This is precisely what is provided for by Rule 25. There would, therefore, be temporary servants who, due to the exigencies of the service, cannot be made permanent though they have qualified themselves for being so made. It is this class of temporary servants who, due to no fault of theirs and who otherwise would have been made permanent, are equated with permanent servants and whose services can be terminated in the same manner as those of the permanent servants. There is, therefore, no difficulty of there being no temporary servants getting the protection of Rule 23A (2) as apprehended by the High Court.

6. In pursuance of the power under Rule 7, the Government issued the order dated March 5, 1964 regarding the examination for the Lower Division Clerks appointed on a temporary basis. This became necessary as otherwise there would be temporary clerks appointed before 1957 and those appointed thereafter, the former continuing to be temporary clerks without undergoing the examination necessary under the rules and the latter having to pass the examination under R. 7 for being recruited. So far as the latter class of persons are concerned, they would not be recruited if they were to fail in the examination held under Rule 7 and Rule 19. It appears that since the former were in temporary service already, the Government gave them as a matter of indulgence two chances to pass the examination and directed that their services should be terminated only if they failed to pass even after two trials. The order was competently made as Rule 7 empowers the Government to make such an order. We do not see how any objection can be validly taken against such an order when its object clearly was to require temporary servants recruited prior to 1957 to conform to the requirements of the rules as to recruitment.

7. In our view the respondents did not fall under the category of temporary servants entitled to the benefit of R. 23A (2) as they did not possess the qualifica-

tions there mentioned, i.e., of having passed the examination prescribed under Rule 7. That being so, the Government was entitled to terminate their services under and in accordance with Rule 23A (1). It is true that provision 2 of the said Rule 7 has been amended in 1969 and the passing of the said examination has been dispensed with. But this amendment, not being retrospective, cannot unfortunately be availed of by the respondents.

8. For the reasons aforesaid, the appeals are allowed and the order of the High Court is set aside. But as directed by the order under which special leave was granted, the appellant-State will not only bear its own costs but will also pay the costs of the respondents, such costs being only one hearing fee.

Appeals allowed.

AIR 1970 SUPREME COURT 1102
(V 57 C 234)

(From: Madras)

M. HIDAYATULLAH, C. J., J. C. SHAH,
K. S. HEGDE, A. N. GROVER, A. N.
RAY AND I. D. DUA, JJ.

A. Sanjeevi Naidu etc., etc., Appellants
v. State of Madras and another, Respondents.

Civil Appeals Nos. 397, 400 to 402, 401 to 417, 422 to 441, 451, 1158 to 1161, 1176, 1178-1181, 1204, 1207 and 1407 of 1969, D/- 5-2-1970.

(A) Constitution of India, Article 166 (3) — Allocation of business — Allocation of Transport to one of ministers — Subject of Motor Vehicles Act not allocated to any minister — Held that subject of Motor Vehicles Act was allocated to Transport Minister and that State Transport Undertaking was being run by Transport Ministry. (Para 8)

(B) Constitution of India, Article 166 (3) — Madras Government Business Rules, Rule 23A — Motor Vehicles Act (1939), Section 68-C — Satisfaction of Secretary of the department — There is no delegation of authority of State — Rule 23A is valid.

Under the Constitution, the Governor is essentially a constitutional head and the administration of State is run by the Council of Ministers. The Constitution has authorised the Governor under Article 166 (3) to make rules for the more convenient transaction of business of the

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government of the State and for the allocation amongst its Ministers, the business of the government. All matters excepting those in which Governor is required to act in his discretion have to be allocated to one or the other of the Ministers on the advice of the Chief Minister. Apart from allocating business among the Ministers, the Governor can also make rules on the advice of his Council of Ministers for more convenient transaction of business. He can, not only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function.

The cabinet is responsible to the legislature for every action taken in any of the ministries. That is the essence of joint responsibility. That does not mean that each and every decision must be taken by the cabinet. Neither the Council of Ministers nor an individual Minister can attend to the numerous matters that come up before the Government. Those matters have to be attended to and decisions taken by various officials at various levels. When those officials discharge the functions allotted to them, they are doing so as limbs of the Government and not as persons to whom the power of the government had been delegated.

(Paras 11, 12, 18)

The validity of Rule 23A of the Madras Government Business Rules cannot be challenged on the ground that the opinion requisite under Section 68-C Motor Vehicles Act is to be formed by the Secretary to the Government in the Ministries. The secretary can validly take action under the Rule. AIR 1945 PC 156 & AIR 1962 SC 1183 & AIR 1968 SC 870 & AIR 1967 SC 1815, Relied on.

(Paras 18, 20)

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M/s. K. K. Venugopal, K. R. Nambiar
and A. S. Nambiar, Advocates, (In Civil
Appeals Nos. 397, 398, 400 to 402, 422,

423, 441 and 451 of 1969), Mr. M. C. Chagla, Senior Advocate, (M/s. V. Subramanian, V. T. Gopalan, Smt. Radharani, M/s. C. S. Prakasa Rao and K. Jayaram, Advocates, with him), (In Civil Appeals Nos. 404 to 417, 1179, 1180 and 1407 of 1969), Mr. M. K. Rammurthi, Senior Advocate (Mrs. Shyamala Pappu and Mr. Vineet Kumar, Advocates, with him), (In Civil Appeal No. 1176 of 1969), Mr. R. V. S. Mani, Advocate, (In Civil Appeals Nos. 424 to 428, 1158 to 1161 and 1207 of 1969), Mr. A. K. Sen, Senior Advocate, (M/s. C. S. Prakasa Rao and R. Gopalakrishnan, Advocates, with him), (In Civil Appeals Nos. 429, 431 to 438, 440, 441, 1178 and 1181 of 1969), M/s. C. S. Prakasa Rao, A. R. Ramnathan and R. Gopalakrishnan, Advocates, (In Civil Appeals No. 430 of 1969), M/s. R. Gopalakrishnan and Sudhir Khanna, Advocates, (In Civil Appeal No. 439 of 1969) and C. S. Prakasa Rao, Venugopal and R. Gopalakrishnan, Advocates (In Civil Appeal No. 1204 of 1969), for Appellants; Mr. Niren De Attorney-General-for-India (Mr. A. V. Rangam, Advocate, with him), (In Civil Appeal No. 397 of 1969), Mr. S. V. Gupta, Senior Advocate (Mr. A. V. Rangam, Advocate), (In Civil Appeal No. 400 of 1969) and Remaining matters — Mr. A. V. Rangam, Advocate, for Respondents.

The following Judgment of the Court was delivered by

HEGDE, J.:— These 51 appellants are private stage carriage operators in the State of Tamil Nadu. They have been operating in various routes in that State. Some of those routes are proposed to be nationalised. A draft scheme of nationalisation has been prepared and published under Section 68 (C) of the Motor Vehicles Act (Central Act IV of 1939) (to be hereinafter referred to as 'the Act'). The validity of the draft scheme was challenged by the appellants before the High Court of Madras under Article 226 of the Constitution. Incidentally the validity of some of the provisions of the amending Act XVIII of 1968 (Madras Act) also came to be challenged in those petitions. A Division Bench of the Madras High Court consisting of Anantanarayanan, C. J. and Natesan, J., have dismissed those petitions. As against the decision of the High Court these appeals have been brought on the strength of the certificates issued by the High Court.

2. In these appeals we are primarily concerned with the validity of the draft scheme under challenge. The ground on which it is challenged is that the opinion

requisite under Section 68 (C) of the Act was not formed by the State Government but by the Secretary to the government in the Industries, Labour and Housing Department, acting in pursuance of the powers conferred on him under Rule 23 (A) of the Madras Government Business Rules (to be hereinafter referred to as 'the Rules'). The contention of the appellants is that the said rule is ultra vires the provisions of the Constitution. There is no dispute that if the rule in question is valid, the challenge directed against the draft scheme must fail. The High Court has opined that that rule is a valid rule. It is the correctness of that conclusion that is primarily in issue in these appeals.

3. Section 68 (G) prescribes:

"Where any State transport undertaking is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service, it is necessary in the public interest that road transport services in general or any particular class of such service in relation to any area or route or portion thereof should be run and operated by the State transport undertaking, whether to the exclusion, complete or partial of other persons or otherwise, the State Transport Undertaking may prepare a scheme giving particulars of the nature of the services proposed to be rendered, the area or route proposed to be covered and such other particulars respecting thereto as may be prescribed, and shall cause every such scheme to be published in the Official Gazette and also in such other manner as the State Government may direct."

4. This section requires that the State Transport Undertaking must form the opinion contemplated therein. In the State of Tamil Nadu, the State Transport Undertaking is a department of the State Government. Therefore the necessary opinion should have been formed by the State Government. It was urged on behalf of the appellants that under our constitutional set up, the requisite opinion could have been formed either by the Council of Ministers or the Minister to whom the business in question had been allocated under the 'Rules'. The same could not have been formed by the Secretary who is merely an official and that too by the Secretary who is not the head of the department to which the functions under the Act had been assigned. The contentions advanced on behalf of the

appellants proceed thus: The executive power of the State vests in the Governor (Article 154). In the exercise of that power he has to be aided and advised by the Council of Ministers with the Chief Minister at the head (Article 163 (1)) but the Governor can make rules for more convenient transaction of the business of the Government of the State and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under the Constitution required to act in his discretion, (Article 166 (3)). A Minister can only deal with the business that has been allocated to him by the Governor under 'the Rules'. He is not competent to deal with any other business. Motor Vehicles Act has been allocated to the Home Department. Mr. Karunanidhi, the Transport Minister was not in-charge of the Home Department. Therefore his department could not have dealt with functions arising under the Act. Further the Governor could not have allocated any business to a Secretary. Hence in making Rule 23 (A), the Governor exceeded the powers conferred on him under Article 166 (3).

5. On the other hand, it was urged on behalf of the State of Tamil Nadu that originally the functions under the Motor Vehicles Act had been allocated to the Home Department but when Mr. Annadurai formed the D. M. K. Government in Tamil Nadu in 1967, the Home Department as such was not allocated to any Minister. The various subjects included in that department were split up and distributed amongst the various Ministers. Transport was allocated to Mr. Karunanidhi. Motor Vehicles Act as such was not allocated to any Minister. The department of Transport included functions under the Motor Vehicles Act as well. Ever since the D. M. K. Ministry was formed, the functions under the Motor Vehicles Act were dealt with by the Transport Ministry. At the instance of the Transport Minister, Mr. Karunanidhi, Governor framed Rule 23 (A) for the more convenient discharge of the business. On behalf of the Government, it was further urged that Article 166 (3) has two parts namely (1) rules for the more convenient transaction of the business of the Government of the State and (2) rules relating to allocation of business of the State among the Ministers. It was said that after allocating the business of the Government among various Ministers, it was open to the Governor on the advice

of the Ministry to make rules for the convenient discharge of the business allocated. Rule 23 (A) is one such rule made under Article 166 (3). Hence its validity is not open to question.

6. The impugned Rule 23 (A) was introduced for the first time by G. O. Ms. No. 2715 Public dated 22-12-67. Under sub-clause (1) of that rule, it is provided that powers and functions which State Transport Undertaking may exercise under Section 68 (C) of the Act shall be exercised and discharged on behalf of the State Government by the Secretary to the Government of Madras in the Industries, Labour and Housing Department. The rule further provides that cases relating to such powers and functions of the State Transport Undertaking under Section 68 (C) need not be submitted to the Minister in-charge. Under sub-clause (2) of that rule, the powers and functions of the State Government under Section 68 (D) of the Act and the rules relating thereto are directed to be exercised and discharged by the Secretary to the Government in the Home Department.

7. Rule 4 of 'the Rules' deals with allocation and disposal of business. It provides that the business of the Government shall be transacted in the department specified in the 1st Sch. and classified and distributed between those departments as laid down therein. Rule 5 says that Governor shall, on the advice of the Chief Minister allot the business of the Government among the Ministers, assigning one or more departments to the charge of a Minister but the proviso to that rule says that nothing in that rule shall prevent the assigning of one department to the charge of more than one Minister. Rule 6 prescribes that each department of the Secretariat shall be under a Secretary who shall be the official head of the department. Under Rule 7, Council of Ministers constituted under Article 163 (1) is held collectively responsible for all the executive orders issued in the name of the Governor in accordance with rules, whether such orders are authorised, by an individual Minister on a matter pertaining to his portfolio or as a result of the discussion at the meeting of the Council of Ministers. Rule 9 provides that without prejudice to the provisions of Rule 7, the Minister-in-charge of a department shall be primarily responsible for the disposal of the business pertaining to his department. Section III of the Rules contain-

ing Rules 21 to 30 deal with the departmental disposal of business. Rule 21 says that except as otherwise provided by any other rule cases shall ordinarily be disposed of by or under the authority of the Minister in-charge who may by means of standing orders give such directions as he may think fit for the disposal of cases in the department; copies of such standing orders shall be sent to the Governor and the Chief Minister. Rule 22 provides that each Minister shall by means of standing orders arrange with the Secretary of the department what matters or class of matters are to be brought to his personal notice; copies of such standing orders have to be sent to the Governor and the Chief Minister. Rule 23 prescribes that except as otherwise provided in the rules, all cases shall be submitted to the Minister in-charge by the Secretary of the department to which they belong. Then comes Rule 23 (A) to which reference has already been made.

8. The first question that has to be decided is whether the functions under the Motor Vehicles Act had been assigned to Mr. Karunanidhi, the Minister for Transport. It is true that when the various departments were reorganized in 1961, Motor Vehicles Act as well as Transport were included in the Home Department. But when the D. M. K. Ministry came to power after the 1967 general elections, the Home Department as such was not allocated to any Minister. The various subjects included in that department were distributed amongst several Ministers. Transport was allocated to the Transport Minister. Motor Vehicles Act as such was not allocated to any Minister. The allocation of business among the various Ministers appears to have been made under broad heads. In 1961 while allocating subjects to the various departments there was a detailed and exhaustive enumeration of the subjects. But that method was not adopted in 1967 while distributing the business of the Government among the various Ministers. The functions under the Act undoubtedly relate to Transport department. It cannot be assumed that functions under the Act had not been assigned to any Minister. It is proved that those functions were being discharged by the Minister for Transport. Hence we agree with the High Court that those functions had been allocated to the Transport Minister and that the State Transport Undertaking was being run by the Transport Ministry.

9. Mr. Karunanidhi has in his affidavit filed before the High Court sworn to the fact that Rule 23 (A) was framed at his instance. Admittedly he could have assigned the functions under Section 68 (C) of the Act to the Transport Secretary by making a standing order under Rule 22. If he could have done that, we fail to see why he could not advise the Governor through the Chief Minister to make Rule 23 (A).

10. It was urged on behalf of the appellants that the Parliament has conferred powers under Section 68 (C) of the Act to a designated authority. That power can be exercised only by that authority and by no one else. The authority concerned in the present case is the State Government. The Government could not have delegated its statutory functions to any one else. The Government means the Governor aided and advised by his Ministers. Therefore the required opinion should have been formed by the Minister to whom the business had been allocated by 'the Rules'. It was further urged that if the functions of the Government can be discharged by any one else then the doctrine of ministerial responsibility which is the very essence of the cabinet form of Government disappears; such a situation is impermissible under our Constitution.

11. We think that the above submissions advanced on behalf of the appellants are without force and are based on a misconception of the principles underlying our Constitution. Under our Constitution, the Governor is essentially a constitutional head, the administration of State is run by the Council of Ministers. But in the very nature of things, it is impossible for the Council of Ministers to deal with each and every matter that comes before the Government. In order to obviate that difficulty the Constitution has authorised the Governor under sub-article (3) of Article 160, to make rules for the more convenient transaction of business of the Government of the State and for the allocation amongst its Ministers, the business of the Government. All matters excepting those in which Governor is required to act in his discretion have to be allocated to one or the other of the Ministers on the advice of the Chief Minister. Apart from allocating business among the Ministers, the Governor can also make rules on the advice of his Council of Ministers for more convenient transaction of business. He can,

not only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function. But this again he can do, only on the advice of the Council of Ministers.

12. The cabinet is responsible to the legislature for every action taken in any of the ministries. That is the essence of joint responsibility. That does not mean that each and every decision must be taken by the cabinet. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Ministers to discharge all or any of the governmental functions. Similarly an individual Minister is responsible to the legislature for every action taken or omitted to be taken in his ministry. This again is a political responsibility and not personal responsibility. Even the most hard-working minister cannot attend to every business in his department. If he attempts to do it, he is bound to make a mess of his department. In every well-planned administration, most of the decisions are taken by the civil servants who are likely to be experts and not subject to political pressure. The Minister is not expected to burden himself with the day to day administration. His primary function is to lay down the policies and programmes of his ministry while the Council of Ministers settle the major policies and programmes of the Government. When a civil servant takes a decision, he does not do it as delegate of his Minister. He does it on behalf of the Government. It is always open to a Minister to call for any file in his ministry and pass orders. He may also issue directions to the officers in his ministry regarding the disposal of Government business either generally or as regards any specific case. Subject to that over all power, the officers designated by the 'Rules' or the standing orders, can take decisions on behalf of the Government. These officers are the limbs of the Government and not its delegates.

13. In *Emperor v. Sibnath Banerji*, 72 Ind App 241= (AIR 1945 PC 156), construing Section 59 (3) of the Government of India Act, 1935, a provision similar to Article 160 (3), the Judicial Committee held that it was within the competence of the Governor to empower a civil servant to transact any particular business of the Government by making appropriate rules. In that case their Lordships further observed that the

Ministers like civil servants are subordinates to the Governor. In *Kalyan Singh v. State of U. P.*, 1962 (Supp) 2 SCR 76= (AIR 1962 SC 1183) this Court repelling the contention that the opinion formed by an official of the Government does not fulfil the requirements of Section 68 (C) observed:

"The opinion must necessarily be formed by somebody to whom, under the rules of business, the conduct of the business is entrusted and that opinion, in law, will be the opinion of the State Government. It is stated in the counter-affidavit that all the concerned officials in the Department of Transport considered the draft scheme and the said scheme was finally approved by the Secretary of the Transport Department before the notification was issued. It is not denied that the Secretary of the said Department has power under the rules of business to act for the State Government in that behalf. We, therefore, hold that in the present case the opinion was formed by the State transport undertaking within the meaning of Section 68 (C) of the Act, and that, there was nothing illegal in the manner of initiation of the said Scheme".

14-16. In *Ishwarlal Girdharlal Joshi v. State of Gujarat*, 1968-2 SCR 266= (AIR 1968 SC 870) this Court rejected the contention that the opinion formed by the Deputy Secretary under Section 17 (1) of the Land Acquisition Act cannot be considered as the opinion of the State Government. After referring to the rules of business regulating the government business, this Court observed at p. 282:

"In our case the Secretaries concerned were given the jurisdiction to take action on behalf of Government and satisfy themselves about the need for acquisition under Section 6, the urgency of the matter and the existence of waste and arable lands for the application of subsections (1) and (4) of Section 17. In view of the Rules of business and the instructions their determination became the determination of Government and no exception could be taken."

17. In *Capital Multi-purpose Co-op. Society v. State of Madhya Pradesh*, C. A. No. 2201 of 1966, D/- 30-3-1967 (reported in AIR 1967 SC 1815), this Court dealing with the scope of Section 68 (D) of the Act observed that the State Government obviously is not a natural person and therefore some natural person has to

give hearing on behalf of the State Government and hence the hearing given by the Special Secretary pursuant to the power conferred on him by the business rules framed under Article 166 (3) is a valid hearing.

18. As mentioned earlier in the very nature of things, neither the Council of Ministers nor an individual Minister can attend to the numerous matters that come up before the Government. Those matters have to be attended to and decisions taken by various officials at various levels. When those officials discharge the functions allotted to them, they are doing so as limbs of the Government and not as persons to whom the power of the Government had been delegated. In *Halsbury Laws of England Vol. I 3rd Edn.* at p. 170, it is observed:

"Where functions entrusted to a Minister are performed by an official employed in the Minister's department there is in law no delegation because constitutionally the act or decision of the official is that of the Minister."

19. Similar view has been expressed in "*Principles of Administrative Law*" by Griffith and Street. That is also the view taken by Sir Ivor Jennings in his "*Cabinet Government*".

20. For the reasons mentioned above, we are of opinion that the functions under the Motor Vehicles Act had been allocated by the Governor to the Transport Minister under "the Rules" and the Secretary of that ministry had been validly authorised under Rule 23-A to take action under Section 68 (C) of the Act.

21. The validity of some of the provisions of Madras Act 18 of 1968 which amended the Act was canvassed before us. It is not necessary to go into those questions for deciding the validity of the impugned scheme. Those questions can be more appropriately gone into and decided if and when action is taken on the strength of those provisions. Hence we leave open those questions.

22. In the result these appeals fail and they are dismissed with costs — hearing fee one set.

Appeals dismissed.

AIR 1970 SUPREME COURT 1108

(V 57 C 235)

(From: Calcutta)*

M. HIDAYATULLAH, C. J., J. C. SHAH,
K. S. HEGDE, A. N. GROVER,
A. N. RAY AND I. D. DUA, JJ.

Champa Kumari Singhi and others, Appellants v. The Member Board of Revenue, West Bengal and others, Respondents.

Civil Appeals Nos. 564 to 571 of 1968,
D/- 2-2-1970.

Income-tax Act (1922), Section 40 (7),
Proviso (4) — Payment to be made by
instalments — Limitation of one year
runs from the date on which last instal-
ment is due.

(Per Majority, Hegde, J. Contra).

Under the agreements between the assessee and the Income-tax Department two things were done. Firstly, the total liability of the parties was calculated and each party became jointly and severally liable for the whole sum. The instalments were fixed and on the breach of single instalment the whole of the amount became exigible. Under the assessment order a notice of demand was sent to pay the money of the first instalment by March 31, 1953. On breach of it the whole amount was said to be exigible and the demand in respect of that was also made. Assessee therefore, became defaulter on the failure to pay the first instalment. Since instalments were granted, clause (iv) of the Proviso to sub-section (7) of Section 48 applied to the case. That clause does not mention about the exigibility of the whole amount or exigibility of any particular instalment. It only says that if instalments are granted time of one year ending with the end of the financial years is to be calculated from the date on which the last instalment is payable. There was a concession shown in the matter of penalty and smaller instalments were fixed. But the Central Board of Revenue had stipulated even then that the concession mentioned would only be available if the revised scheme of payment was strictly followed. In other words payment was to be made by instalments and this concession therefore attracted the provisions of clause (iv). The Government could always accept any instalment even if paid late without having to worry about the period of limi-

tation of one year from the date of demand. The scheme of the instalments took the matter out of the main part of sub-section (7) and brought it within the proviso to clause (iv). The period of limitation counted from the last instalment which here was March 31, 1957. The default could be taken note of earlier also because the whole amount remained exigible the moment the first default was made. In the present case the certificate was issued on March 14, 1956, and therefore, it was well within the period of limitation. (Para 17)

Mr. M. C. Chagla, Senior Advocate (Mr. P. N. Tiwari, Advocate and M/s. J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocate of M/s. J. B. Dadachanji & Co., with him), for Appellants (In all the Appeals); Mr. Jagadish Swarup, Solicitor-General of India, (M/s. R. Gopalkrishnan and R. N. Sachthey, Advocates, with him), for Respondents (In all the Appeals).

The Judgment of Hidayatullah, C. J. and Shah, Grover, Ray and Dua, JJ., was delivered by

HIDAYATULLAH, C. J.:— This judgment shall dispose of Civil Appeals 564-571 of 1968. Of these, four are against the common judgment and order of a Division Bench of the Calcutta High Court, December 10, 1963, dismissing 4 appeals (139-142 of 1959) from the order of a learned Single Judge, April 23, 1959 in Writ Petitions 159-162 of 1958. The remaining four appeals are against the order, November 24, 1964, refusing to certify the case as fit for appeal to this Court under Article 133 (1) of the Constitution.

2. The facts are as follows: One Dalchand Singhi held a prospecting license in the eastwile Korea State (now in Madhya Pradesh). His son Bahadur Singh Singhi took a mining lease and started a colliery known as Jhagrakhand Colliery. In 1942 a private limited Company called the Jhagrakhand Collieries Ltd. was started with an authorised capital of Rs. 24 Lakhs (2400 shares of Rupees 1000 each.) Bahadur Singh divided equally the 2400 shares between himself and his 3 sons Rajendra Singh Singhi, Narendra Singh Singhi and Birendra Singh Singhi. In 1943 the colliery business and its assets were transferred by the joint family to the Company. In 1944 the father and his 3 sons separated and partitioned the property. Bahadur Singh Singhi died on July 7, 1944 leaving a

* (Original Order Nos. 139 to 142 of 1959,
D/- 24-11-1964 — Cal.)

will — Letters of Administration with the will annexed were granted in 1945. The register of Jhagrakhand Collieries Ltd., was rectified and showed thereafter 900 shares in the name of Narendra Singh Singhi and Rajendra Singh Singhi and 600 shares in the name of Rajendra Singh Singhi. Birendra Singh Singhi died on December 12, 1950 leaving a widow Smt. Champa Kumari and two minor sons Ashok Kumar Singhi, Chandra Kumar Singhi and also a minor daughter. These minors have now attained majority.

3. Under what is known as the 'Tyagi Scheme' announced on May 19, 1951 a voluntary disclosure was made by the Jhagrakhand Collieries Ltd. and the shareholders. The time limit for such disclosure was August 31, 1951. Before this the Income-tax Officer had filed a complaint for certain offences and under a search warrant seized the books of account of the company from 1945 to 1950. This was on July 3, 1951. The shareholders and the company then disclosed on July 31, 1951 a concealed income of Rs. 42,52,501 during the years 1945 to 1948.

4. On November 28, 1951 the Commissioner of Income-tax offered to withdraw prosecutions if the Company and the shareholders agreed to pay taxes due on a total income of Rs. 90,00,000 to be distributed over the years 1945-1950 (both inclusive) together with a penalty of 20% and interest at 3% p. a. on unpaid tax. There were certain other conditions with which we need not concern ourselves. Certain representations followed and finally on December 26, 1951, it was agreed that the parties jointly and severally pay Rs. 67,48,341/11. It was also agreed that a sum of Rs. 55,99,832/6 would be accepted in full satisfaction upon the parties paying the amount in the following instalments:

(a) By December 31, 1951	Rs. 7,50,000
(b) By March 31, 1952	Rs. 5,00,000
(c) By March 31, 1953	Rs. 9,50,000
(d) By March 31, 1954	Rs. 9,50,000
(e) By March 31, 1955	Rs. 9,50,000
(f) By March 31, 1956	Rs. 9,50,000
(g) By March 31, 1957	the balance

On the failure of any of the instalments the whole sum of Rs. 67,48,341/11 together with interest would become due. A deed of Agreement, Guarantee and Equitable Mortgage showing the total income and total net tax liability of each share holder were shown. They were—

1947/48 to 1951-52

Total tax

Smt. Champa Kumari's husband

Rajendra Singh Singhi	Rs. 5,28,917-11
Narendra Singh Singhi	Rs. 9,30,498-03
Jhagrakhand Collieries Ltd.	Rs. 9,93,816-15
	Rs. 43,99,712-11

5. The Company paid the following sums by way of tax:

February 1, 1952	Rs. 3,50,000
April 1, 1952	Rs. 90,000
April 22, 1952	Rs. 1,22,000

Narendra Singh Singhi paid the following sums by way of tax:

February 1, 1952	Rs. 1,50,000
April 1, 1952	Rs. 60,000
April 22, 1952	Rs. 48,000

Smt. Champa Kumari paid the following sums by way of tax:

April 1, 1952	Rs. 1,00,000
April 1, 1952	Rs. 40,000
April 1, 1952	Rs. 32,000

Rajendra Singh Singhi paid the following sums by way of tax:

April 1, 1952	Rs. 1,50,000
April 1, 1952	Rs. 60,000
April 22, 1952	Rs. 48,000

On April 22, 1952 they signed the agreement. By that date the position in the payment of instalments had reached item (c) above showing Rs. 9,50,000 as due on March 31, 1953.

6. On August 29, 1952 the Income-tax Officer made several assessment orders in respect of the assessment years 1947-48 to 1951-52. Each such order included the following:

"In accordance with the terms of the Agreement dated 22nd April 1952, executed in connection with the petitions dated 18th July, 1951 filed by the assessee and others under concessional scheme for the settlement of disclosures announced by the Government of India, the assessment is made as under:"

and then follows the computation of total income, the computation of tax and the total amount demanded.

7. On September 22, 1952, the Income-tax Officer (Companies District I), Calcutta sent the following letter to each assessee. The one sent to Smt. Champa Kumari Singhi may alone be quoted here as an example:

From:

Shri V. Satyamurti, M. A., B. L.,
Income-tax Officer,
Companies District I, Calcutta.

To,

Smt. Champa Kumari Singhi,
49, Gariahat Road, Calcutta.

Madam,

I am sending today by separate post (Regd. with A/D) copies of Assessment

orders, Penalty Orders, Demand notices and chalans etc., in regard to the amount of taxes and penalties payable by you in accordance with the terms of the Agreement dated 22nd April, 1952 between you and the Government drawn up in connection with the disposal of the disclosure petition filed by you under the concessional scheme.

In the Demand notices and chalans, demands have been shown to be payable on or before the 31st March, 1953, when the next instalment of payment under this Agreement falls due. Needless to say if there is no default in the matter of payment of that instalment (viz., Rs. 9,50,000 with all interest due thereon by 31st March, 1953) further extension of time for payment of the balance will be granted by me.

Yours faithfully,

D/-
22-9-52

Sd/- Illegible
Income-tax Officer."

With this letter were forwarded the assessment orders and notices of demand under Section 29 of the Income-tax Act, 1922. These notices of demand reached the several appellants on 24th September, 1952. Similar notices of demand for excess profits tax and Business Profits Tax were also served calling upon the assessee to pay the dues on or before March 31, 1953.

8. On March 25, 1953 the appellants filed applications for revision under Section 33-A of the Income-tax Act against the orders of assessment and application of Section 23-A of the Income-tax Act. The Commissioner held the assessments to be proper as they were made in accordance with the settlement after appellants' disclosures. The appellants next asked that Rs. 1,00,000 be accepted instead of Rs. 9,50,000 payable on March 31, 1953 and they be not treated as defaulters. The amount was appropriated towards the current liability for the current financial year.

9. In February 1954, the Commissioner after hearing the appellants, promised reference to the Board of Revenue for a variation of the agreement of April 22, 1952. The main variation was to be that the penalty would be reduced to half and the appellants would have to pay Rs. 5,60,000 on March 31, 1954, and similar instalments each year for six years. The agreement was revised on December 27, 1954. The Company sent a cheque for Rs. 5,60,000 on March 31, 1954, earmarking it as the said payment

but it was appropriated towards the demand on the company for 1947-48.

10. On March 14, 1956 certificates under Section 46 (2) of the Indian Income-tax Act, 1922 were issued and notices under Section 7 of the Bengal Public Demands Recovery Act, 1913 were served on the appellants in May, 1956. In June 1956, the appellants filed several petitions under Section 9 of the Recovery Act contending inter alia that the proceedings were barred by limitation. This objection was overruled on January 5, 1957.

11. The appellants appealed to the Commissioner under Section 51 of the Recovery Act and the objection that the certificates were barred by limitation under Section 46 (7) of the Indian Income-tax Act, 1922 was accepted and the certificates were cancelled. The Union of India thereupon filed several revisions before the Board of Revenue under Section 53 of the Public Demands Recovery Act, against the order of the Commissioner. They were allowed by a common order dated June 27, 1958. The appellants were again called upon to pay the amount on pain of distress warrants.

12. The above facts were necessary to understand the background of the dispute from which the petitions under Article 226 of the Constitution arose. The appellants filed Writ Petitions 159-162 of 1958 asking for a writ of certiorari to quash the orders of the Board of Revenue and prohibiting the certificate Officer from enforcing the recovery certificates. The writ petitions were heard by Sinha, J., and were dismissed on April 23, 1959. The recovery proceedings were held not barred by limitation. The appellants then filed appeals in the High Court against the judgment and order of Sinha, J., (Nos. 139-142 of 1959). These appeals were heard by Mookerji and Sen JJ. who, by the common judgment now under appeal in four of these appeals, dismissed them. The applications for certificate under Article 133 (1) of the Constitution were also rejected and have given rise to the other four appeals before us.

13. Mr. Chagla who argued these appeals submitted the question of limitation at the forefront and then attempted to argue the merits such as the interpretation of the agreements and the reliance placed on them in the High Court and distribution pro rata of the amounts paid on March 31, 1954. These points were not allowed to be raised by us.

These questions were not raised before Sinha, J., The Divisional Bench also did not allow these points to be raised.

14. The short question, therefore, is one of limitation applicable in this case. We are concerned in answering this question with Section 46 of the Indian Income-tax Act, 1922. We are not required to consider the entire section but only sub-sections (1) and (7) which are relevant, They read:

"46. Mode and time of recovery.—

(1) When an assessee is in default in making a payment of income-tax, the Income-tax Officer may in his discretion direct that, in addition to the amount of the arrears, a sum not exceeding that amount shall be recovered from the assessee by way of penalty."

xx xx xx xx
xx xx xx xx xx

"(7) Save in accordance with the provisions of sub-section (1) of Section 42, or of the proviso to Section 45, no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the last day of the financial year in which any demand is made under this Act:

Provided that the period of one year herein referred to shall—

xx xx xx xx xx
xx xx xx xx xx

(iv) where the sum payable is allowed to be paid by instalments, from the date on which the last of such instalments was due:

Provided further that nothing in the foregoing proviso shall have the effect of reducing, the period within which proceedings for recovery can be commenced, namely, after the expiration of one year from the last day of the financial year in which the demand is made.

Explanation.— A proceeding for the recovery of any sum shall be deemed to have commenced within the meaning of this section, if some action is taken to recover the whole or any part of the sum within the period hereinbefore referred to and for the removal of doubts it is hereby declared that the several modes of recovery specified in this section are neither mutually exclusive, nor affect in any way any other law for the time being in force relating to the recovery of debts due to Government, and it shall be lawful for the Income-tax Officer, if for any special reasons to be recorded he so thinks fit, to have recourse to any such mode of recovery notwithstanding that

the tax due is being recovered from an assessee by any other mode."

The contention of the appellants is that we have to find out when they could be treated as defaulters within the first sub-section and whether under the main part of sub-section (7) the proceedings for the recovery of the tax with penalty could be commenced after the expiration of one year from the last day of the financial year in which the demand was made. The argument of the Department is that the matter is covered by clause (iv) of the first proviso which allows limitation of one year to be calculated from the date on which the last instalment was due in the present case.

15. To begin with there is an error in the fourth clause of the first proviso inasmuch as the words "be reckoned" have been inadvertently left out in that clause. The intention to use those words is obvious from the way in which the first three clauses are worded. Supplying those words, because they were inadvertently omitted, it is clear that one of two limitations is applicable to the present case, according to the circumstances of the case. If it is to be considered under the main clause of sub-section (7), then we have to find out whether the whole of the amount was payable by a particular date on which the assessee can be said to have become a defaulter. If, however, the fourth clause of the proviso applies then we have to see whether by reason of the grant of instalments, limitation would only commence to run from the date on which the last of the instalments was payable. In this connection reference has been made by the High Court and the Board of Revenue to the agreements and the letters written sending the assessment orders and the notices of demand. The agreements set out a scheme of payments by instalments and the entire sum payable was Rupees 67,48,841/11/-. This was payable in different instalments, from 1952 to 31st March 1957. It was however, provided as follows:

".....provided however that in the event of due and punctual payment of all instalments Government will give up the sum of Rs. 11,49,019/5/- with interest thereon, from the last instalment and accept the sum of Rs. 55,99,822/6/- with interest thereon in full settlement of the balance due provided further that in the event of any default in payment of any sum on due date therefrom or in the event of it being found that the guarantee

thereby given or any part thereof is not enforceable for any reason whatsoever there will be no abatement and the parties of the first and second part will pay the full sum of Rs. 67,48,841/11/-.

The monies payable on 31st March, 1953, 31st March, 1954, 31st March, 1955, 31st March, 1956 and 31st March, 1957 shall be applied pro rata towards the tax liability of the party of the first part and the parties of the second part mentioned in Schedule "Y" hereto.

The said parties shall however be at liberty to make any part payment at any time towards the said instalments not less than Rs. 10,000 (Rupees ten thousand) at a time.

4. In the event of any instalment not being paid within the time mentioned above (such time being deemed to be of the essence of the arrangement) or in the event of it being found that the guarantee hereby given or any part thereof is not enforceable for any reason whatsoever the whole of the balance of the said sum of Rs. 67,48,841/11/- will at once become due and payable with interest at the rate aforesaid and Government will (in addition to all rights for enforcement of this document) be entitled to take all steps to enforce payment including issue of certificate under Section 46 (2) of the Income Tax Act and proceedings under the West Bengal Public Demands Recovery Act and Revenue Recovery Act."

16. The contention of the appellants is that the letters of the 22nd September, 1952 (one of which has been reproduced above as a sample) were accompanied by the notices of demand and on the breach of the payment of the instalment of Rs. 9,50,000/- on 31st March, 1953, the appellants became defaulters within the meaning of the Act in respect of the whole amount of tax. Therefore recovery proceedings could only commence within the end of a financial year commencing from 31st March, 1953 since the payment of the instalment was co-terminus with the end of the financial year. This, according to them, was provided in the agreement itself in the extract just reproduced from the agreements above. The other side contends that Clause (iv) of the proviso to Section 46, sub-sec. (7) takes no account of the exigibility of the whole amount under a scheme of payment by instalments. Whenever instalments are granted the period of limitation counts from the last instalment and here it would be one year from March 31, 1957. The default could be

taken note of earlier also because the whole amount remained exigible the moment the first default was made. In the present case the certificate was issued on March 14, 1956 and, therefore, it was well within the period of limitation.

17. The learned single Judge in the case (Sinha, J.) very rightly pointed out that under the agreements two things were done. Firstly, the total liability of the parties was calculated and each party became jointly and severally liable for the whole sum. Then instalments were fixed and on the breach of a single instalment the whole of the amount became exigible. The assessment order reproduced the agreement as part of it and the agreement therefore became the assessment order. Under the assessment order a notice of demand was sent to pay the money of the first instalments of Rs. 9,50,000 by March 31, 1953. On breach of it the whole amount was said to be exigible and the demand in respect of that was also made. The appellants, therefore, rightly concluded the Judge, became defaulters on the failure to pay the first instalment. Since instalments were granted Clause (iv) of the proviso to sub-section (7) of Section 46 applied to the case. This conclusion is correct. That clause does not mention about the exigibility of the whole amount or exigibility of any particular instalment. It only says that if instalments are granted time of one year ending with the end of a financial year is to be calculated from the date on which the last instalment is payable. The language of Clause (iv) of the proviso was unfortunate in expressing this intent and has now been corrected in the new Act but the intention was always obvious. Even in the second agreement which replaced the first agreement the same condition obtained. There was a concession shown in the matter of penalty and smaller instalments were fixed. But the Central Board of Revenue had stipulated even then that the concession mentioned above would only be available if the revised scheme of payment was strictly followed. In other words, payment was to be made by instalments and this concession therefore attracted the provisions of Cl. (iv). The Government could always accept any instalment even if paid late without having to worry about the period of limitation of one year from the date of demand, since Clause (iv) of the first proviso gave them an option to wait till the last instalment was payable. The scheme of

the instalments took the matter out of the main part of sub-section (7) and brought it within the provision to Cl. (iv). We are, therefore, satisfied that the High Court was right in holding that the certificates were issued within the period of limitation prescribed by law and were not barred by time. The first four appeals therefore fail and are dismissed with costs. The other appeals need not be considered since special leave was granted against the main order and those appeals themselves have failed. The remaining four appeals against order refusing certificate are accordingly dismissed as infructuous with no separate order as to costs.

18. HEGDE, J.: These appeals should be allowed, as in my opinion the impugned certificate is barred under sub-sec. (7) of Section 46 of the Indian Income Tax Act, 1922 (in short 'the Act').

19. The facts of the case are fully set out in the judgment of my Lord, the Chief Justice. Hence there is no need to state them over again.

20. Under the agreement entered into between the assessee and the department, if the assessee fails to pay any one or more of the instalments fixed, the entire tax became recoverable forthwith. Admittedly the assessee failed to pay the instalments as stipulated in the agreement and therefore it was open to the department to recover the entire arrears of tax. It is true that the default clause in the agreement was intended for the benefit of the department and therefore under the law of contract, it was open to the department to waive that clause and sue for the recovery of the various instalments as and when they fell due. But that aspect of the question is not relevant for considering the true scope of sub-section (7) of Section 46. Section 46 creates a special machinery for the recovery of arrears of tax. Section 46 is found in Chapter IV of the Act which deals with recovery of tax and penalties. Section 45 prescribes, when an assessee becomes a defaulter. The main part of that section says:

"Any amount specified as payable in a notice of demand under sub-section (3) of Section 23A or under Section 29 or an order under Section 31 or Section 33, shall be paid within the time, at the place and to the person mentioned in the notice or order or if a time is not so mentioned, then on or before the first day of the second month following the date of the service of the notice or order

and any assessee failing so to pay shall be deemed to be in default, provided that, when an assessee has presented an appeal under Section 30, the Income-tax Officer may in his discretion treat the assessee as not being in default as long as such appeal is undisposed of."

(The proviso to that section and the explanation are not relevant for our present purpose).

21. For finding out whether an assessee is a defaulter or not, all that we have to see is whether he has failed to comply with the provisions of Section 45. If he has failed to comply with the demand made in accordance with the provisions in Section 45 within the time mentioned therein then he is 'defaulter' within the meaning of 'the Act'. Unless the assessee is a defaulter, no action can be taken against him under Section 46. Non-fulfilment of the terms of the agreement does not amount to a default under Section 45. Therefore the first thing we have to see is when the assessee became defaulters. For deciding that question reference to the agreement is irrelevant. Admittedly demand notices under Section 29 had been issued to the assessee on September 22, 1952 in respect of the entire tax due from them. Therefore they became defaulters as soon as they failed to comply with those demands.

22. This takes us to Section 46. Sub-section (1) of Section 46 says:

"When an assessee is in default in making a payment of income-tax, the Income-tax Officer may in his discretion direct that, in addition to the amount of the arrears, a sum not exceeding that amount shall be recovered from the assessee by way of penalty."

23. The default referred to in this sub-section is necessarily a default under Section 45. That much is obvious from the scheme of Ch. VI. Now let us read sub-section (7) of Section 46. It is as follows:

"Save in accordance with the provisions of sub-section (1) of Section 42 or to the proviso to section 45, no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the last day of the financial year in which any demand is made under this Act:

Provided that the period of one year herein referred to shall—

X X X X X X

(iv) where the sum payable is allowed to be paid by instalments, from the date

on which the last of such instalments was due."

24. If we read the impugned sub-section (7) of Section 46, it is clear that no proceedings for the recovery of any sum payable under the Act can be commenced after the expiration of one year from the last day of the financial year in which any demand is made under the Act. In the instant case, the demands in question were made on September 22, 1952. Therefore the recovery proceedings should have been commenced before 31st March 1953 but actually they were commenced on March 14, 1956. Hence they are *prima facie* barred.

25. This takes us to sub-clause (iv) of the proviso to sub-section (7) of Sec. 46. Under that proviso where the sum payable is allowed to be paid by instalments, the one year prescribed in sub-section (7) of Section 46 will be computed from the date on which the last of such instalments was due. The expression "was due" does not appear to be grammatically correct. It should have been "is due". This correction has been made in the corresponding provision of the 1961 Indian Income-tax Act; but that error is immaterial for our present purpose. The words "was due" can only mean "is due" even under the Act. For finding out when the sum claimed "was due", we must again go back to Section 45. In view of the demand notices issued in September, 1952 the sum became due when the assessee became defaulters and therefore the recovery proceedings under the Act should have been initiated before March, 1954. The same having not been initiated before that date, the proceedings in question must be held to have been barred. In my opinion for finding out the date on which the last instalment was due, we cannot fall back on the agreement between the assessee and the revenue. Chapter V of the Act has nothing to do with the agreement between the assessee and the revenue. The expression "was due" in Section 46 (7) has reference to the tax which is due in accordance with the provisions in Ss. 45 and 46.

26. For the reasons mentioned above I allow these appeals.

ORDER

27. In accordance with the opinion of the majority, Civil Appeals Nos. 584, 585, 586 and 570 of 1966 (arising from the common judgment and order of the Division Bench of the Calcutta High Court,

December 10, 1963) are dismissed with costs. The other appeals are also dismissed as infructuous with no separate order as to costs.

Appeals dismissed.

AIR 1970 SUPREME COURT 1114

(V 57 C 230)

(From: Madras)

J. C. SHAH AND K. S. HEGDE, JJ.

Commissioner of Hindu Religious and Charitable Endowments, Mysore, Appellant v. U. Krishna Rao and others, Respondents.

Civil Appeal No. 2312 of 1966, D/- 17-10-1969.

(A) Constitution of India, Article 133 — Matter to be decided on evidence — Supreme Court will not enter upon such matter. (Para 10)

(B) Madras Hindu Religious and Charitable Endowments Act (19 of 1951), S. 70 (2) — Commissioner has to determine fee for auditing accounts of each religious endowment — Decision of High Court Reversed.

Under Section 76 (2) audit fee is not to be prescribed by rules; the Commissioner has to determine the fee for auditing the accounts of each religious endowment. The Commissioner has to form an estimate of the reasonable cost which may be incurred in making an effective audit of the accounts of the religious institution, and to state it in terms of a percentage of the income. The percentage of income levied as audit fee must of necessity be based on an estimate, and the demand will not be struck down merely because it turns out that the amount demanded is not precisely equivalent to the cost actually incurred for auditing the accounts.

Where the High Court proceeded upon the ground of absence of determination by the Commissioner, which was never pleaded, and the High Court has not determined whether the audit fee demanded was in truth for meeting the cost of auditing the accounts of the religious institution the order passed by the High Court has to be set aside. Decision of High Court Reversed. (Paras 11, 12)

(C) Madras Hindu Religious and Charitable Endowments Act (19 of 1951), (as amended by Act 27 of 1954), Section 76 (1) — General rules prescribing levy of

CN/DN/F222/69/DHJ/A

fee sufficient — Rules governing individual endowment not necessary — Decision of High Court Reversed.

Under the Act a fee though levied for rendering services of a particular type is not to be correlated to the services performed for each individual who is intended to obtain the benefit of the services. The correlation must be between the expenses incurred by authority levying the fee for generally providing the service and the aggregate of the levy from persons who are to be made subject thereto. It is a necessary corollary that under the Act general rules prescribing the levy of fee from religious endowments have to be made, and not rules governing individual endowments. If services are provided, assuming that a particular institution either does not need the services, or does not obtain the benefit of the services, the contribution would still be recoverable. Decision of High Court Reversed.

(Paras 6, 7, 8)

(D) Madras Hindu Religious and Charitable Endowments Act (19 of 1951), Section 100 — Rules under — Rules framed in 1955 by Madras Government prescribing graduated scale of rates of contribution under Section 76 (1) — Because rules were framed at a time when several different kinds of services were intended to be rendered and the Court later struck down certain provisions of the Act under which services were to be rendered, the rules framed in 1955 were not rendered inapplicable. — Decision of High Court Reversed.

(Para 8)

(E) Civil P. C. (1908), Order 3, R. 4 — Concession by Advocate-General at the hearing in High Court — Held did not oblige State Government to frame separate rules in respect of each individual religious institution under Section 76 of the Madras Hindu Religious and Charitable Endowments Act.

(Para 7)

Cases Referred: Chronological Paras (1963) AIR 1963 SC 966 (V 50)=

1963 Supp (2) SCR 302, Sudhindra Thirtha Swamiar v. Commr. for Hindu Religious & Charitable Endowments, Mysore 6

(1960) 38 Mys LJ 245= ILR (1959) Mys 365, Devaraja Shenoy v. State of Mysore 3, 5, 7

(1954) AIR 1954 SC 282 (V 41)= 1954 SCR 1005, Commr. of Hindu Religious and Charitable Endowments, Madras v. Sri Lakshmin-dra Thirtha Swamiar of Sri Shirur Mutt 1

The following Judgment of the Court was delivered by

SHAH, J.:— The Madras Religious and Charitable Endowments Act 19 of 1951 was enacted to provide for the better administration and governance of Hindu Religious and Charitable Institutions and Endowments in the State of Madras. This Court in *The Commissioner of Hindu Religious and Charitable Endowments, Madras v. Sri Lakshmin-dra Thirtha Swamiar of Sri Shirur Mutt*, 1954 SCR 1005 = (AIR 1954 SC 282) held that Sections 21, 30 (2), 31, 55, 56 and 63 to 69 of Act 19 of 1951 were ultra vires, in that they infringed the guarantee of the fundamental rights in Articles 19 (1) (f), 25 and 26 of the Constitution of India. This Court also held that Section 76 (1) providing for imposing liability for payment of contribution which was of the nature of a tax and not a fee, was beyond the legislative competence of the State Legislature.

2. The Legislature then amended the Act by Madras Act 27 of 1954. On August 11, 1955, the Government of Madras framed Rules under the Act prescribing a graduated scale of rates of contribution under Section 76 (1).

3. The respondents who are trustees of the Venkataramana Temple at Mulki, District South Kanara, moved a petition in the High Court of Madras for an order restraining the Commissioner of Hindu Religious and Charitable Endowments from enforcing the provisions of the Amending Act 27 of 1954. Under the scheme of reorganisation of State of Madras, the petition was transferred for trial to the High Court of Mysore. The High Court of Mysore by order dated March 10, 1959, held that Sections 21, 30 (2), 31, 63 to 69 and 89 as amended by Act 27 of 1954 were invalid: *Devraja Shenoy v. State of Mysore*, (1960) 38 Mys LJ 245.

4. The Assistant Commissioner of Religious Endowments Mysore, issued on September 30, 1959 directing the respondent to pay the arrears of contributions and audit fee under the Commissioner's demand notice dated June 25, 1957. The respondents moved another petition in the High Court of Mysore challenging the validity of the demand. The High Court upheld the plea on the ground that no rules had been framed under Section 100 of the Act, and therefore, the demand for levy of contribution was premature, and that audit fee demanded by the Com-

missioner was without determination under Section 76 (2) of the Act and was "on that account without competence or authority of law". With certificate granted by the High Court, the Commissioner of Hindu Religious & Charitable Endowments has preferred this appeal.

5. The provisions of the Act which are relevant may first be read:

Section 71. "(1) The trustee of every religious institution shall keep regular accounts of all receipts and disbursements.

(2) The accounts of every religious institution, the annual income of which as calculated for the purposes of Section 76 for the fasli year immediately preceding is not less than sixty thousand rupees, shall be subject to concurrent audit, that is to say, the audit shall take place as and when expenditure is incurred.

(3) xx xx xx xx

(4) The audit shall be made—

(a) in the case of a religious institution the annual income of which calculated as aforesaid for the fasli year immediately preceding is not less than one thousand rupees, by auditors appointed in the prescribed manner, x x x x

(b) xx xx xx xx

Section 76. "(1) In respect of the services rendered by the Government and their officers and for defraying the expenses incurred on account of such services every religious institution shall, from the income derived by it, pay to the Commissioner annually such contribution not exceeding five per centum of its income as may be prescribed.

(2) Every religious institution, the annual income of which, for the fasli year immediately preceding as calculated for the purposes of the levy of contribution under sub-section (1), is not less than one thousand rupees, shall pay to the Commissioner annually, for meeting the cost of auditing its accounts, such further sum not exceeding one and a half per centum of its income as the Commissioner may determine.

(3) xx xx xx xx

(4) The Government shall pay the salaries, allowances, pensions and other beneficial remuneration of the Commissioner, Deputy Commissioners, Assistant Commissioners and other officers and servants (other than executive officers of religious institutions) employed for the purposes of this Act and the other expenses incurred for such purposes, including the expenses of Area Committees and the cost of auditing the accounts of religious institutions.

(5) xx xx xx xx

Section 100. "(1) The Government may make rules to carry out all or any of the purposes of this Act and not inconsistent therewith.

(2) In particular, and without prejudice to the generality of the foregoing power, they shall have power to make rules with reference to the following matters:—

xx xx xx xx

(o) the method of calculating the income of a religious institution for the purpose of levying contribution and the rate at which it shall be levied;

xx xx xx xx

Rules were framed by the State of Madras on August 11, 1955 authorising the imposition of a graded levy of contribution. The Rules framed by the Government of the State of Madras remained in force in the State of Mysore after re-organization of the State of Madras and applied to the temples in the Mangalore District which was incorporated in the Mysore State. It is true that the High Court of Mysore declared invalid certain provisions of the Act imposing control upon the administration of temples governed by the Act. But on that account the power to make rules was not restricted, nor were the rules framed by the Government rendered invalid. The decision of the High Court that no rules for the levy of contribution were framed was largely influenced by the observations made in the judgment in Devaraja Shenoy's case, (1960) 38 Mys LJ 245. It was observed in that case that since the respondents had applied for restraining the State from enforcing any of the provisions of the Act, an investigation into the sustainability of that claim would have involved determination of the validity of Section 76 (1) and of any demand for contribution under its provisions, and since the Advocate-General appearing for the State in that case had informed the Court that the question did not fall to be determined because rules prescribing the contribution payable by the respondent-temple "had yet to be made, which meant that until such rule was made no contribution could be demanded", the conclusion reached by the Court was in truth "a decision on one of the material questions arising in that case, and binding on all the parties to that case". The Court proceeded to observe:

"In that view of the matter it is incontrovertible that what was stated in the previous case on behalf of the State was that the amount of contribution pay-

able by the petitioners (respondents) temple should be prescribed by a rule which remained to be made which means that what was decided by this Court was that no such contribution could be recovered from that temple until such a rule was made.

The impugned demand made on June 25, 1957 before this Court rendered its decision in Devraja Shenoy's case, (1960) 38 Mys LJ 245 on March 10, 1959 having no efficacy or effect, since it was a plainly premature demand made even before the liability to pay the contribution came into existence, has to be and is accordingly quashed."

This view, in our judgment, proceeds upon an incorrect view of the true nature of the contribution leviable under Section 76 (1) of the Act. The assumption made by the Court that under the Act the Government had to make under Section 100 rules applicable to each temple separately and prescribing the method for determining contribution finds no support in the provisions of the Act or its scheme.

6. The true nature of the contribution exigible under Section 76 (1) under Madras Act 19 of 1951 was explained by this Court in *Sudhindra Thirtha Swamiar v. Commr. for Hindu Religious & Charitable Endowments, Mysore*, 1963 Supp (2) SCR 302= (AIR 1963 SC 966). It was pointed out that (at p. 323) (of SCR)= (at p. 975 of AIR):

"A levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have direct relation to the actual services rendered by the authority to individual who obtains the benefit of the service. If with a view to provide a specific service, levy is imposed by law and expenses for maintaining the service are met out of the amounts collected there being a reasonable relation between the levy and the expenses incurred for rendering the service, the levy would be in the nature of a fee and not in the nature of a tax. It is true that ordinarily a fee is uniform and no account is taken of the varying abilities of different recipients. But absence of uniformity is not a criterion on which alone it can be said that it is of the nature of a tax. A fee being a levy in consideration of rendering service of a particular type, correlation between the expenditure by the Government and the levy must undoubtedly exist, but a levy

will not be regarded as a tax merely because of the absence of uniformity in its incidence, or because of compulsion in the collection thereof, nor because some of the contributories do not obtain the same degree of service as others may."

Under the Act a fee though levied for rendering services of a particular type is not to be correlated to the services performed for each individual who is intended to obtain the benefit of the services. The correlation must be between the expenses incurred by the authority levying the fee for generally providing the service and the aggregate of the levy from persons who are to be made subject thereto. It is a necessary corollary that under the Act general rules prescribing the levy of fee from religious endowments have to be made, and not rules governing individual endowments.

7. The Act does not contemplate separate rules to be made in respect of each religious institution likely to obtain the benefit of services rendered by the State for which the contribution is to be levied. The concession made by the Advocate-General at the hearing in *Devaraja Shenoy's case*, (1960) 38 Mys LJ 245 does not oblige the State to frame separate rules in respect of each individual religious institution. The rules under the Act have to be general. And such rules were in fact framed and were in operation. We are unable therefore, to agree with the High Court that appropriate rules were not in existence at the time when the demand was made, and on that account the demand was premature.

8. If services are provided, assuming that the Venkataramana temple either does not need the services, or does not obtain the benefit of the services, the contribution would still be recoverable. We are also unable to accept the argument raised that because the rules were framed at a time when several different kinds of services were intended to be rendered and the Court later struck down certain provisions of the Act under which services were to be rendered, the rules framed in 1955 were rendered inapplicable.

9. The order passed by the High Court upholding the claim of the respondent-temple on this part of the case must therefore, be set aside.

10. The High Court has not investigated the question whether there is a reasonable relation between the expenditure incurred by the Government for providing services and the amounts intended

to be collected from the religious institutions for whose benefit the services are to be rendered. Since this is a matter to be decided on evidence, we do not propose to enter upon that question in this appeal.

11. The second question relates to the levy of audit fee. Under Section 76 (2) of the Act audit fee is not to be prescribed by rules: the Commissioner has to determine the fee for auditing the accounts of each religious endowment. The power of the Commissioner is subject to a three-fold restriction: (1) that the annual income of the religious institution for the relevant year preceding the year is Rupees 1000/- or more; (2) that the fee does not exceed 1½% of the income; and (3) that the fee is levied for meeting the cost of auditing the accounts of religious institution. In the present case, conditions (1) and (2) are satisfied. But the High Court was of the view that the Commissioner had not determined the cost of auditing the accounts of the respondent-temple, and proceeded to observe:

"It is sufficient to say that the demand made of the petitioners' temple for the payment of a sum of Rs. 1,162-83 nP. towards the audit of its accounts in respect of the year 1963 *fasli* does not rest upon any determination made under Section 76 (2) and is therefore one made without competence or the authority of law."

In so observing, in our judgment, the High Court erred. It was not the case of the respondents in their petition that the Commissioner had not determined the audit fee under Section 76 (2). In paragraph 12 of the petition it was merely asserted that the fee determined by the Commissioner at the rate of 1½% of the income was excessive. It is true that the Commissioner may not under Section 76 (2) of the Act impose a flat rate of audit fee on the religious institutions governed by the provisions of the Act: he has to determine audit fee for meeting the costs of auditing the accounts as a percentage of the income of each religious institution. The Commissioner has to determine, having regard to the facts and circumstances of each case, the fee (being not more than the maximum prescribed) for meeting the cost of audit of the institution. That implies that the Commissioner has to form an estimate of the reasonable cost which may be incurred in making an effective audit of the accounts of the religious institution, and to state it in terms of a percentage of the income. The percentage of income levied as audit fee

must of necessity be based on an estimate, and the demand will not be struck down merely because it turns out that the amount demanded is not precisely equivalent to the cost actually incurred for auditing the accounts.

12. Since where the High Court has proceeded upon the ground of absence of determination by the Commissioner, which was never pleaded, and the High Court has not determined whether the audit fee demanded was in truth for meeting the cost of auditing, the accounts of the Venkatarumana temple, the order passed by the High Court in respect of this part of the case must also be set aside.

13. The order of the High Court is set aside and it is directed that the case do stand remanded to the High Court and that the High Court do dispose of the case according to law and in the light of the observations made in this judgment.

14. Costs of this appeal will be costs in the High Court.

Appeal allowed.

AIR 1970 SUPREME COURT 1118
(V 57 C 237)

M. HIDAYATULLAH, C. J., J. M. SHELAT, V. BHARGAVA,
G. K. MITTER AND C. A. VAIDIALINGAM, JJ.

Sampat Prakash, Petitioner v. The State of Jammu and Kashmir and another, Respondents.

I. S. K. B. Rehman and others, & Nizamuddin and others. Interveners.

Writ Petn. No. 111 of 1968, D/- 10-10-1968.

(A) Constitution of India, Articles 370, 35 (c) (in its application to Jammu and Kashmir) and 22 — Article 370 never ceased to apply to Jammu and Kashmir — Effect — J. and K. Preventive Detention Act (13 of 1964) is not void.

Article 370 of the Constitution has never ceased to be operative in Jammu and Kashmir. The President, therefore, could validly pass Constitution (Application to J. and K.) Orders in 1959 and 1964 extending time for giving protection to any law relating to preventive detention in Jammu and Kashmir against invalidity on the ground of infringement of any of the fundamental rights guaranteed by Part III of the Constitution, from five

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years under Article 35 (c) to ten years and fifteen years respectively. The J. and K. Preventive Detention Act (13 of 1964) is immune from being declared void on the ground of inconsistency with Article 22. (Para 8)

The object of the Orders 1959 and 1964 orders was to extend the period of protection to the preventive detention law and not to infringe or abridge the fundamental rights, though the result of the extension is that a detenu cannot, during the period of protection, challenge the law on the ground of its being inconsistent with Article 22. Such extension is justified *prima facie* by the exceptional state of affairs which continue to exist. (Para 15)

(B) Constitution of India, Articles 370, 367 — Provisions in respect of Jammu and Kashmir — Interpretation of Art. 370 — Section 21 of General Clauses Act is applicable — Power of making Orders under Article 370 — Can be exercised from time to time — General Clauses Act (1897), Section 21.

Article 367 makes Section 21 of the General Clauses Act applicable for purpose of interpretation of the Constitution. There is nothing in Article 370 which would exclude the applicability of Section 21 when interpreting the power granted by that article. The President, therefore, can in exercise of power under Article 370 make orders from time to time. The power to modify in Cl. (d) of Article 370 (1) also includes the power to subsequently vary, alter, add to or rescind such an order by reason of the applicability of the rule of interpretation laid down in Section 21 of the General Clauses Act. (Paras 11, 12)

Article 370 cannot also be so interpreted that the power of making modifications and exceptions in the orders made under Article 370 (1) (d) should be limited to making minor alterations and should not cover the power to practically abrogate an article of the Constitution applied in J. and K. State. AIR 1956 SC 197 and AIR 1961 SC 1519, Followed. (Para 14)

(C) Constitution of India, Articles 370, 368 — Application of Article 368 to Jammu and Kashmir — Effect on President's power under Article 370.

Article 368 is not primarily intended for amending the Constitution as applicable in Jammu and Kashmir but is for the purpose of carrying the amendments made in the Constitution for the rest of

India into the Constitution as applied in the State of Jammu and Kashmir. Even in this process, the powers of the President under Article 370 have to be exercised and, consequently, the applicability of Article 368 does not curtail the power of the President under Article 370. (Para 13)

Cases Referred: Chronological Paras

(1961) AIR 1961 SC 1519 (V 48) =

(1962) 1 SCR 688, Puranlal

Lakhanpal v. President of India 14

(1956) AIR 1956 SC 197 (V 43) =

(1955) 1 SCR 1101 = 1956 Cri

LJ 421 (2), P. L. Lakhanpal v.

State of Jammu and Kashmir 14

M/s. M. K. Ramamurthi, Haroobhai Mehta, Vineet Kumar and Mrs. Shyamala Pappu, Advocates, (Petitioner was also produced in Court), for Petitioner; Mr. C. K. Daphtary, Attorney-General for India and Mr. B. R. L. Iyengar, Sr. Advocate (Mr. R. N. Sachthey, Advocate with them), for Respondents; Mr. R. K. Garg, Advocate, *amicus curiae* (for No. D) and M. R. V. S. Mani, Advocate, *amicus curiae* (for No. 2), for Respondents.

The following Judgment of the Court was delivered by

BHARGAVA, J.: This petition under Article 32 of the Constitution of India (hereinafter referred to as "the Constitution") has been presented by Sampat Prakash who was the General Secretary of the All Jammu and Kashmir Low-Paid Government Servants Federation. On October 25, 1967, Government employees and teachers of the Jammu Province held a mass meeting making a demand that dearness allowance at Central rates should be paid to them. They further resolved that, if the Government did not accept this demand, the employees and the teachers would go on 'Dharna' on 5th November, 1967. The Revenue Minister of the Jammu and Kashmir State promised dearness allowance at half the rates applicable to Central Government servants. No dharna was started on 5th November, 1967, but, on 17th November, 1967, a notice was given on behalf of the employees to the Government that there would be a hunger strike on 19th November, 1967. On that day, the employees went on a hunger strike for one day outside the residence of the Chief Minister. Then, there was a mass meeting on 27th November, 1967, in which it was announced that, if their demands were not met, the employees would go on a *pen-down* strike on 2nd December, 1967. The

Government failed to comply with this demand. Then, between 4th and 10th December, 1967, the employees went on a strike—first a pen-down strike and, later, a general strike. Between this period, on 5th December, 1967, there was another mass meeting which was addressed by the petitioner. On 11th December, 1967, even the workers of the various industries in the State went on a general strike in sympathy with the Government employees. On that day, the petitioner was dismissed from government service and on 12th December, 1967, he addressed another mass meeting. In view of these activities of the petitioner and the continuance of such a situation the District Magistrate of Jammu, on 16th March, 1968, made an order of detention of the petitioner under Sec. 8 of the Jammu and Kashmir Preventive Detention Act No. 13 of 1964 (hereinafter referred to as "the Act") and, on 18th March, 1968, the petitioner was actually placed under detention. The grounds of detention were served on the petitioner on the 28th March, 1968 and the State Government granted approval to the order of detention on 8th April, 1968. The detention of the petitioner was continued without making a reference to the Advisory Board, as the State Government purported to act under Section 13A of the Act. The present petition was filed by the petitioner on 3rd May, 1968.

2. During the preliminary bearing of this petition, Mr. Ramamurthy, representing the petitioner, raised a ground that Section 13A of the Act was ultra vires the Constitution as contravening the provisions of Article 22 of the Constitution. That question was referred by the Constitution Bench of the Court to a larger Bench and came before the Full Court. On this occasion, the Court held that, in view of Clause (c) of Article 35 of the Constitution introduced in the Constitution in its application to the State of Jammu and Kashmir, the point that had been raised stood answered by the addition of this clause and, unless the clause itself was challenged, the point raised on behalf of the detenu did not arise. In this view, that reference was dissolved and the case has been heard by the Constitution Bench.

3. On the return of the reference, the main point which has been argued on behalf of the petitioner is based on the fact that Article 35 (c) of the Constitution, as initially introduced by the Constitution (Application to Jammu and

Kashmir) Order, 1954 (C. O. 48) had given protection to any law relating to preventive detention in Jammu and Kashmir against invalidity on the ground of infringement of any of the fundamental rights guaranteed by Part III of the Constitution for a limited period of five years only. This clause, as introduced in 1954, read as follows:

"No law with respect to preventive detention made by the Legislature of the State of Jammu and Kashmir, whether before or after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, shall be void on the ground that it is inconsistent with any of the provisions of this Part, but any such law shall, to the extent of such inconsistency, cease to have effect on the expiration of five years from the commencement of the said Order, except as respects things done or omitted to be done before the expiration thereof."

It was urged that the five years mentioned in the clause expired in 1959, and consequently, the Act, which was passed in 1964, did not get immunity from being declared void on the ground of inconsistency with Article 22 of the Constitution. It, however, appears that for the words "five years" in Article 35 (c), the words "ten years" were substituted by the Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1959 (C. O. 59), which was passed before the expiry of those five years and, subsequently, for the words "ten years" so introduced, the words "fifteen years" were substituted by the Constitution (Application to Jammu and Kashmir) Amendment Order, 1964 (C. O. 69). This modification was also made before the expiry of the period of ten years from the date on which the Constitution (Application to Jammu and Kashmir) Order, 1954 was passed. On these facts, the point raised on behalf of the detenu was that these two modifications in 1959 and 1964, substituting "ten years" for "five years" and "fifteen years" for "ten years", were themselves void on the ground that orders making such modifications could not be validly passed by the President under Article 370 (1) of the Constitution in the years 1959 and 1964.

4. Article 370 of the Constitution is as follows:—

"370. (1) Notwithstanding anything in this Constitution,—

(a) the provisions of Art. 233 shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said State shall be limited to—

(i) those matters in the Union List and the Concurrent List which, in consultations with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation. — For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;—

(c) the provisions of article (1) and of this article shall apply in relation to that State:

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in Clause (2) shall be necessary before the President issues such a notification."

The first argument was that this article contained temporary provisions which ceased to be effective after the Constituent Assembly convened for the purpose of framing the Constitution of the Jammu and Kashmir State had completed its task by framing the Constitution for that State. Reliance was placed on the historical background in which this Article 370 was included in the Constitution to urge that the powers under this article were intended to be conferred only for the limited period until the Constitution of the State was framed, and the President could not resort to them after the Constituent Assembly had completed its work by framing the Constitution of the State. The background of the legislative history to which reference was made, was brought to our notice by learned counsel by drawing our attention to the speech of the Minister Sri N. Gopalaswami Ayyangar when he moved in the Constituent Assembly Clause 306A of the Bill, which now corresponds with Article 370 of the Constitution. It was stated by him that conditions in Kashmir were special and required special treatment. The special circumstances, to which reference was made by him were:—

(1) that there had been a war going on within the limits of Jammu and Kashmir State;

(2) that there was a cease-fire agreed to at the beginning of the year and that cease-fire was still on,

(3) that the conditions in the State were still unusual and abnormal and had not settled down;

(4) that part of the State was still in the hands of rebels and enemies;

(5) that our country was entangled with the United Nations in regard to Jammu and Kashmir and it was not possible to say when we would be free from this entanglement;

(6) that the Government of India had committed themselves to the people of Kashmir in certain respects which commitments included an undertaking that an opportunity would be given to the people of the State to decide for themselves whether they would remain with the Republic or wish to go out of it; and

(7) that the will of the people expressed through the Instrument of a Consti-

tuent Assembly would determine the Constitution of the State as well as the sphere of Union jurisdiction over the State.

Learned counsel urged that, in this background, Article 370 of the Constitution could only have been intended to remain effective until the Constitution of the State was framed and the will of the people of Jammu and Kashmir had been expressed and, thereafter, this article must be held to have become ineffective, so that the modifications made by the President in exercise of the powers under this article, subsequent to the enforcement of the Constitution of the State, would be without any authority of law. The Constitution of the State came into force on 26th January, 1956 and, therefore, the two Orders of 1959 and 1964 passed by the President in purported exercise of the power under Article 370 were void. It was also urged that the provisions of Cl. (2) of Article 370 support this view, because it directs that, if the concurrence of the Government of the State is given under paragraph (ii) of sub-clause (b) of Clause (1) or under the second proviso to sub-clause (d) of that clause before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, that concurrence has to be placed before such Assembly for such decision as it may take thereon. From this, it was sought to be inferred that the power of the President, depending on the concurrence of the Government of the State, must be exercised before the dissolution of the Constituent Assembly of the State, so that the concurrence could be placed for its decision, and that power must be held to cease to exist after the dissolution of the Constituent Assembly when that course became impossible.

5. We are not impressed by either of these two arguments advanced by Mr. Ramamurthy. So far the historical background is concerned, the Attorney-General appearing on behalf of the Government also relied on it to urge that the provisions of Article 370 should be held to be continuing in force because the situation that existed when this article was incorporated in the Constitution had not materially altered, and the purpose of introducing this article was to empower the President to exercise his discretion in applying the Indian Constitution while that situation remained unchanged. There is considerable force in this submission. The legislative history

of this article cannot, in these circumstances, be of any assistance for holding that this article became ineffective after the Constituent Assembly of the State had framed the Constitution for the State.

6. The second submission based on clause (2) of Article 370 does not find support even from the language of that clause which only refers to the concurrence given by the Government of the State before the Constituent Assembly was convened, and makes no mention at all of the completion of the work of the Constituent Assembly or its dissolution.

7. There are, however, much stronger reasons for holding that the provisions of this article continued in force and remained effective even after the Constituent Assembly of the state had passed the Constitution of the State. The most important provision in this connection is that contained in Clause (3) of the article which lays down that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date, as the President may specify by public notification, provided that the recommendation of the Constituent Assembly of the State referred to in Clause (2) shall be necessary before the President issues such a notification. This clause clearly envisages that the article will continue to be operative and can cease to be operative only if, on the recommendation of the Constituent Assembly of the State, the President makes a direction to that effect. In fact, no such recommendation was made by the Constituent Assembly of the State, nor was any Order made by the President, declaring that the article shall cease to be operative. On the contrary, it appears that the Constituent Assembly of the State made a recommendation that the article should be operative with one modification to be incorporated in the Explanation to Clause (1) of the article. This modification in the article was notified by the President by Ministry of Law Order No. C. O. 44 dated 15th November, 1952, and laid down that, from the 17th November, 1952, the article was to be operative with substitution of the new Explanation for the old Explanation as it existed at that time. This makes it very clear that the Constituent Assembly of the State did not desire that this article should cease to be operative and, in fact, expressed its agreement to the continued operation of this article by making a recommendation that it should be operative with this modification only.

8. Further reference may also be made to the proviso added to Article 368 of the Constitution in its application to the State of Jammu and Kashmir, under which an amendment to the Constitution made in accordance with Article 368 is to have no effect in relation to the State of Jammu and Kashmir unless applied by order of the President under Cl. (1) of Article 370. The proviso, thus, clearly requires that the powers of the President under Article 370 must be exercised from time to time in order to bring into effect in Jammu and Kashmir amendments made by Parliament in the Constitution in accordance with Article 368. In view of these provisions, it must be held that Article 370 of the Constitution has never ceased to be operative and there can be no challenge on this ground to the validity of the Orders passed by the President in exercise of the powers conferred by this Article.

9. The next submission made for challenging the validity of the Orders of modification made in the years 1959 and 1964 was that, under sub-clause (d) of Clause (1) of Article 370 of the Constitution, the power that is conferred on the President is for the purpose of applying the provisions of the Constitution to Jammu and Kashmir and not for the purpose of making amendments in the Constitution as applied to that State. The interpretation sought to be placed was that, at the time of applying any provision of the Constitution to the State of Jammu and Kashmir the President is competent to make modifications and exceptions therein but once any provision of the Constitution has been applied, the power under Article 370 would not cover any modification in the Constitution as applied. Reliance was thus placed on the nature of the power conferred on the President to urge that the President could not from time to time amend any of the provisions of the Constitution as applied to the State of Jammu and Kashmir. It was further urged that the President's power under Article 370 should not be interpreted by applying Section 21 of the General Clauses Act, because a Constitutional power cannot be equated with a power conferred by an Act, rule, bye-law, etc.

10. The argument, in our opinion, proceeds on an entirely incorrect basis. Under Article 370 (1) (d), the power of the President is expressed by laying down that provisions of the Constitution, other

than article (1) and article 370 which, under Article 370 (1) (c), became applicable when the Constitution came into force, shall apply in relation to the State of Jammu and Kashmir subject to such exceptions and modifications as the President may by order specify. What the President is required to do is to specify the provisions of the Constitution which are to apply to the State of Jammu and Kashmir and, when making such specification, he is also empowered to specify exceptions and modifications to those provisions. As soon as the President makes such specification, the provisions become applicable to the State with the specified exceptions and modifications. The specification by the President has to be in consultation with the Government of the State if those provisions relate to matters in the Union List and the Concurrent List specified in the Instrument of Accession governing the accession of the State to the Dominion of India as matters with respect to which the Dominion Legislature may make laws for that State. The specification in respect of all other provisions of the Constitution under sub-clause (d) of Cl. (1) of Article 370 has to be with the concurrence of the State Government. Any specification made after such consultation or concurrence has the effect that the provisions of the Constitution specified with the exceptions and modifications become applicable to the State of Jammu and Kashmir. It cannot be held that the nature of the power contained in this provision is such that Section 21 of the General Clauses Act must be held to be totally inapplicable.

11. In this connection, it may be noted that Article 367 of the Constitution lays down that, unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India. This provision made by the Constitution itself in Article 367, thus, specifically applied the provisions of the General Clauses Act to the interpretation of all the articles of the Constitution which include Article 370. Section 21 of the General Clauses Act is as follows:

"Where by any Central Act or Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in

the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued." This provision is clearly a rule of interpretation which has been made applicable to the Constitution in the same manner as it applies to any Central Act or Regulation. On the face of it, the submission that Section 21 cannot be applied to the interpretation of the Constitution will lead to anomalies which can only be avoided by holding that the rule laid down in this section is fully applicable to all the provisions of the Constitution. As an example, under Art. 77 (3), the President, and, under Article 166 (3) the Governor of a State are empowered to make rules for the more convenient transaction of the business of the Government of India or the Government of the State, as the case may be, and for the allocation among Ministers of the said business. If, for the interpretation of these provisions, section 21 of the General Clauses Act is not applied, the result would be that the rules once made by the President or a Governor would become inflexible and the allocation of the business among the Ministers would for ever remain as laid down in the first rules. Clearly, the power of amending these rules from time to time to suit changing situations must be held to exist and that power can only be found in these articles by applying section 21 of the General Clauses Act. There are other similar rule-making powers, such as the power of making service rules under Article 309 of the Constitution. That power must also be exercisable from time to time and must include within it the power to add to, amend, vary or rescind any of those rules. The submission that Section 21 of the General Clauses Act cannot be held to be applicable for interpretation of the Constitution must, therefore, be rejected. It appears to us that there is nothing in Article 370 which would exclude the applicability of this section when interpreting the power granted by that article.

12. The legislative history of this article will also fully support this view. It was because of the special situation existing in Jammu and Kashmir that the Constituent Assembly framing the Constitution decided that the Constitution should not become applicable to Jammu and Kashmir under Article 394, under which it came into effect in the rest of India, and preferred to confer on the President

the power to apply the various provisions of the Constitution with exceptions and modifications. It was envisaged that the President would have to take into account the situation existing in the State when applying a provision of the Constitution and such situations could arise from time to time. There was clearly the possibility that, when applying a particular provision, the situation might demand an exception or modification of the provision applied; but subsequent changes in the situation might justify the rescinding of those modifications or exceptions. This could only be brought about by conferring on the President the power of making orders from time to time under Article 370 and this power must, therefore, be held to have been conferred on him by applying the provisions of Section 21 of the General Clauses Act for the interpretation of the Constitution.

13. The next point urged was that Article 368 of the Constitution having been applied to Jammu and Kashmir with a proviso added to it, there now exists a provision relating to amendment of the Constitution as applied to Jammu and Kashmir under this article and, consequently, while such special provision for this purpose exists, we should interpret Article 370 as being no longer applicable for amending or modifying the provisions of the Constitution applied to that State. This argument, in our opinion, is based on a wrong premise. Article 368 has been applied to Jammu and Kashmir primarily with the object that amendments made by the Parliament in the Constitution of India as applicable in the whole of the country should also take effect in the State of Jammu and Kashmir. The proviso, when applying this article, serves the purpose that those amendments made should be made applicable to the State of Jammu and Kashmir only with the concurrence of the State Government and, after such concurrence is available these amendments should take effect when an order is made under Article 370 of the Constitution. Thus, Article 368 is not primarily intended for amending the Constitution as applicable in Jammu and Kashmir, but is for the purpose of carrying the amendments made in the Constitution for the rest of India into the Constitution as applied in the State of Jammu and Kashmir. Even, in this process, the powers of the President under Article 370 have to be exercised and, consequently, it cannot be held that the

applicability of this article would necessarily curtail the power of the President under Article 370.

14. It was also urged that the power of making modifications and exceptions in the orders made under Article 370 (1) (d) should at least be limited to making minor alterations and should not cover the power to practically abrogate an article of the Constitution applied in that State. That submission is clearly without force. The challenge to the validity of Article 35 (c) introduced in the Constitution as applied to Jammu and Kashmir on this ground was repelled by this Court in *P. L. Lakhanpal v. State of Jammu and Kashmir*, (1955) 2 SCR 1101 = (AIR 1956 SC 197). Subsequently, the scope of the powers of making exceptions and modifications was examined in greater details by this Court in *Puranlal Lakhanpal v. President of India*, (1962) 2 SCR 688 at p. 692 = (AIR 1961 SC 1519 at p. 1521). Dealing with the scope of the word "modification" as used in Article 370 (1), the Court held:—

"But, in the present case, we have to find out the meaning of the word "modification" used in Article 370 (1) in the context of the Constitution. As we have said already, the object behind enacting Article 370 (1) was to recognise the special position of the State of Jammu and Kashmir and to provide for that special position by giving power to the President to apply the provisions of the Constitution to that State with such exceptions and modifications as the President might by order specify. We have already pointed out that the power to make exceptions implies that the President can provide that a particular provision of the Constitution would not apply to that State. If, therefore, the power is given to the President to efface in effect any provision of the Constitution altogether in its application to the State of Jammu and Kashmir, it seems that when he is also given the power to make modifications that power should be considered in its widest possible amplitude. If he could efface a particular provision of the Constitution altogether in its application to the State of Jammu and Kashmir, we see no reason to think that the Constitution did not intend that he should have the power to amend a particular provision in its application to the State of Jammu and Kashmir. It seems to us that when the Constitution used the word "modification" in Article 370 (1), the in-

tention was that the President would have the power to amend the provisions of the Constitution if he so thought fit in their application to the State of Jammu and Kashmir."

Proceeding further, and after discussing the meaning of the word "modify", the Court held:

"Thus, in law, the word "modify" may just mean "vary" i. e., amend; and when Article 370 (1) says that the President may apply the provisions of the Constitution to the State of Jammu and Kashmir with such modifications as he may by order specify, it means that he may vary (i. e., amend) the provisions of the Constitution in its application to the State of Jammu and Kashmir. We are, therefore, of opinion that in the context of the Constitution we must give the widest effect to the meaning of the word "modification" used in Article 370 (1) and in that sense it includes an amendment. There is no reason to limit the word "modifications" as used in Article 370 (1) only to such modifications as do not make any "radical transformation".

This decision being binding on us, it is not possible to accept the submission urged by counsel.

15. Lastly, it was argued that the modifications made in Article 35 (e) by the Constitution (Application to Jammu and Kashmir) Orders of 1959 and 1964 had the effect of abridging the fundamental right of the citizens of Kashmir under Article 22 and other articles contained in Part III after they had already been applied to the State of Jammu and Kashmir and an order of the President under Article 370 being in the nature of law, it would be void under Article 13 of the Constitution. Article 35 (c) as originally introduced in the Constitution as applied to Jammu and Kashmir laid down that no law with respect to preventive detention made by the Legislature of that State could be declared void on the ground of inconsistency with any of the provisions of Part III, with the qualification that such a law to the extent of the inconsistency was to cease to have effect after a period of five years. This means that, under Clause (c) of Art. 35, immunity was granted to the preventive laws made by the State Legislature completely, though the life of the inconsistent provisions was limited to a period of five years. The extension of that life from five to ten years and ten to fifteen years cannot, in these circumstances, be held to be an abridgement of any funda-

mental right, as the fundamental rights were already made inapplicable to the preventive detention law. On the other hand, if the substance of this provision is examined, the proper interpretation would be to hold that, as a result of Article 35 (c), the applicability of the provisions of Part III for the purpose of judging the validity of a law relating to preventive detention made by the State Legislature was postponed for a period of five years, during which the law could not be declared void. As already stated Article 370-(1) (d), in terms, provides for the application of the provisions of the Constitution other than Articles 1 and 370 in relation to Jammu and Kashmir with such exceptions and modifications as President may by order specify. It was not disputed that the President's Order of 1954, by which immunity for a period of five years was given to the State's preventive detention law from challenge on the ground of its being inconsistent with Part III of the Constitution was validly made under and in conformity with Cl. (d) of Article 370 (1). We have already held that the power to modify in Clause (d) also includes the power to subsequently vary, alter, add to or rescind such an order by reason of the applicability of the rule of interpretation laid down in section 21 of the General Clauses Act. If the order of 1954 is not invalid on the ground of infringement or abridgement of fundamental rights under Part III, it is difficult to appreciate how extension of period of immunity made by subsequent amendments can be said to be invalid as constituting an infringement or abridgement of any of the provisions of Part III. The object of the subsequent Orders of 1959 and 1964 was to extend the period of protection to the preventive detention law and not to infringe or abridge the fundamental rights, though the result of the extension is that a detenu cannot, during the period of protection, challenge the law on the ground of its being inconsistent with Article 22. Such extension is justified *prima facie* by the exceptional state of affairs which continue to exist as before.

16. The provision made in Art. 35 (c) has the effect that the validity of the Act cannot be challenged on the ground that any of the provisions of the Act are inconsistent with Article 22 of the Constitution.

17. As a result the grounds taken to challenge the validity of the Act fail and

are rejected. The petition will now be set down for hearing arguments, if any, on the facts of the case.

Order accordingly.

AIR 1970 SUPREME COURT 1126 (V 57 C 238)

(From Delhi: AIR 1969 Delhi 330)

M HIDAYATULLAH, C. J.; J. M. SHELAT, C. A. VAIDIALINCAM, A. N. CROVER AND A. N. RAY, JJ.

The Management of Advance Insurance Co. Ltd., Appellant v. Shri Curudasmal and others, Respondents.

Civil Appeal No. 2258 of 1969, D/- 4-3-1970.

(A) Constitution of India, Sch. VII, List I, Entry 80, Articles 367, 372 and 372A — Belonging to any State — After Adaptation Order No. 1 of 1956, word 'State' includes 'Union Territory' — Members of Police force belonging to Union Territory can have their jurisdiction extended to other States — Article 372A conferred fresh power on President to adapt General Clauses Act.

The definition of word "State" in Section 3 (58) of the General Clauses Act after its adaptation by the Adaptation Order No. 1 of 1956 applies to the definition of 'State' in entry 80 of the Union List with the result that the definition includes Union Territories also. Consequently members of Police Force belonging to Union Territory like Delhi Special Police Establishment can have powers and jurisdiction extended to another State provided the Government of that State consents. (Paras 12 and 16)

Section 3 (58) of the General Clauses Act has been validly adapted by the Adaptation Order No. 1 and includes in the definition of the 'State' a Union Territory. This adaptation has been made under Article 372A which confers a power on the President of India to adapt any law in force in India by making such adaptations and modifications, whether by way of repeal or amendment, as may be necessary and to provide that the law so adapted or modified shall have effect subject to the adaptations or modifications so made and the adaptations and modification shall not be questioned. This was a fresh power equal and analogous to Article 372 (2). Therefore, when the President adapted the General Clauses

Act by giving a new definition of 'State' the new definition appropriate to the purpose applied to the interpretation of the Constitution. The word 'State' in Entry 80 of Union List, therefore, applied to Union Territories also. AIR 1966 SC 644, (Reference to Article 372, held was per incuriam), AIR 1968 SC 637, Ref. (Paras 11, 12, 15)

(B) Constitution of India, Sch. VII, Entry 80 — Expression "police force belonging to any State" — Expression means a police force constituted to function in an area.

The scheme of the Constitution is that the Union territories are centrally administered and if the words 'belonging to any State' in Entry 80 of Union List mean *belonging to a part of India*, the expression is equal to a police force constituted to function in an area. In this way the Delhi Police Establishment means a police force constituted and functioning in the Union Territory of Delhi. The expression 'belonging to' only conveys the meaning that it is a police force constituted and functioning in one area which may be authorised to function in another area. The change from 'for' to 'in' makes no difference because both expressions fit in with the meaning of the phrase 'belonging to' in the Entry. (Paras 20 and 21)

(C) Civil P. C. (1908), Pre. — Interpretation of Statutes — Provisions must be read as far as possible with a view to their validity and not to render them invalid. (Para 21)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 637 (V 55) =

1968-2 SCR 103, Kanniyar v. I.T. Officer, Pondicherry 16

(1966) AIR 1966 SC 644 (V 53) =
1966-1 SCR 430, Ram Kishore

Sen v. Union of India 16

A. K. Sen, Senior Advocate (Mr. B. Datta, Advocate with him), for Appellant; Mr. Jagdish Swarup, Solicitor General of India (M/s. R. L. Mitter and R. N. Sachthley, Advocates with him), for Respondents.

The Judgment of the Court was delivered by

HIDAYATULLAH, C. J.:— On a complaint, January 30, 1968 by the Income-tax Officer (Section X Central) Bombay, of the Commission of Offences under Sections 409, 477A and 120B read with Section 409 of the Indian Penal Code a case was registered by the Superinten-

dent of Police, Special Police Establishment, New Delhi. Investigation was entrusted to an Inspector under the Establishment. It was to be made in Maharashtra State. The appellant, which is a limited company, called the Management of Advance Insurance Company Limited, thereupon filed a petition under Article 226 of the Constitution in the High Court at Delhi challenging the right of the Special Police Establishment to investigate the case. This petition was disposed of on October 18, 1968 by the High Court ordering its dismissal. The present appeal is by certificate granted by the High Court.

2. Before the High Court many questions were mooted. Shortly stated the argument is that the Delhi Special Police Establishment is not constitutional and that it has no jurisdiction to investigate the cases in other States. This argument has many facets which will presently appear. Before we consider them it is necessary to say something about the original constitution of this Special Police Establishment.

3. We are concerned today with the Delhi Special Police Establishment Act of 1946 (XXV of 1946). This Act succeeded two Ordinances which had been earlier passed by the Governor-General and it had been amended from time to time by way of adaptation and modification. It was passed when the Government of India Act, 1935 was in force. Entry No. 3 of the Provincial Legislative List in the 7th Schedule to the Government of India Act, 1935 read "police including railway and village police". Entry 39 of the Federal Legislative List was as follows:

"39. Extension of the powers and jurisdiction of members of a police force belonging to any part of British India to any area in another Governor's Province or Chief Commissioner's Province, but not so as to enable the police of one part to exercise powers and jurisdiction elsewhere without the consent of the Government of the Province or the Chief Commissioner as the case may be; extension of the powers and jurisdiction of members of a police force belonging to any unit to railway areas outside that unit."

It was substituted by the India (Provisional Constitution) Order 1947, as follows:

"39. Extension of the powers and jurisdiction of members of a police force be-

longing to any province to any area in another province, but not so as to enable the police of one province exercise powers and jurisdiction in another province without the consent of the Government of that Province; extension of powers and jurisdiction of members of a police force belonging to any unit to railway areas outside that unit.

In this entry "province" includes a Chief Commissioner's province." The explanation which was included in this last entry was to obviate the implication of the definition of a Province in Section 46 (3) of the Act which read:

"In this Act the expression "Province" means unless the context otherwise requires, a Governor's Province, and "Provincial" shall be construed accordingly." The implication of the explanation was to apply Entry 39 to the Chief Commissioner's Province in addition to Governor's Province. In this way the jurisdiction exercisable under Entry 39 was made co-extensive again with what was formerly British India, which, by Section 311 (1) of the Act, meant both kinds of provinces. The prior history of the Act may be shortly noted. It has little bearing upon the questions in hand.

4. On July 12, 1943 the Governor-General enacted an Ordinance (XXII of 1943) in exercise of his powers conferred by Section 72 of the Government of India Act which was continued in the Ninth Schedule to the Government of India Act, 1935. An emergency had been declared owing to World War II and the powers were exercisable by the Governor-General. The ordinance was called the Special Police Establishment (War Department) Ordinance, 1943. It extended to the whole of British India and came into force at once. By Section 2 (4) the Special Police Establishment (War Department) was constituted to exercise throughout British India the power and jurisdiction exercisable in a province by the members of the police force of that province possessing all their powers, duties, privileges and liabilities. Under Section 4 the superintendence of the Special Police Establishment (War Department) was vested in the Central Government. It was, however, provided by Section 3 as follows:

"Offences to be investigated by Special Police Establishment:—

The Central Government may by general or special order specify the offences or classes of offences committed in con-

nection with Departments of the Central Government which are to be investigated by the Special Police Establishment (War Department), or may direct any particular offence committed in connection with a Department of the Central Government."

This ordinance would have lapsed on September 30, 1946. Before that on September 25, 1946 another ordinance of the same name (No. XXII of 1946) was promulgated. This constituted a special police force for the Chief Commissioner's province of Delhi for investigation of certain offences committed in connection with matters concerning departments of the Central Government. The scheme of this ordinance was slightly different. Under Section 2 Special Police Establishment was constituted for the Chief Commissioner's Province of Delhi for the investigation in that province of offences notified in Section 3. This was notwithstanding the provisions of the Police Act of 1861. The Police Establishment had throughout the Chief Commissioner's Province of Delhi in relation to those offences the powers, duties, privileges and liabilities of the regular police officers subject, however, to any orders which the Central Government might make in this behalf. Section 3 of the new ordinance was almost the same as Section 3 of the previous ordinance. The only changes were that the offences had to be notified and the power to refer any particular case was not repeated. In the Ordinance Section 5 provided that the consent of the Government of the Governor's Province or of the Chief Commissioner should be obtained to the extension before the powers would be exercised.

5. Ordinance No. XXII of 1946 was repealed by the Delhi Police Establishment Act, 1946 (XXV of 1946) which re-enacted the provisions of the Ordinance. This Act was adapted and amended on more than one occasion. First came the Adaptation of Laws Order 1950, enacted under Clause 3 of Article 372 of the Constitution on January 26, 1950. It made two changes. The first was throughout the Act for the words "Chief Commissioner's Province of Delhi" the words "State of Delhi" were substituted and for the word "Provinces" the words "Part A and C States" were substituted. This was merely to give effect to the establishment of "States" in place of provinces under the scheme of our Constitution.

6. Next came the changes introduced by Part B States (Laws) Act, 1951 (Act

III of 1951). They were indicated in the schedule to that Act. Those changes removed the words 'in the States' in the long title and the preamble. The purpose of this was to remove reference to the States in the phrases "for the extension to other areas in the States". The more significant changes came in 1952 by the Delhi Special Police Establishment (Amendment) Act 1952 (XXVI of 1952). In the long title (after the "Adaptation of Laws Order 1950") the words were:

"An Act to make provision for the constitution of a special police force for the State of Delhi for the investigation of certain offences committed in connection with matters concerning Departments of the Central Government etc."

After the amendment the words read:

"An Act to make provision for the constitution of a special police force in Delhi for the investigation of certain offences in Part C States."

Similar changes were also made in the preamble and in Section 3 the reference to Departments of Government was also deleted. The change from 'for the State of Delhi' to 'in Delhi' was the subject of comment in the High Court. To that we shall refer later.

7. In 1956 the Constitution (Seventh Amendment) Act, 1956 was enacted. Previously the Constitution specified the States as Parts A, B and C States and some territories were specified in Part D in the First Schedule. By the amendment the distinction between Parts A and B was abolished. All States (previously Part A and B States) were shown in the First Schedule under the heading 'The States' and Part C States and Part D territories were all described as Union Territories. Thereupon an Adaptation of Laws Order, 1956 was passed and in the Delhi Special Police Establishment Act 1946 all references to 'Part C States' were replaced by the expression 'union territory'. Another significant change made by the Amending Act was to remove from Section 2 the words 'for the State of Delhi', and all references to offences by the words 'committed in connection with matters concerning Departments of the Central Government' were deleted. The resulting position in 1956 may thus be stated by quoting the pertinent sections:

"Section 2 (1). Notwithstanding anything in the Police Act, 1861, the Central Government may constitute a special police force to be called the Delhi Special Police Establishment ... for the investi-

gation of offences notified under Section 3.

(2) Subject to any orders which the Central Government may make in this behalf, members of the said police establishment shall have throughout in relation to the investigation of such offences and arrest of persons concerned in such offences, all the powers, duties, privileges and liabilities which police officers have in connection with the investigation of offences committed therein.

(3) Any member of the said police establishment of or above the rank of Sub-Inspector may, subject to any orders which the Central Government may make in this behalf, exercise in any of the powers of the officer-in-charge of a police station in the area in which he is for the time being and when so exercising such powers shall, subject to any such orders as aforesaid, be deemed to be an officer-in-charge of a police station discharging the functions of such an officer within the limits of his station."

"Section 3. The Central Government may, by notification in the Official Gazette, specify the offences or class of offences which are to be investigated by the Delhi Special Police Establishment."

"Section 5 (1). The Central Government may by order extend to any area (including Railway areas) the powers and jurisdiction of members of the Delhi Special Police Establishment for the investigation of any offences or classes of offences specified in a notification under Section 3."

"Section 6. Nothing contained in Section 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in (a State not being a Union territory or railway area) without the consent of the Government of that State."

The remaining sections need not be quoted here as they follow the scheme of the earlier ordinances and confer powers, jurisdiction etc. equal to those of the regular police. Those provisions are not in dispute.

8. After the passing of the 1946 Act a number of notifications succeeded which notified the offences which the Special Police Establishment could investigate. On November 6, 1956 (Notification No. 7/5/55-AVD) was issued under Section 3 of the Act of 1946. It enabled the Special Police Establishment to investigate inter alia offences under Sections 409 and 477-A of the Indian Penal Code. A

memorandum (No. DPE/1260/6554-V) dated July 2, 1960 shows that the Government of Maharashtra consented to the Delhi Special Police Establishment exercising powers and jurisdiction in the State of Maharashtra in respect of offences mentioned in notifications of the Government of India dated November 6, 1956, February 12, 1957, June 21, 1957 and August 27, 1957. The first notification has been referred to already. The remaining three notifications were not brought to our notice.

9. A doubt raised in the High Court and before us that the Government of Maharashtra had not considered the matter or that the consent was not properly given, is sufficiently answered by the affidavit of the Under Secretary to the Government of Maharashtra dated July 18, 1963 in which it is clearly stated that the Chief Minister had considered the matter and given his consent and that under the Rules of Business he was quite competent to do so. No argument has been advanced before us which entitles the appellant to go behind the memorandum and the affidavit. There is a presumption of regularity of official acts and even apart from it, the memorandum and the affidavit clearly establish that the consent was given.

10. It is, however, urged that the Government of India on February 18, 1963 issued another notification (No. 25/12/62-AVD-II) which superseded the earlier Notification No. 25/7/60-AVD dated January 21, 1961. From this it is argued that the earlier notification to which consent was given by the Maharashtra Government had all been revoked and fresh consent was, therefore, necessary and has not been proved. In our judgment this is an argument of no avail. It is true that if Sections 409 and 477-A Indian Penal Code were newly added, consent of the Government of Maharashtra would have been necessary. But the Maharashtra Government had on more than one occasion consented to the investigation in the State of Maharashtra of these offences. The notifications mentioned those offences afresh with some other offences. In so far as the newly added offences are concerned, the argument would have some validity but not in respect of offences already assented to. We find no force in the argument since we consider the new notification as merely restating the old notification after including some other offences in the new notification.

11. This brings us to the two main arguments. The first is that after the Constitution (Seventh Amendment) Act which removed the description 'Part C States' from the Constitution and introduced the expression 'Union Territories' the present Entry 80 of the Union List (corresponding to Entry 39 of the Federal Legislative List of the Government of India Act 1935) cannot be read as enabling the power to be exercised in respect of a police force belonging to the Union Territories such as Delhi. Entry No. 80 may be read here:

"80. Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State."

12. This entry speaks of a 'police force belonging to any State' and not of a police force belonging to the Union Territory. The adaptation of the Delhi Special Police Establishment Act by the Adaptation of Laws (No. 3) Order, 1956 by substituting 'Union territories' in place of 'Part C States', it is said, cut the Act adrift from the entry under which the power could alone be exercised. This power is limited in extent, it is argued, and cannot be used except as specifically conferred and it applies to a police force belonging to a State and not Union territory. In reply the provisions of the General Clauses Act, as adapted by Adaptation Order (No. 1) were brought to our notice. Section 3 (58) of the General Clauses Act was adapted to read:

"State —

(a) as respects any period before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean a Part A State, a Part B State or a Part C State; and

(b) as respects any period after such commencement, shall mean a State specified in the First Schedule to the Constitution and shall include a Union Territory."

Previously the definition read:

"State shall mean a Part A State, a Part B State or a Part C State".

This definition furnishes a complete answer to the difficulty which is raised since

Entry 80 must be read so as to include Union Territory. Therefore members of a police force belonging to the Union territory can have their powers and jurisdiction extended to another State provided the Government of that State consents. The Bombay State has consented as shown above.

13. Faced with this complete answer the appellants raise the argument that the powers of adaptation of the President in relation to the General Clauses Act came to an end in 1953 and the adaptation of the General Clauses Act is ineffective to give the new meaning of the word 'State' in Entry 80. This argument needs some consideration.

14. Article 367 which followed Article 366 in which the terms of the Constitution were expressly defined applied in addition the provisions of the General Clauses Act for the interpretation of an Act of the Legislature of the Dominion of India. The Article, however, said that the General Clauses Act might be adapted and modified under Article 372. Under that article continuance of the laws in force in the territory of India immediately before the commencement of the Constitution was laid down by Clause (1). Clause (2) then empowered the President to bring the provisions of any such law into accord with the provisions of the Constitution by making such adaptations and modifications of such laws whether by way of repeal or amendment as were required and by providing in that order the date from which the law subject to the adaptation or modification was to have effect. The clause further provided that any such adaptation or modification shall not be questioned in any Court of Law. If this power had no time limit the adaptation of the General Clauses Act in 1956 would be covered by Article 372 (2) but the learned Counsel for the appellants pointed out that there was a time limit of 2 years (later extended to 3 years) in clause (3) (a) of the article and that time limit expired in 1953. They contended that the definition prior to the amendment would only apply.

15. This argument overlooks the provision of a fresh power of adaptation conferred on the President of India by Article 372-A which was introduced by the Constitution (Seventh Amendment) Act 1956. That article reads:

"372A. Power of the President to adapt laws.

(1) For the purposes of bringing the provisions of any law in force in India

or in any part thereof, immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, into accord with the provisions of this Constitution as amended by that Act, the President may by order made before the 1st day of November, 1957, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any Court of Law.

(2) Nothing in clause (1) shall be deemed to prevent a competent legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause." This conferred a power on the President of India to adapt any law in force in India by making such adaptations and modifications, whether by way of repeal or amendment, as may be necessary and to provide that the law so adapted or modified shall have effect subject to the adaptations or modifications so made and the adaptations and modification shall not be questioned. This was a fresh power equal and analogous to Article 372 (2). Therefore, when the President adapted the General Clauses Act by giving a new definition of 'State' the new definition appropriate to the purpose applied to the interpretation of the Constitution. The word 'State' in Entry 80 of Union List, therefore, applied to Union Territories also.

16. Reference is made to Ramkishore Sen v. Union of India, 1966-1 SCR 430 at p. 438 = (AIR 1966 SC 644 at p. 648) where the reference was to Article 372. This was per incuriam as the proper reference ought to have been to Article 372A. It is also argued that the definition cannot be read at all the places where the word 'State' occurs in the Constitution. A number of such articles were brought to our notice, one such being Article 246 (2). It is contended that in that clause at least the definition cannot be read as including Union Territories and, therefore, the General Clauses Act, as amended, cannot be read in Entry 80 either. The argument is correct that the definition cannot always be read. But the answer is plain. The definitions apply unless there is anything repugnant in the subject or context. After the Seventh Amendment India is a Union of States

(Article I) and the territories thereof are specified in the First Schedule. Then there are Union Territories which are mentioned separately. There is thus a distinction between 'States' and 'Union Territories' which cannot be lost sight of. When the definition cannot be made applicable owing to the context or the subject, the word 'State' refers to States in the First Schedule only. Such an occasion arose in *T. M. Kanniyar v. Income-tax Officer, Pondicherry*, 1968-2 SCR 103 at p. 108 = (AIR 1968 SC 637 at pp. 640, 641) and Bachawat, J., explained Article 246 by holding that the definition of 'State' in two parts in the adapted Section 3 (58) of the General Clauses Act was repugnant to the subject and context of Article 246. There is nothing in the subject or context of Entry 80 of the Union List which can be said to exclude the application of the definition in Section 3 (58). Indeed the Part C States were expressly mentioned in Entry No. 39 of the Federal List of the Government of India Act, 1935 (after its amendment in 1947) and thus before the Seventh Amendment the definition of State (subject to the subject or context) included Part C States. Therefore, the definition of 'State' in Section 3 (58) in the General Clauses Act after the adaptation in 1956 applies and includes Union Territories in Entry 80 of the Union List.

17. The last argument is that the Entry 80 of the Union List speaks of a police force 'belonging to any State' and this phrase was also used in the Government of India Act, 1935 in Entry 39 of the Federal Legislative List both before and after its amendment in 1947. It is argued that in Ordinance XXII of 1946 the phrase was 'for the Chief Commissioner's Province of Delhi' and it was repeated in Act XXV of 1946 till the phrase was changed to 'for Part C States'. Thus the word 'for' took the place of the words 'belonging to' in the Entry. Then came the change to the present phrase 'a special police force in Delhi'.

18. It is pointed out that the Special Police Establishment does not belong to the Union Territory of Delhi, since the superintendence of it vests in the Central Government. It is said that the force of the words 'belonging to' is not the same as that of the word 'in'. Therefore it is claimed that the Act is not in accord with the Entry.

19. Various meanings of the expression 'belonging to' are suggested in the

arguments before us. On behalf of the appellants it is said that it meant 'employed by' and not merely 'located in'. In this sense, it is argued, the Special Police Establishment did not belong to any State or Union Territory. On the other side it is argued that the words 'belonging to' convey no more than a territorial nexus. The police force belongs to a part of India and it does not have to belong to a Provincial Government or a State Government or Government of a Union Territory. The extension of the powers, jurisdiction etc., of such a force is also in another part of India, placing again an emphasis on the territory. This shows that the police force of one area operates in another area.

20. Now the scheme of the Constitution is that the Union Territories are centrally administered and if the words 'belonging to' mean belonging to a part of India, the expression is equal to a police force constituted to function in an area. In this way the Delhi Police Establishment means a police force constituted and functioning in the Union Territory of Delhi. Previously the same force functioned in the Chief Commissioner's Province of Delhi, then in Part C State of Delhi and now it functions in the Union Territory of Delhi.

21. It is no doubt true that the words are susceptible of the other meaning also but so long as the words are capable of bearing the meaning we have given it is not necessary to discover another meaning under which the whole scheme would become void. Provisions of law must be read as far as is possible with a view to their validity and not to render them invalid. In our judgment the expression 'belonging to' only conveys the meaning that it is a police force constituted and functioning in one area which may be authorised to function in another area. The change from 'for' to 'in' makes no difference because both expressions fit in with the meaning of the phrase 'belonging to' in the Entry. We see no force in this argument also.

22. The result is that the appeal is devoid of force. It fails and will be dismissed. There will be no order about costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1133

(V 57 C 239)

(From: Kerala)

M. HIDAYATULLAH, C. J., J. M. SHELAT, C. A. VAIDIALINGAM, A. N. GROVER AND A. N. RAY, JJ.

The Twyford Tea Co. Ltd., and another, Petitioners v. The State of Kerala and another, Respondents.

Writ Petn. Nos. 135-137 of 1969, D/-15-1-1970.

Constitution of India, Article 14 — Kerala Plantation (Additional Tax) Act (17 of 1960) as amended by Kerala Plantation (Additional Tax) Amendment Act (19 of 1967) — Validity — Act does not contravene Art. 14 — (Per Majority — Shelat and Grover, JJ. contra.)

(Per majority — Shelat and Grover, JJ. contra): There is a wide range of selection and freedom in appraisal not only in the objects of taxation and the manner of taxation but also in the determination of the rate or rates applicable.

The burden of proving discrimination is always heavy and heavier still when a taxing statute is under attack, and it is on a person complaining of discrimination. The burden is proving not possible 'inequality' but hostile "unequal" treatment. This is more so when uniform taxes are levied. When the legislature reasonably applies an uniform rate after equalising matters between diversely situated persons differences in treatment must be capable of being reasonably explained in the light of the object for which the particular legislation is undertaken. This must be based on some reasonable distinction between the cases differentially treated. To be able to succeed in the charge of discrimination, a person must establish conclusively that persons equally circumstanced have been treated unequally and vice versa. (Paras. 15, 16, 18)

The Act, no doubt, deals with seven different kinds of plantations and imposes an uniform rate of Rs. 50/- per hectare but it lays down principles on which equal treatment is ensured. In the case of cocoanut, arecanut, rubber, coffee and pepper plantations, plants capable of yielding produce are to be counted and then the hectares are determined by dividing the total number of plants by a certain figure. This is intended to equalise the different plantations for purposes of taxability. In the remaining two cases the extent of land yielding the crop is

itself taken as the measure for the tax because it is considered fair and just to treat one actual hectare of crop yielding plantation as equal to the other areas converted into hectares on the basis of the number of plants or trees. Differences in yield between one plantation and another having the same crop, no doubt, arise from situation, altitude and rainfall but they are not the only factors. The law does not single out any particular plantation for hostile or unequal treatment. Therefore there is no discrimination notwithstanding the uniform rate for each plantation based on the actual crop yielding area and the Act is valid. AIR 1961 SC 552, Rel. on; AIR 1967 SC 1458 & AIR 1967 SC 1801 & AIR 1969 SC 378, Distinguished. (Paras 10, 19)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 378 (V 56) =
(1969) 1 SCJ 691, State of Kerala
v. Haji K. Kutty Naha 13, 38
- (1967) AIR 1967 SC 1458 (V 54) =
(1967) 3 SCR 28, State of Andhra
Pradesh v. Nalla Raja Reddy 12, 31
- (1967) AIR 1967 SC 1801 (V 54) =
(1967) 2 SCR 679, New Manek
Chowk Spinning and Weaving
Mills Co. Ltd. v. Municipal Cor-
poration of the City of Ahmeda-
bad 13
- (1966) AIR 1966 Ker 165 (V 53) =
ILR (1965) 2 Ker 619, Essa Ismail
v. State of Kerala 14, 38
- (1964) AIR 1964 Ker 141 (V 51) =
1964 Ker LT 47, Thuttapar Plant-
ing Co. v. Tahsildar Chittur 14, 38
- (1963) AIR 1963 SC 591 (V 50) =
(1963) 3 SCR 809, Khandige Sham
Bhat v. Agricultural Income-tax
Officer 18, 32
- (1962) AIR 1962 SC 1733 (V 49) =
(1963) 1 SCR 404, East India
Tobacco Co. v. State of Andhra
Pradesh 15, 39
- (1961) AIR 1961 SC 552 (V 48) =
(1961) 3 SCR 77, Kunnathat
Thathunni Moopil Nair v. State of
Kerala 5, 7, 8, 18, 23, 24, 25,
26, 29, 30, 31, 32, 37, 38
- (1958) AIR 1958 SC 538 (V 45) =
1959 SCR 279, Ram Krishna
Dalmia v. Justice S. R. Tendolkar 8
- (1956) AIR 1956 SC 20 (V 43) =
1952-2 SCR 857, Parushottam
Govindji v. B. M. Desai 18
- (1940) 309 US 83 = 84 Law Ed 590,
Madden v. Kentucky 18

The following Judgment of Hidayatullah, C. J. and Vaidialingam and Ray, J.J. was delivered by

HIDAYATULLAH, C. J.— These are three petitions by Twyford Tea Company and one of its directors under Art. 32 of the Constitution seeking appropriate writ, order or direction to declare the Kerala Plantation (Additional Tax) Act, 1960 (Act XVII of 1960) and the Kerala Plantation (Additional Tax) Amendment Act, 1967 (Act XIX of 1967) unconstitutional and void. In addition the petitioners ask that the notices annexures B, C and D demanding payment of the tax be also quashed and a sum of Rs. 1,02,106.02 already paid as tax to the Kerala Government be ordered to be refunded. They further seek a mandamus restraining the State of Kerala and Tehsildar Peermade from using the two Acts against the petitioners.

2. The petitioner company is incorporated in India and the majority of its shareholders are Indians. It owns a tea estate in Kuttikanam area in the Peermade hills in Kerala State. The estate consists of 1006 hectares equal to 2486 acres of which 491 hectares equal to 1214 acres are tea plantations. According to the petitioners Peermade hills are in the Western Ghats and are divided into two main parts. Kuttikanam area roughly 35 sq. miles is situated at an altitude of 3400 to 3700 ft. and receives 150 to 200 inches of rainfall annually. The Periyar valley area roughly 60 sq. miles is situated at an altitude of 2800 to 3200 ft. and receives 100 to 150 inches rainfall annually. The Periyar valley area is more fertile than the Kuttikanam area. According to the Petitioners' statements M/s. Parkins Private Ltd., are the Managing Agents of Twyford Tea Company and also the Haileyburia Tea Estate. The former is in Kuttikanam and the latter is Periyar area. The extent of produce from these two areas is very different. Between the years 1963 to 1967 Twyford Tea Company produced 959 to 1211 kgs. per hectare while Haileyburia produced 1461 to 1845 kgs. per hectare. The other tea estates disclosed the same differences in production. Examples are given of Penshurst, Karimtharuvu estates under the same management and of Stagbrook and Cheenthalaar and other estates. The Twyford Tea Company's net profits have declined from Rs. 2,28,222 (1963) to Rs. 59,933 (1967). The net profits of Twyford Tea Company after taxation per hectare rang-

ed from Rs. 122.00 (1967) to Rs. 465.00 (1963) with loss in 1966, while the profits of Haileyburia ranged from Rs. 909.00 (1963) to Rs. 770.00 (1967) with Rs. 245.00 in 1966. This difference is attributed to the differences in fertility between the Kuttikanam and Periyar areas. The petitioners state that similar differences exist in the Vandiperiyar and Nelliampathy areas. The petitioners point out that for purposes of excise duty these areas have been formed into different zones and different rates of excise duty are leviable in these zones.

3. The two statutes which are impugned here imposed a tax on plantations. In the Act XVII of 1960 there is a levy of "additional tax" on plantations. The Act came into force on 1-4-1960. "Plantations" mean land used for growing seven kinds of crops. They are (1) Coconut, (2) Arecanut, (3) Rubber, (4) Coffee, (5) Tea, (6) Cardamom, and (7) Pepper. Section 3 of Act XVII of 1960 is the charging section. Under that section for each financial year a plantation tax additional to the basic tax charged as land tax under the Land Tax Act, 1955 is payable at the rate mentioned in Schedule I of the Act. This Schedule states that no tax is payable if the aggregate extent of plantations held by a person is below five acres. But if the plantations held by a person is 5 acres or more, a tax of Rs. 8/- per acre is payable with exemption for the first two acres. For purposes of finding out the extent of the plantations in acres held by a person a method of calculation is added in Schedule II. It is not necessary to quote this schedule because it has been amended by Act XIX of 1967 and that Schedule will be quoted presently. By the Amended Act the name of the tax is changed. The word "additional" is removed in all places and it is declared that the tax is additional to land revenue or any tax in lieu thereof, if any, payable in respect of such land. The rate of tax is altered in Schedule I to Rs. 50/- per hectare which is payable in respect of plantations of two hectares or more with an exemption for the first hectare. The method of calculation of the extent of plantation in hectares is restated in Schedule II as follows:

"Schedule II.

For the purposes of the assessment of plantation tax payable by a person, the extent of plantations held by him shall be deemed to be the aggregate of the following, expressed in hectares, namely:—

(i) the quotient obtained by dividing the total number of bearing cocoanut trees standing on all lands held by him by 200;

(ii) the quotient obtained by dividing the total number of bearing arecanut trees standing on all lands held by him by 1500;

(iii) the quotient obtained by dividing the total number of yield rubber plants standing on all lands held by him by 450;

(iv) the quotient obtained by dividing the total number of yielding coffee plants standing on all lands held by him by 1500;

(v) the quotient obtained by dividing the total number of yielding pepper vines standing on all lands held by him by 1000;

(vi) the extent of lands on which tea plants are grown which have begun to yield crops;

(vii) the extent of lands on which cardamom plants are grown which have begun to yield crops.

Provided that where the total extent of land held by a person, which is cultivated with the aforesaid crops, is less than the aggregate calculated as above, the actual extent alone shall be deemed to be the extent of plantations held by him."

4. The petitioners paid tax under the old Act without objection. They state that they did so without realising their rights. They were issued three demands for the assessments years 1960-61 to 1968. They had already paid between April 10, 1961 and October 18, 1968, a sum of Rs. 1,02,106.02. It is because of this additional demand arising from the increase in the rate of tax from Rs. 3/- per acre or Rs. 20/- per hectare to Rs. 50/- per hectare that they have challenged the constitutionality of the two Acts.

5. The contention of the petitioners is that there is no rational classification of plantations; that unequals have been treated as equals and that a flat rate imposed upon all the plantations irrespective of their yield is arbitrary. According to them some of the plantations cannot make enough profit to be able to pay tax and in their case the tax became confiscatory. They also complain of discrimination and question the legislative competency of the Kerala Legislature to impose plantation tax in the absence of a specific entry in the 7th Schedule to the Constitution either in List II or III enabling the State Legislature to impose it. They also say that the land tax imposed

under the Land Tax Act was successfully challenged before this Court in *Kunna-th Thathunni Moopil Nair v. State of Kerala*, (1961) 3 SCR 77= (AIR 1961 SC 552) and the change making it additional land revenue imposed an obligation upon the State Legislature to make assessment on the basis of the produce from the land in much the same way as land revenue is calculated after taking into account the fertility of the soil, its yield and such other factors.

6. Stated simply there are three contentions. The first is that the State Legislature lacks competence to impose this tax and even if it did have the competence it has followed a wrong method in imposing additional land revenue without effecting proper settlement. The next contention is that the Act is discriminatory in that it takes no account of differences in situation, fertility and yield between the plantations belonging to the same category. Lastly it is contended that it is discriminatory inasmuch as it seeks to treat plantations of different kinds as if they were equal in all respects by reducing them to a common measure of hectares when it is not possible to do so regard being had to the different incomes derived from these plantations. We shall take up these questions one by one.

7. The first question is of the competence of the State legislature. There is no specific entry in the legislative List Nos. 2 and 3 in the Seventh Schedule to the Constitution. The Land Tax Act 1955, as amended by the Travancore-Cochin Land Tax (Amendment) Act, X of 1957, was declared unconstitutional in its operative sections in *K. T. Moopil Nair's case*, (1961) 3 SCR 77= (AIR 1961 SC 552) (supra). Immediately afterwards the Kerala Land Tax Act 1961 was passed following an Ordinance and that Act is now included in the 9th Schedule to the Constitution at No. 38 and receives the protection of Article 31-B. The competency to impose land tax thus is no longer open to dispute. The present Act is challenged on the same lines as the former Act and the argument is rested upon the principles accepted in *K. T. Moopil Nair's case*, (1961) 3 SCR 77= (AIR 1961 SC 552) (supra). It is, therefore, necessary to recall what was decided there. Under the Land Tax Act 1955 all lands of whatever description and held under whatever tenure were to be charged and levied an uniform tax per acre known as the basic tax. Section 7 of the Act, how-

ever, conferred a power on Government to exempt wholly or in part any land. This Court considered the tax to be discriminatory because it paid no heed to quality or productive capacity of land and the tax was also held to be confiscatory since owners of unproductive land were liable to be eliminated by slow stages. The power of exemption was also considered unreasonable because it enabled Government to pick and choose lands arbitrarily for grant of exemption. The lack of classification was considered to create inequality. Sarkar, J., who dissented held that there was an attempt at classification according to areas, and the tax was levied because land in the State was held, and not because of its productivity.

8. In dealing with this case the arguments have been moulded round the observations in that case. In support of the contention that yield of tea varies from estate to estate and district to district (of which figures are already quoted in the petition) the Tea Statistics (1967-68) compiled by the Tea Board of India were also cited. It is hardly necessary to refer to the findings of the Tea Board because it may be assumed without discussion that there are differences. It may also be conceded that the uniform tax falls more heavily on some plantations than on others because the profits are widely discrepant. But does that involve a discrimination? If the answer be in the affirmative hardly any tax direct or indirect would escape the same censure for taxes touch purses of different lengths and the very uniformity of the tax and its equal treatment would become its undoing. The rich and the poor pay the same taxes irrespective of their incomes in many instances such as the sales-tax and the profession tax etc. It may be remembered that in *K. T. Moopil Nair's case*, (1961) 3 SCR 77= (AIR 1961 SC 552) (*supra*) the majority accepted the observations of S. R. Das, C. J., in *Ram Krishna Dalmia v. Justice S. R. Tendolkar*, 1959 SCR 279 at p. 299= (AIR 1958 SC 538 at p. 548) to the following effect:

"A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law

out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself."

We have always to see what the statute does to make for equality of treatment.

9. The contention here is that there is an uniform rate of tax per hectare which every owner of a named plantation has to pay irrespective of the extent or value of the produce and, therefore, the law imposes an uniform tax burden on unequals. In our opinion this is a wrong way to look at the provisions of the Act.

10. The Act, no doubt, deals with seven different kinds of plantations and imposes an uniform rate of Rs. 50/- per hectare but it lays down principles on which equal treatment is ensured. In the case of coconut, arecanut, rubber, coffee and pepper plantations, plants capable of yielding produce are to be counted and then the hectares are determined by dividing the total number of plants by a certain figure. This is intended to equalise the different plantations for purposes of taxability. In the remaining two cases the extent of land yielding crop is itself taken as the measure for the tax because it is considered fair and just to treat one actual hectare of crop yielding plantation as equal to the other areas converted into hectares, on the basis of the number of plants or trees. Differences in yield between one plantation and another having the same crop, no doubt, arise from situation, altitude and rainfall but they are not the only factors. Otherwise how is it that the same areas give different yield in different years. The respondents have given the figures of yield of Glenmari estate contiguous to Twyford estate. The produce in that estate ranges from 1427 to 1571 kilograms per hectare which is almost

equal to the estates in Periyar area. The yield of Cardamom also varies similarly. In the Highland Produce Co. Ltd., the per acre yield varied from 5770 lbs. in 1965 to 26,690 lbs. in 1962. In 1961 the per acre yield was 91 lbs. and in 1962, 254 lbs. It is obvious that there are circumstances other than situation, rainfall etc., which have made the yield almost 2½ times as much.

11. The legislature thinks that Rs. 50/- per hectare in the case of Cardamom and Tea is reasonable levy and this is equal to other plantations, where the crop-yielding plants and trees has to be converted into hectares according to a formula. It is obvious that the legislature has made an attempt at equalisation of tax burden for different plantations. This is not a case where barren lands have been subjected to equal tax with productive lands. The tax is only levied on crop yielding land. In some cases where the crop may be scattered over a wide area, there is an elaborate mechanism to determine the extent of the crop yielding plantation. The differences which have been pointed out may be the result of some fortuitous circumstance and even bad husbandry. The Court cannot regard the law to be discriminatory on the evidence produced in the case.

12. Before we state the principles on which we have proceeded we may refer to a few cases which were also brought to our notice. In *State of Andhra Pradesh v. Nalla Raja Reddy*, (1967) 3 SCR 28 = (AIR 1967 SC 1458), the Andhra Pradesh Land Revenue (Additional Assessment) and Case Revision Act (22 of 1962) was held to offend Article 14. That Act was passed to bring uniformity in assessment of Land Revenue in the Telangana and Andhra areas of the State of Andhra Pradesh. An additional assessment at the rate of 75% of the yearly assessment was imposed on dry land and the total assessment was not to be less than 50 n. p. per acre. On wet lands the additional assessment was to be 100% for lands irrigated from a Government source and 50% in the case of other wet lands and a minimum total demand was also prescribed. This Act was considered to be discriminatory as the minimum had no relation to the fertility of land, there was no relationship between the land and the ayacut to which it belonged and the procedure for determining the applicable rate was arbitrary. This Court examined the matter critically and came to the con-

clusion that the assessment was left to the arbitrary discretion of an officer without any opportunity to question his findings. This Court compared the procedure for assessment at proper settlements and found that those equitable and reasonable methods of assessment were abandoned. That case is peculiar to itself and cannot be called in aid since in this case there is a reasonable attempt to make the burden equal.

13. Two other cases were referred to but they bear upon a different topic. In *New Manek Chowk Spinning and Weaving Mills Co. Ltd. v. Municipal Corporation of the City of Ahmedabad*, (1967) 2 SCR 679 = (AIR 1967 SC 1801) and *State of Kerala v. Haji K. Kutty Naha*, AIR 1969 SC 378 the question was one of rating. The proposition laid down was that taking only the floor area of a building as the basis for determination of the tax was an arbitrary method when buildings must have different rental values depending upon the nature of the construction, the kind of building and the purpose for which they can be used. These were held vital considerations in the rating of buildings and could not be ignored. These cases were decided on different principles and no analogy can be found merely because equal tax was imposed in diverse conditions.

14. As against these cases the other side relies upon *Thuttampar Planting Co. v. Tahsildar, Chittur*, 1964 Ker LT 47 = (AIR 1964 Ker 141) and *Essa Ismail v. State of Kerala*, ILR (1965) Ker 619 = (AIR 1966 Ker 165) where this tax was upheld. In the second of these cases it was held that the tax was not related to the productivity of the land but to its user and the method of calculation was found to be fair and equitable.

15. We may now state the principles on which the present case must be decided. These principles have been stated earlier but are often ignored when the question of the application of Article 14 arises. One principle on which our Courts (as indeed the Supreme Court in the United States) have always acted, is nowhere better stated than by Willis in his "Constitutional Law" page 587. This is how he put it:

"A State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably The Supreme Court has been practical

and has permitted a very wide latitude in classification for taxation."

This principle was approved by this Court in *East Indian Tobacco Co. v. State of Andhra Pradesh* (1963) 1 SCR 404 at p. 410 = (AIR 1962 SC 1733 at p. 1735). Applying it, the Court observed:

"If a State can validly pick and choose one commodity for taxation and that is not open to attack under Article 14, the same result must follow when the State picks out one category of goods and subjects it to taxation."

This indicates a wide range of selection and freedom in appraisal not only in the objects of taxation and the manner of taxation but also in the determination of the rate or rates applicable. If production must always be taken into account there will have to be a settlement for every year and the tax would become a kind of income-tax.

16. The next principle is that the burden of proving discrimination is always heavy and heavier still when a taxing statute is under attack. This was also observed in the same case of this Court at page 411 (of SCR) = (at p. 1735 of AIR) approving the dictum of the Supreme Court of the United States in *Madden v. Kentucky*, (1940) 309 US 83 = 84 Law Ed 590:

"In taxation even more than in other fields, Legislatures possess the greatest freedom in classification. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." As *Rottschaefer* said in his *Constitutional Law* at p. 668:

"A statute providing for the assessment of one type of intangible at its actual value while other intangibles are assessed at their face value does not deny equal protection even when both are subject to the same rate of tax. The decisions of the Supreme Court in this field have permitted a State Legislature to exercise 'an extremely wide discretion' in classifying property for tax purposes 'so long as it refrained from clear and hostile discrimination against particular persons or classes.'" (Emphasis (here in ' ') added).

The burden is on a person complaining of discrimination. The burden is proving not possible 'inequality' but hostile 'unequal' treatment. This is more so when uniform taxes are levied. It is not proved to us how the different plantations can be said to be 'hostilely or unequally' treated. A uniform wheel tax on cars does

not take into account the value of the car, the mileage it runs, or in the case of taxis, the profits it makes and the miles per gallon it delivers. An Ambassador taxi and a Fiat taxi give different returns in terms of money and mileage. Cinemas pay the same show fee. We do not take a doctrinaire view of equality. The Legislature has obviously thought of equalising the tax through a method which is inherent in the tax scheme. Nothing has been said to show that there is inequality much less 'hostile treatment'. All that is said is that the State must demonstrate equality. That is not the approach. At this rate nothing can ever be proved to be equal to another.

17. There is no basis even for counting one tree as equal to another. Even in a thirty years' settlement, the picture may change the very next year for some reason but the tax as laid continues. Siwai income is brought to land revenue on the basis of number of trees but not on the basis of the produce. This is worked out on an average income per tree and not on the basis of the yield of any particular tree or trees.

18. What is meant by the power to classify without unreasonably discriminating between persons similarly situated, has been stated in several other cases of this Court. The same applies when the legislature reasonably applies a uniform rate after equalising matters between diversely situated persons. Simply stated the law is this: Differences in treatment must be capable of being reasonably explained in the light of the object for which the particular legislation is undertaken. This must be based on some reasonable distinction between the cases differentially treated. When differential treatment is not reasonably explained and justified the treatment is discriminatory. If different subjects are equally treated there must be some basis on which the differences have been equalised otherwise discrimination will be found. To be able to succeed in the charge of discrimination, a person must establish conclusively that persons equally circumstanced have been treated unequally and vice versa. However, in *Khandige Sham Bhat v. Agricultural Income-tax Officer*, (1963) 8 SCR 809 at p. 817 = (AIR 1963 SC 591 at p. 594) it was observed:

"If there is equality and uniformity within each group, the law will not be condemned as discriminative, though due to some fortuitous circumstance arising out of a peculiar situation some included

in a class get an advantage over others, so long as they are not singled out for special treatment. Taxation law is not an exception to this doctrine: vide *Purshotam Govindji Halai v. Shree B. N. Desai*, 1955-2 SCR 887 = (AIR 1956 SC 20) and (1961) 3 SCR 77 = (AIR 1961 SC 552). But in the application of the principles, the courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the legislature in the matter of classification, so long it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of "wide range and flexibility" so that it can adjust its system of taxation in all proper and reasonable ways."

19. Taking these principles into consideration we are satisfied that the law does not single out any particular plantation for hostile or unequal treatment. In fact it is nowhere proved in this case that tea has been discriminated against deliberately. As between different tea gardens, it is not possible to say that the difference in the yield is entirely due to natural circumstances and no other cause. It is, therefore, not possible to say that there is discrimination notwithstanding the uniform rate for each plantation based on the actual crop yielding area.

20. The petitions must therefore fail. They will be dismissed with costs.

21. SHELAT, J. (On behalf of himself and Grover, J.): Petitioner No. 1, a public limited company, of which the second petitioner is a shareholder, owns the Twyford Estates situate in Kuttikanam area in Kerala State. The estate is a tea plantation admeasuring 1006 hectares (2486 acres), out of which 491 hectares (1214 acres) have tea plants. In these petitions, the petitioners challenge the constitutional validity of the Kerala Plantations (Additional Tax) Act, XVII of 1960, as amended by the Kerala Plantations (Additional Tax) Amendment Act, XIX of 1967 (hereinafter referred to as the Act). The challenge is on the ground that the Act violates the petitioners' guaranteed rights under Articles 14, 19 (1) (f) and (g) and 31 (1).

22. Before we set out the facts and the contentions based thereon, it is necessary to recite briefly the history of the legislation pertaining to land taxation in the State.

23. In 1955, the Legislature of the then State of Travancore Cochin passed

the Travancore-Cochin Land Tax Act, XV of 1955 which by Sections 4 and 5 imposed in respect of all lands, of whatever description and tenure a uniform rate to be called the basic tax at the rate of 3 pies per cent per annum in lieu of any existing tax in respect of the said land. With the formation of the present State of Kerala under the reorganisation of States, the State Legislature passed the Travancore-Cochin Land Tax (Amendment) Act, X of 1957 by which the expressions "the State of Kerala" and "the Land Tax Act" were substituted for the words "the State of Travancore-Cochin" and "the Travancore-Cochin Land Tax Act" respectively. The amendment Act also added a new section, Section 5A, which inter alia, provided for provisional assessment of the basic tax for lands so far not surveyed. The constitutional validity of Act XV of 1955, as amended by Act X of 1957, was challenged in this Court in (1961) 3 SCR 77 = (AIR 1961 SC 552). The Act was struck down by this Court, inter alia, on the ground of its being violative of Articles 14 and 19 (1) (f). The judgment of this Court striking down the Act was pronounced on December 9, 1960.

24. Before the case of *Moopil Nair* (1961) 3 SCR 77 = (AIR 1961 SC 552) was decided, the Kerala Legislature passed the impugned Act, XVII of 1960, which on receiving the Governor's assent, was published in the Gazette, Extraordinary of August 24, 1960. Section 2 (6) of the Act defined a "plantation" to mean land used for growing one or more of the seven categories of trees or plants set out therein, category 5 thereof being tea plants. Thus, the land used for growing any trees, plants or crops other than these seven categories is not subject to the additional tax under the Act. Section 3 provides that there shall be charged, in respect of the lands comprised in plantations held by a person, an additional tax or plantation tax at the rate specified in Schedule I and the person holding such plantation shall be liable to pay the plantation tax. Schedule I to the Act lays down that the additional tax would not be payable if the aggregate extent of the plantation held by a person is below 5 acres. But if it is 5 acres or more, the first two acres thereof would be exempt from the tax and the remainder would be chargeable at the rate of Rs. 8 per acre. Sub-section (4) of Section 3 provides that for purposes of the assessment of plantation tax

payable by a person under this Act, the extent of plantation held by him shall be determined in the manner specified in Schedule II. Section 3 (5) declares that the tax charged under this section shall be in addition to the basic tax payable under the Land Tax Act, 1955. Sections 4 and 5 deal with the returns relating to the plantations, the determination of the extent of plantation and the assessment of the tax. The rest of the provisions of the Act provide for such subjects as the provisional assessment notice of demand, appeal and revision against assessment orders, recovery of the tax, refund etc. Schedule II provides that the extent of plantation held by a person shall be deemed to be the aggregate of the following expressed in acres, namely:—

(i) the quotient obtained by dividing the total number of bearing coconut trees standing on all lands held by him by 85;

(ii) the quotient obtained by dividing the total number of bearing arecanut trees standing on all lands held by him by 600;

(iii) the quotient obtained by dividing the total number of yielding rubber plants standing on all lands held by him by 180;

(iv) the quotient obtained by dividing the total number of yielding coffee plants standing on all lands held by him by 600;

(v) the quotient obtained by dividing the total number of yielding pepper vines standing on all lands held by him by 400;

(vi) the extent of lands on which tea plants are grown which have begun to yield crops; and

(vii) the extent of lands on which cardamom plants are grown which have begun to yield crops.

Provided that where the total extent of land held by a person, which is cultivated with the aforesaid crops, is less than the aggregate calculated as above, the actual extent alone shall be deemed to be the extent of plantations held by him. Though the Schedule lays down different quotients in respect of lands cultivated with coconut and arecanut trees, rubber and coffee plants and pepper vines, they cannot achieve equality of the burden of the tax as yields of even the same crop cannot be equal or approximately equal by reason of differences in the lands in one area from those

in other areas depending on their soil, situation and a number of other such factors. Furthermore, no explanation is forthcoming about the principle, if any, on which the quotient for each of the said categories was fixed and whether they inter se work out reasonable equality among the plantations cultivating the said trees and plants. In the case of tea plants, the holder is liable to pay tax on the extent of lands on which they are grown irrespective of the number of tea plants which are or can be grown, their quality or their possible yield.

25. The Act was amended, as aforesaid, by Act XIX of 1967 by which the expression 'additional tax' was substituted by the word 'tax', and in Section 4 instead of the measure for charging the tax being 5 acres or more, the measure now adopted was 2 hectares and more. The two new Schedules, which were substituted for those in Act XVII of 1960 provided by Schedule I that no tax would be payable if the aggregate extent of plantation was below 2 hectares, but where it is 2 hectares or more, there would be no tax on the first one hectare but the rest of the land would be taxed at Rs. 50 per hectare. With the substitution of hectare as the measure in place of acre, the quotients were suitably modified in proportion of a hectare being equal to 2.475 acres. Thus, under the Act, as amended by Act XIX of 1967, a holder of land, whose land is plantation, is now required to pay Rs. 50 per hectare instead of Rs. 20 per hectare over and above the basic tax payable by him under the Land Tax Act, 1955, as amended in 1957. The petitioner-company thus is liable to pay Rs. 24,500/- as additional tax on its 491 hectares cultivated for tea plants over and above the basic tax payable by it. It will be noticed that notwithstanding the reasons on which in Moopil Nair's decision (1961) 3 SCR 77 = (AIR 1961 SC 552) the Land Tax Act, XV of 1955 was struck down, no changes in the light of that decision were made in Act XVII of 1960 even when it was amended in 1967.

26. In consequences of Act XV of 1955 having been struck down as aforesaid, the Kerala Legislature passed a new Act, called the Kerala Land Tax Act, XIII of 1961, giving it a retrospective effect by Section 1 (3) thereof. The Act was obviously passed in the light of the observations made by this Court in Moopil Nair's case, (1961) 3 SCR 77 =

(AIR 1961 SC 552). Section 5 provided that there shall be charged a tax called "basic tax" on all lands of whatever description and tenure. Sub-section (3) of that section provided that the basic tax so charged shall be deemed to be public revenue due on lands within the meaning of the Revenue Recovery Act. Section 6 (1) laid down the rate of the basic tax. The basic tax was first fixed at Rs. 2 per acre per annum, but subsequently changed to Rs. 4.94 P. per hectare. Section 6 (2) provided that notwithstanding anything contained in sub-section (1), where a land-holder liable to pay basic tax proved to the satisfaction of the prescribed authority that the gross income from any land was less than Rs. 10 per acre per annum (now changed to Rupees 24.70 P. per hectare), the basic tax payable on such land shall be at a rate fixed by the prescribed authority calculated at 1/5th of the gross income from such land. The second proviso to sub-section (2) laid down that the Government may, having regard to the potential productivity of any land used principally for growing cocoanut, arecanut, pepper, tea, coffee, rubber, cardamom, or cashew or any other special crop, plant or tea that might be specified by the Government by notification, levy and collect basic tax at the rate of two rupees per acre per annum on such land notwithstanding the fact that such crops, plants or trees have not begun to yield or bear and that for the time being no income is made from the land or that the income made is less than ten rupees per acre per annum. Explanation (i) to S. 6 laid down that for the purpose of S. 6 gross income shall mean the actual gross income or the gross income that would be made from the land with due diligence, whichever was higher. Thus, S. 6(2), the second proviso thereto and Explanations 1 and 3 to the section clearly disclose that this time the Legislature taxed the land on the standard of potential productivity instead of the ad hoc levy originally provided in the Act of 1955 and also removed the objection as to the absence of any remedy against assessment by providing appeal and revision. The position, therefore, is that whereas under the Kerala Land Tax Act, XIII of 1961, as amended in 1963 and 1969, the basic or land tax is levied on the basis of potential productivity and yield, the tax as imposed by the impugned Act as a tax in addition to the basic tax is a uniform tax at a flat rate without

any regard to the productivity of the land, potential or actual.

27. According to the petitioners, Peer-made Hills, where their estate is situate, falls roughly into two areas, the Kuttikanam area and the Periyar valley area. Though both these areas are situate in high ranges, they differ in the extent of their productivity and quality the reason being that the Periyar valley area is the basin of Periyar river. The difference in the fertility and the quality of soil in these two areas is sought to be illustrated by showing that Twyford estate situate in Kuttikaram area and Haileyburia estate situate in Periyar valley area, though under common management, give different average yields. The average yield in 1967 per hectare in Twyford estate was 959 Kgs. while that of Haileyburia estate was 1542 Kgs. To show such differences also in other areas in the State and elsewhere the petitioners have furnished various statistics. These statistics first show that the average annual yield per hectare in the tea-growing areas in Madras, Mysore and Kerala for the year 1967 was 1394, 1178 and 1076 Kgs. respectively. The all-India average yield according to these figures was 1100 Kgs. per hectare per year. The average of tea production per hectare in Kerala State thus compares favourably with that of the other tea growing regions as also with the all-India average. Therefore, the tea planters in Kerala cannot be said to be backward or less forward-looking or less venturesome than those in the other regions. Secondly, these figures also show that the average yield in the different districts in Kerala itself varies from district to district ranging from about 350 Kgs. for the district of Ernakulam to as much as 1850 Kgs. for Trichur district. The production figure for the whole of the Kerala State appears to have remained steady throughout 1965 to 1967 as it varies from about 43000 Kgs. to 44000 Kgs. These figures indicate that different areas in the State where tea is grown differ in a very large way in productivity and fertility. These figures are taken from the Reports of the Tea Board, and therefore, can be safely regarded as reliable.

28. In the counter-affidavit filed by the State these differences, no doubt, are not admitted. To show that such differences do not exist only the example of one estate, Glenmari near Kuttikanam, is taken. It is urged that that estate has a larger production per hectare than the petitioners' estate though both happen to

be situate in the same area. The respondents, however, have frankly conceded that the fertility of the land and the difference in productivity of estates in different areas are not relevant, for, the impugned tax is levied with reference to the specified user to which the land is put and not to its productivity, potential or actual.

29. Counsel for the petitioners contended that the tax charged under the Act is discriminatory and arbitrary, and therefore, violates Article 14. The argument was that the tax, being an ad hoc levy uniformly imposed, merely on the basis of the use of the land for any one or more of the seven kinds of trees and plants selected by Section 2 (6) of the Act without any classification and without any consideration to the situation, the kind of land, its potential productivity, water-supply, natural or artificial, and geographical features, falls unequally on the holders of the land. It was submitted that this inequality arises as a result of the absence of any rational classification, and the Act, for that reason, suffers from the same infirmity for which in the Moopil Nair's case, (1961) 3 SCR 77 = (AIR 1961 SC 552) this Court struck down the Travancore-Cochin Land Tax Act, 1955, as amended by Act X of 1957. The contention urged, on the other hand, on behalf of the State was that by selecting the seven kinds of plantations in Section 2 (6), the Legislature has made an intelligible classification amongst holders of land, that that classification has a reasonable nexus with the object of the Act; namely, to obtain additional revenue by imposing tax in addition to the basic tax, that the Legislature in the matter of taxation has a wide discretion in selecting persons and properties for imposing a tax, that in exercise of its power to tax, it was entitled to levy the tax based on certain kinds of user of land and was not bound to make a further classification of the land according to its potential productivity, its situation, its geographical features, income and other such considerations.

30. Before we examine these contentions we think it expedient to consider first the principles laid down by this Court in the matter of the power to levy taxes of the kind we have before us. In Moopil Nair's case, (1961) 3 SCR 77 = (AIR 1961 SC 552) this Court laid down the following principles: (1) that Article 14 read with Arti-

cle 13 (2) applies to a taxing statute as much as to other statutes, and therefore, if the impugned statute, even though a taxing one, violates Article 14, it has to be struck down as unconstitutional; (2) that the statute there impugned, namely, the Travancore-Cochin Land Tax Act, 1955, as amended by Act X of 1957, imposed a uniform tax on all lands, whether productive or not, and without any reference to their income, actual or potential, (3) that since the Act in terms claimed by Section 3 thereof to be a general revenue settlement of the State, the tax being one on land or land revenue had to be assessed and levied on the actual or potential productivity of the land sought to be taxed: in other words such a tax has reference to the income actually made or which could have been made with due regard to its incidence, and (4) that the inequality writ large on the Act arose by reason of the absence of any classification of the land on which the tax was imposed. The argument which appears to have appealed to the learned dissenting Judge that the Act made a classification between holders of land according to the quantum of land held by them and that that classification was reasonably linked with the object of the Act to raise revenue for the State, failed to receive the approval of the rest of the Court. The fact that a person holds a large area of land and is taxed according to the area he holds cannot by itself mean that in taxing him he is meted out equal treatment as compared to a person who holds a lesser quantity of land but of a better and more productive quality, merely on the ground that both hold land and are taxed according to the quantity each of them holds. A uniform tax without consideration of its incidence, when actually implemented must result in inequality of treatment amongst persons similarly situated, and therefore, would be violative of Article 14.

31. In (1967) 3 SCR 28 = (AIR 1967 SC 1458) the relevant facts were as follows: Originally two different revenue systems prevailed in Andhra and Telengana. In the former, the principles of Ryotwari system prevailed which meant that lands were classified under two principal heads, wet and dry. Lands of similar grain values were bracketed together in orders called "tarams", each with its own rate of assessment, which was further adjusted in the case of dry lands with reference to the nature and quality of water supply. This system,

prevailed since times immemorial and by reason of its being equitable had general approval. In Telengana, the relative scale of soils was classified in terms of annas. The existing or former rates used to be taken as the basis for the purpose of resettlements and were adjusted having regard to altered conditions, such as the rise and fall of prices, increase in population etc. Besides, the settlement officers used to fix the rates after ascertaining what profit would be left to the cultivators. Thus, under the system of assessment which prevailed in both the areas, the land revenue fixed varied according to the classification of soil based upon productivity. Later, the Andhra Pradesh Land Revenue Assessment (Standardisation) Act, 1952 and the Hyderabad Land Revenue (Special Assessment) Act, 1952 were passed to standardise the rates on the basis of price level. These two Acts increased the rates by way of surcharge on the existing rates. In 1958, the State Government appointed a Committee to examine the existing system of rates of assessment. The Committee inter alia suggested that assessment should be based on the quality and productivity of soils, the nature of water supply and the prices. The State Legislature then passed the impugned Act, Andhra Pradesh Land Revenue (Additional Assessment) and Cess Revision Act, XXII of 1962, which was amended by Act XXIII of 1962. Under Sections 3 and 4 of the Act, as amended, a new scheme was laid down in accordance with which an additional assessment at 75% of the earlier assessment was charged. But the proviso thereto laid down that the total assessment should not in any case be less than 50 nP. per acre per year, irrespective of the quality and productivity of the soil. Every acre of dry land had thus to bear a minimum assessment of 50 nP. per acre per year. For wet lands also, a scheme was adopted which took no account of the quality and productivity of the soil. The Act was challenged on the ground of discrimination arising from the absence of classification as in the case of Moopil Nair, (1961) 3 SCR 77 = (AIR 1961 SC 552). In considering the challenge the Court observed:

"A statutory provision may offend Article 14 of the Constitution both by finding differences where there are none and by making no difference where there is one. Decided cases laid down two tests to ascertain whether a classification is permissible or not, viz, (i) the classifica-

tion must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. The said principles have been applied by this Court to taxing statutes. This Court in (1961) 3 SCR 77 = (AIR 1961 SC 552) held that the Travancore-Cochin Land Tax Act, 1955, infringed Article 14 of the Constitution, as it obliged every person who held land to pay the tax at the flat rate prescribed, whether or not he made any income out of the property, or whether or not the property was capable of yielding any income. It was pointed out that that was one of the cases where the lack of classification created inequality." The Court observed that in the case before it the whole scheme of ryotwari system was given up so far as the minimum rate was concerned. A flat rate was fixed in the case of dry lands without any reference to the quality or fertility of the soil, and in the case of wet lands, a minimum rate was fixed and it was sought to be justified by correlating it to the ayacut. The Court held that that scheme of classification was adopted without any reasonable relation to the objects sought to be achieved, namely, fixation and rationalisation of rates, and therefore, clearly offended the equal protection clause.

32. In (1963) 3 SCR 809 at p. 817 = (AIR 1963 SC 591 at p. 594) the court re-affirmed the principles laid down in Moopil Nair's case, (1961) 3 SCR 77 = (AIR 1961 SC 552) and observed with regard to the provisions there impugned:

"In order to judge whether a law was discriminatory what had primarily to be looked into was not its phraseology but its real effect. If there was equality and uniformity within each group, the law could not be discriminatory, though due to fortuitous circumstances in a peculiar situation some included in a class might get some advantage over others, so long as they were not sought out for special treatment. Although taxation laws could be no exception to this rule, the courts would, in view of the inherent complexity of fiscal adjustment of diverse elements permit a larger discretion to the Legislature in the matter of classification so long as there was no transgression of the fundamental principles underlying the doctrine of classification. The power of

the Legislature to classify, must necessarily be wide and flexible, so as to enable it to adjust its system of taxation in all proper and reasonable ways."

33. The principle emerging from these decisions is thus fairly well settled. While granting a fairly wide discretion to the legislature in the matter of fiscal adjustment, the Court will at the same time insist that the statute in question, like any other statute, should not infringe Article 14 either by introducing unreasonable or irrational classification between persons or properties similarly situated or by a lack of classification. Further, in examining the objection under Article 14 the Court has not to go by the phraseology only of the provision under challenge, but its real impact on persons or properties.

34. The challenge urged on behalf of the petitioners may now be examined in the light of these principles. Both the title and the preamble of Act XVII of 1960 in clear terms call the tax one in addition, as Section 3 (5) declares it, to be the basic tax, payable on lands falling under its purview, i. e., plantations, as defined by Section 2 (6). A plantation, as defined by Section 2 (6), means the land used for any one or more of the seven types of trees and plants set out therein. The tax is thus chargeable in respect of lands which are plantations and not the rest of the lands; however much their income may be. Apart from that, as stated in the State's counter-affidavit, the tax is imposed on the ground of the particular use to which the land is put and not on the basis of its productivity or income, actual or potential. This is so, although it is a tax in addition to the basis or land tax levied under the Kerala Land Tax Act XIII of 1961 and although that basic tax under Section 6 of that Act depends upon the gross income yielded by the particular land. It is true that under the second proviso to that section, if the land is used for growing any of the crops therein mentioned, the Government can impose, having regard to its potential productivity, the basic tax at Rs. 2/- per acre, even though the land has not yet begun to yield or bear the crop and no income has yet begun to be made therefrom. By subsequent amendment the rate was changed to Rs. 4.94 per hectare, but the principle of potential productivity was maintained. The additional tax imposed by Act XVII of 1960, on the other hand, is on the

same land provided it is used for growing any one or more of the specified trees or plants, originally at the uniform rate of Rs. 8 per acre but now enhanced by Act XIX of 1967 to Rs. 50 per hectare, i. e., Rs. 20 per acre. As already stated, the Amendment Act deleted the word 'additional' but the deletion makes no difference as the tax is still in addition to the basic or land tax and must, therefore, partake its character, both taxes being taxes in respect of the same land, where the land is plantation within Section 2 (6). Thus, so far as such lands are concerned, the basic tax on them is assessed according to their productivity or income. But the tax under Act XVII of 1960, as amended by Act XIX of 1967, is imposed in respect of them as an ad hoc uniform tax, irrespective of the kind of their soil or their capacity etc. and only for the reason of their particular user. Prima facie, the incidence of such a tax by reason of its uniformity is bound to be unequal on persons similarly situated and would, therefore, be hit by the equality clause in Article 14. Even assuming that the basic tax is a revenue assessment and the additional tax is not, it would still make no difference in its unequal incidence on those whose lands by their particular user are plantations. In other words, the burden of the tax on persons situated in similar circumstances, i. e., those whose lands are plantations, would be unequal, depending upon the kind of soil, the geographical situation, water supply, elevation and other relevant factors touching the lands they hold. The additional tax is by no means low as it is, after the passing of the amendment Act XIX of 1967, Rs. 50 per hectare, equivalent to Rs. 20 per acre. A person holding 1000 acres of land of inferior soil would, by reason of such an ad hoc tax, be bound to be hit harder than the one holding 1000 acres of superior land with higher fertility or productivity. Such a result would not occur if the land is classified and the incidence of the tax is graded according to its productivity and other relevant factors.

35. In support of the Act it was argued that the impugned Act not only makes a classification between those who hold lands which are plantations and those who hold lands which are not plantations, but also makes a further classification within that classification by the method provided for calculating the extent of plantations in Schedule II. That

argument does not appear to be correct. The Schedule only provides the methods for calculating the extent of the plantations: (1) by means of quotients and (2) where tea and cardamom plants are cultivated by the actual extent of the land used for those purposes. But the Schedule does not solve the difficulty. A piece of land in one area may have a certain number of trees or plants of one or more of the specified categories to make it a plantation. But the incidence of the tax in respect of it would be unequal as compared to another land situate elsewhere by reason of the latter's better situation or fertility even if the number of plants or trees of the specified kind are the same, depending upon the situation and the capacity of the two lands. In such a case the very uniformity of the tax is bound to result in discrimination on account of the relative potentiality of the two lands not being taken into account, and the lands not being classified accordingly. It is, therefore, difficult to say that the Schedule, intended only for calculating the extent of the plantations, seeks to achieve equality of treatment between one kind of plantation and another or between plantations of the same kind, if the principle of their yield or income, actual or potential, is not taken into account. How is it possible to say that the uniform burden of Rs. 50 per hectare in the case, say of cocoanut, tea, coffee or cardamom plantations, is reasonably equal, when the potential yield of each such plantation is not taken into consideration? The same result must also follow amongst holders of the same kind of plantations if the principle of yield or income is discarded. Thus, Schedule II only provides the two methods of calculating the extent of the plantation and does not make a classification within a classification, as urged. The only classification made is between those whose lands fall under the definition of 'plantation' and those whose lands do not. All those who held lands which are plantations are made liable to pay the tax at the uniform rate of Rs. 50 per hectare, no matter what kind of crop, out of the seven kinds mentioned in the Act, is cultivated by them, without regard to the fact that one kind may be more valuable than the other and irrespective of their situation, their income-yielding capacity and other factors.

36. The result of such uniform imposition is that tea planters, who hold lands in Ernakulam, Trichur and Kottayam dis-

tricts, would pay the same amount of tax per hectare although the average yield per hectare in these districts for the years 1965 to 1967 was about 350, 1825 and 1050 Kgs. respectively. The difference in yield in these different districts must clearly be due to the difference in the soil, situation and such other factors for, it is nobody's case (at least not made out in the counter-affidavit of the respondents) that the cultivators in Ernakulam district use inferior seed or are less venturesome than those in Kottayam and Trichur districts. Such a difference in the average yield per hectare occurs also in other tea growing districts, namely, Cannanore, Palghat, Kozhikode, Travandrum and Quilon, whose average yield per hectare during the years 1965 to 1967 was 950, 1490, 1575, 975 and 650 Kgs. respectively. Since these figures are from the statistics prepared by the Tea Board, they cannot be disputed. That such differences in the average yield occur also in the different districts of the States of Madras and Mysore is also clear. Surely, they cannot arise because the cultivators of one district are more adventurous or more technology-minded than those of the other districts. The differences in the yield must, therefore, be attributed to the differences in the soil, situation, water supply, rainfall etc.

37. Imposing a uniform rate of tax in respect of lands where tea is grown, without classifying them on the basis of their productivity, actual or potential, and without differentiating the inferior from the superior kind of soil or without taking into consideration the fact of some of these lands being situated in more advantageous position than the rest, must, therefore, inevitably result in unequal incidence of the tax on those who hold those lands. Therefore, as in the case of Moopil Nair, (1961) 3 SCR 77 = (AIR 1961 SC 552) the present case is also one where inequality emerges as a result of imposing an ad hoc tax, uniformly levied without making any rational or intelligible classification. There is no indication in the Act and none was even sought to be shown as to how and on what basis the uniform rate of Rs. 50 per hectare was fixed and whether it had any relation to the capacity of those who hold lands with different average yields ranging from 350 Kgs. per hectare in Ernakulam to about 1850 Kgs. per hectare in Trichur, in addition to the basic tax also payable by them. Obviously, the tax imposed in the manner pointed out above

must result in inequality among the holders who use their lands for tea growing though they are similarly situated. The principles laid down in Moopil Nair's case (1961) 3 SCR 77 = (AIR 1961 SC 552) approved and confirmed in subsequent decisions and which are binding upon us, apply to the impugned statute.

38. But in 1964 Ker LT 47 = (AIR 1964 Ker 141) a learned Single Judge of the Kerala High Court repelled the contention as to the invalidity of Act XVII of 1960 and held that the decision in Moopil Nair's case, (1961) 3 SCR 77 = (AIR 1961 SC 552) did not apply as by adopting the quotients in Schedule II the impost had been related to the potentiality of the land and its possible yield. As already pointed out, even the counter-affidavit filed by the State in the present petition, does not claim that the additional tax imposed under this Act takes into account the potentiality of the land or its possible yield. It, on the other hand, asserts in plain language that the tax is levied by reason only of the particular use to which the land is put and which makes it fall within Section 2 (6). If potentiality of the land and its possible yield had been taken into consideration the amount of tax could not have been uniform as its quantum would have depended on its quality, situation and other factors. Indeed, in ILR (1965) 2 Ker 619 = (AIR 1966 Ker 165) a Division Bench of that very High Court held that what Act XVII of 1960 did was to tax lands comprised in plantations, not on the basis of their productivity but on the basis of their user. But the Division Bench held that the Act was "just and equitable", and therefore, was not hit by Article 14. At page 623 of the Report (ILR Ker) = (at p. 166 of AIR), the learned Judges observed that the yield would vary from crop to crop and place to place, but "it is not the productivity of the soil that forms the foundation of the tax but its user in a specific way for a specific purpose". Though these two decisions cited Moopil Nair's case, (1961) 3 SCR 77 = (AIR 1961 SC 552) neither of them considered the result of the lands being uniformly taxed without classifying them according to their potentiality so that the incidence of the tax may be just and equitable. How a tax imposed uniformly without regard to the potentiality of the property taxed and without any classification on any other just basis works inequality is illustrated by the scrutiny by this Court of the Kerala

Buildings Tax Act, XIX of 1961 in AIR 1969 SC 378. After noting the uniform rate of the tax levied according to the floor area of a building but without taking into account its kind or its potential yield, the Court observed:

"For determining the quantum of tax the sole test is the area of the floor of the building. The Act applies to the entire State of Kerala, and whether the building is situate in a large industrial town or in an insignificant village, the rate of tax is determined by the floor area; it does not depend upon the purpose for which the building is used, the nature of the structure, the town and locality in which the building is situate, the economic rent which may be obtained from the building, the cost of the building and other related circumstances which may appropriately be taken into consideration in any rational system of taxation of building."

At page 380 the Court further observed:

"But in enacting the Kerala Buildings Tax Act no attempt at any rational classification is made — As already observed, the Legislature has not taken into consideration in imposing the tax the class to which the building belongs, the nature of construction, the purpose for which it is used, its situation, its capacity for profitable user and other relevant circumstances which have a bearing on matters of taxation. They have adopted merely the floor area of the building as the basis of tax irrespective of all other considerations. Where objects, persons or transactions essentially dissimilar are treated by the imposition of a uniform tax, discrimination may result, for, in our view, refusal to make a rational classification may itself in some cases operate as denial of equality."

On this reasoning the charging section of the Act impugned in that case was held violative of Article 14 and therefore bad.

39. The same reasoning is, in our view, apposite so far as the impugned tax is concerned, for, the tax is uniformly levied merely on the footing of the land being used for growing tea, without any regard to its potentiality, situation, the kind of tea which can suitably be grown at a particular place, its geographical and other features etc. No doubt, the State in exercise of the taxing power can select persons and objects for taxation but if it is found that within the range of that selection the law ope-

rates unequally by reason either of classification or its absence, such a provision would be hit by the equality clause of Article 14. (see (1963) 1 SCR 404 = (AIR 1962 SC 1733).) Even amongst the selected plantations inequality as a result of uniformity of tax must result because it is possible that the user of the land for one specified purpose may give a better and a more valuable yield than the user of another land though situated in the same area for another specified purpose. This, in our view, has happened in so far as the tax on tea plantations, with which only we are concerned in these petitions, is concerned, and therefore, to the extent that Act XVII of 1960, as amended by Act XIX of 1967, imposes the tax on holders of tea plantations, it is violative of Article 14 and is, therefore, void.

40. Accordingly, the petitions are allowed with costs.

ORDER

41. In accordance with the opinion of the majority, the petitions are dismissed with costs.

Petitions dismissed.

AIR 1970 SUPREME COURT 1147

(V 57 C 240)

(From: Bombay)*

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Khushal Khemgar Shah and others,
Appellants v. Mrs. Khorshed Banu Dadiba
Boatwalla and another, Respondents.

Civil Appeal No. 1201 of 1966, D/-
12-2-1970.

(A) Partnership Act (1932), Section 14
— Property of firm — Good-will of the
business of the firm is expressly included.
(Para 3)

(B) Partnership Act (1932), Section 55
— Death of partner — Partnership to
continue under agreement — Section not
a bar to legal representative claiming
share in good-will as one of assets of
firm.

Section 55 does not provide that good-will may be taken into account only when there is a general dissolution of the firm, and not when the representatives of a deceased partner claim his share in the

*(Appeal No. 79 of 1963, D/- 24-6-1965
— Bom.)

DN/DN/B29/70/KSB/A

firm, which by express stipulation is to continue notwithstanding the death of a partner. (Para 4)

(C) Partnership Act (1932), Sections 39, 42 and 46 — Provisions deal with consequences ensuing after general dissolution — They do not abrogate terms of contract under which partnership is to continue between surviving partners after death of one — Act does not extinguish rights of deceased partner in assets of firm.

Sections 39, 42 and 46 deal with the concept and consequences of dissolution of the firm they do not abrogate the terms of the contract between the partners. The Partnership Act does not operate to extinguish the right in the assets of the firm of a partner who dies, when the partnership agreement provides that on death the partnership is to continue. In the absence of a term in the deed of partnership to that effect, it cannot be inferred that a term that the partnership shall continue notwithstanding the death of a partner, will operate to extinguish his proprietary right in the assets of the firm. (Para 4)

(D) Partnership Act (1932), Section 42 — Contract to contrary — Death of partner — Partnership to continue under agreement between surviving partners — Share of deceased partner in assets including good-will will devolve on his legal representative in absence of anything to contrary in agreement.

In interpreting the deed of partnership, the Court will insist upon some indication that the right to a share in the assets is, by virtue of the agreement that the surviving partners are entitled to carry on the business on the death of the partner, to be extinguished. In the absence of a provision expressly made or clearly implied, the normal rule that the share of a partner in the assets devolves upon his legal representatives will apply to the good-will as well as to other assets. (Para 7)

Cases Referred: Chronological Paras
(1905) 92 LT 313, Smith v. Nelson 6
(1895) 1895-2 Ch 223, Hunter v.

Dowling 6

(1885) ILR 9 Bom 536, Bachubai

and L. A. Watkins v. Shamji

Jadowji 6

M/s. F. S. Nariman, K. D. Mehta and
I. N. Shroff, Advocates, for Appellants;
Mr. M. C. Chagla, Senior Advocate, (Mrs.
A. K. Verma, Advocate and M/s. J. B.
Dadachanji and Co., Advocates with him),
for Respondents.

The following Judgment of the Court was delivered by

SHAH, J.—**Dadiba Hormusji Boatwalla** was one of the eight partners of Messrs Meghji Thobhan & Company — a firm of Muccadams and cotton brokers. Boatwalla died on February 20, 1957. By virtue of clause 8 of the deed of partnership the business of the firm was continued by the surviving partners. Khorshed and Nariman — widow and son respectively of Boatwalla — obtained letters of administration to the estate of Boatwalla and commenced an action in the High Court of Bombay for an account of the partnership between Boatwalla and the surviving partners and for an order paying to the plaintiffs the amount determined to be due to Boatwalla at the time of his death. The suit was resisted by the surviving partners who will hereinafter be called the defendants. Tarkunde, J., passed a preliminary decree declaring that qua Boatwalla the partnership stood dissolved on February 20, 1957, but not in respect of the surviving partners, and directed that an account be taken of the partnership up to February 20, 1957. Against that decree the defendants appealed under Clause 15 of the Letters Patent. In appeal the High Court modified the decree. The learned Judges held that the plaintiffs were not entitled to an account in the profits and losses of the firm after the death of Boatwalla, nor to exercise an option under Section 37 of the Partnership Act, but that the plaintiffs were entitled only to interest at six per cent. per annum on the amount found due as Boatwalla's share in the assets of the partnership including the goodwill. They further declared that the interest of Boatwalla in the firm ceased on February 20, 1957, and deleted the direction with regard to the dissolution of the firm as between Boatwalla and the defendants. With special leave, this appeal has been filed by the defendants.

2. The defendants contend that the plaintiffs as legal representatives of Boatwalla were not entitled to a share in the value of the goodwill of the firm because the goodwill of a firm may be taken into account only when there is a dissolution of the firm and in any event because Boatwalla had agreed that this interest in the goodwill shall cease on his death and the business shall be continued by the surviving partners. The defendants do not challenge the decree of the High Court awarding to the plaintiffs

Boatwalla's share in the assets of the firm other than goodwill, they contend that in the goodwill of the firm the plaintiffs had no share.

3. By Section 14 of the Partnership Act 1932, it is enacted that:

"Subject to contract between the partners, the property of the firm includes all property and rights and interest in property originally brought into the stock of the firm or acquired, by purchase or otherwise, by or for the firm or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business."

Goodwill of the firm is expressly declared to be the property of the firm.

4. Counsel for the defendants relied upon Section 55 of the Partnership Act which makes a provision with regard to sale of goodwill after dissolution. It is provided by sub-section (1) of Section 55 that:

"In settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm."

But it is not enacted thereby that goodwill may be taken into account only when there is a general dissolution of the firm, and not when the representatives of a partner claim his share in the firm, which by express stipulation is to continue notwithstanding the death of a partner. Nor do Sections 39, 42 and 46 which were relied upon by counsel for the defendants support that contention. Under Section 39 the dissolution of partnership between all the partners of a firm is called the "dissolution of the firm"; and by Section 42 a firm is said to be dissolved subject to the contract between the partners on the happening of certain contingencies. Section 46 provides that on the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights. These provisions deal with the concept and consequences of dissolution of the firm: they do not either abrogate the terms of the contract between the partners relating to the consequences to ensue in the event of the death of a partner when the firm is not to stand dissolved by such death, nor to the right which the partner has in the

assets and property of the firm. The Partnership Act does not operate to extinguish the right in the assets of the firm of a partner who dies, when the partnership agreement provides that on death the partnership is to continue. In the absence of a term in the deed of partnership to that effect, it cannot be inferred that a term that the partnership shall continue notwithstanding the death of a partner, will operate to extinguish his proprietary right in the assets of the firm.

5. Clause 8 of the deed of partnership reads as follows:

"This partnership shall not be dissolved or determined by the death of any of the parties hereto but the same shall be continued as between the surviving partners on the same terms and conditions but with such shares as shall then be determined."

Mr. Nariman says that goodwill is nothing but the right to the name, the place of business and the reputation of the firm, and when all these components of the right by express agreement between the partners devolve upon the surviving partners, it follows that the share of the deceased partner in the goodwill of the firm devolves upon the surviving partners and not upon his legal representatives. The goodwill of a business is however an intangible asset being the whole advantage of the reputation and connections formed with the customers together with the circumstances which make the connection durable. It is that component of the total value of the undertaking which is attributable to the ability of the concern to earn profits over a course of years because of its reputation, location and other features. An agreement between the partners that the name, the place of business and the reputation of the firm are to be utilised by the surviving partners will not necessarily warrant an inference that it was intended that the heirs of the deceased partner will not be entitled to a share in the goodwill.

6. Our attention was invited to *Hunter v. Dowling*, (1895) 2 Ch 223; *Smith v. Nelson*, (1905) 96 LT 313 and *Bachubai and L. A. Watkins v. Shamji Jadowji*, (1885) ILR 9 Bom 536. The first two cases proceed upon the interpretation of certain clauses in partnership agreements. It was inferred in those cases from the terms of the agreement that the right in the goodwill of a partner in a firm dying or retiring shall not survive to his legal

representatives. *Bachubai and L. A. Watkins's case*, (1885) ILR 9 Bom 536 arose out of a case in which in the partnership agreement it was provided that the firm shall be the agents of a company carrying on business as a manufacturer of cotton textiles so long as the firm carries on business in Bombay, or until the firm should resign. The firm were appointed the agents of the Company and continued to act as agents. One of the partners died, and a representative of the partner filed a suit, claiming a certain share in the assets of the firm including the goodwill. It was observed by Sargent, C. J., in rejecting the claim of the plaintiff to a share in the goodwill of the business as an asset of the firm, that:—

"Assuming (which may well be doubted) that the term 'goodwill' is applicable to a business of this nature, it is plain that it is attached to the name of the firm which, by the partnership agreement itself, is to be used by the surviving partners or partner for their own benefit. Such an arrangement between the partners must take away all value from the goodwill; even if it be not, — as Mr. Justice Lindley in his *Treatise on Partnership*, p. 887, (3rd ed.), considers it to be — inconsistent with its being an asset at all."

The learned Chief Justice expressed a doubt — presumably relying upon old English decisions — that the goodwill of a firm may not be an asset at all. These observations do not set out any rule of interpretation of a deed of partnership. But the question is now settled by statutory enactment. Under the Partnership Act, 1932, it is expressly declared that the goodwill of a business is an asset. Whether the goodwill has any substantial value may be determined on the facts of each case.

7. We are unable to agree with Mr. Nariman that in interpreting a deed of partnership, business whereof it is stipulated shall be continued by the surviving partners after the death of a partner, the Court will not award to the legal representatives of the deceased partner a share in the goodwill in the absence of an express stipulation to the contrary. The goodwill of a firm is an asset. In interpreting the deed of partnership, the Court will insist upon some indication that the right to a share in the assets is, by virtue of the agreement, that the surviving partners are entitled to carry on the business on the death of the partner, to be extinguished. In the absence of a provision

expressly made or clearly implied, the normal rule that the share of a partner in the assets devolves upon his legal representatives will apply to the goodwill as well as to other assets.

8. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1150 (V 57 C 241)

(From: Madhya Pradesh)*

M. HIDAYATULLAH, C.J., A. N. GROVER, A. N. RAY, P. JAGANMOHAN REDDY AND I. D. DUA, JJ.

Dr. S. L. Agarwal, Appellant v. The General Manager, Hindustan Steel Ltd., Respondent.

Civil Appeal No. 524 of 1967, D/- 19-12-1969.

(A) Constitution of India, Art. 311 — Protection of Cl. (2) extends to persons referred to in Cl. (1).

The protection of Article 311 (2) extends only to persons referred to in Article 311 (1), viz., (i) persons who are members of (a) a Civil Service of the Union, or (b) an All-India Service or (c) a Civil Service of a State, or (ii) hold a civil post under the Union or a State. Category (i) refers to the standing services which have been created in the Union and the States and which are permanently maintained in strength. In addition to the standing services there are certain posts which are outside the permanent services, viz. such posts on the civil side as opposed to the military side. Incumbents of such posts also receive protection. (Para 7)

(B) Constitution of India, Art. 311 (2) — Holder of a civil post under the Union or the State — Employee of Hindustan Steel Ltd. is not a holder of such post — Protection of Art. 311 (2) cannot be claimed.

Hindustan Steel Limited which is a corporation is not a department of the Government nor are the servants of it holders of civil posts under the State. It has its independent existence and by law relating to Corporations it is distinct even from its members. There-

fore, its employees are not entitled to the protection of Article 311. Case law ref. (Para 10)

(C) Constitution of India, Art. 133 — New grounds — Points which were never raised before High Court nor touched upon in High Court's Judgment or grounds of appeal — Not allowed to be raised. (Para 5)

Cases Referred: Chronological Paras (1969) AIR 1969 SC 1306 (V 56) =

Civil Appeal No. 612 of 1966, D/- 19-2-1969 Praga Tools Corporation v. C. V. Imanual 10

(1969) Civil Appeals Nos. 512-518 of 1969, D/- 19-9-1969 = (1969) 1 SCC 87, State of Bihar v. Union of India 10

(1963) AIR 1963 Cal 421 (V 50) = (1963) 2 Lab LJ 569, M. Verghese v. Union of India 9

(1961) AIR 1961 All 502 (V 48) = Ram Babu Rathaur v. Divisional Manager, Life Insurance Corporation of India 10

(1957) AIR 1957 Pat 10 (V 44) = 1956 BLJR 513, Subodh Ranjan Ghosh v. Sindhri Fertilizers and Chemicals Ltd. 10

(1956) 60 Cal WN 1023 = 1957-1 Lab LJ 223, Damodar Valley Corporation v. Provat Roy 10

(1956) AIR 1956 Pat 398 (V 43) = ILR 34 Pat 412, Lachmi v. Military Secy. to the Govt. of Bihar 10

(1950) 1950-1 KB 18 = 65 TLR 422, Tamlin v. Hannaford 10

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: The appellant, who appeals by certificate granted by the High Court of Madhya Pradesh, was appointed as Assistant Surgeon on probation for one year by the Board of Directors, Hindustan Steel Ltd., Ranchi with effect from October 22, 1959. After completing his period of probation he was employed on a contract for 5 years. Ex. P-3 is the Contract of Service which he entered into with the Company. Under the terms of the contract there was a further period of probation. During the period of probation the Company could terminate his service without notice and without assigning any reason. On the completion of the period of probation, either side could terminate the contract by 3 months' notice without assigning any reason. The Company could also

* (Misc. Petn. No. 83 of 1965, D/- 19-7-1966 — Madh Pra.)

terminate the employment by giving in lieu of notice, three months' salary. This term was applicable till three months immediately before the end of the period of 5 years. If a notice terminating the service was not given three months before the close of the end of 5 years the contract was automatically extended till the incumbent became superannuated on reaching the age of 55 years.

2. The appellant passed the probation period and he was entitled to three months' notice if his services were to be terminated. The Company maintains certain set of Rules governing the employment of its workmen, in addition to the Standing Orders of the Company. Ex. P-4 represents the procedure for imposing major penalties and for punishment and appeal. These are extracts from the Disciplinary and Appeal Rules.

3. On September 17, 1964 the appellant was on duty in the Medical Out-Patients Department. He examined one Mrs. Holey who complained of cold, headache and weakness. It appears that Mrs. Holey complained of some misbehaviour on the part of the appellant and her husband reported the matter to the Chief Medical Officer of the Bhilai Steel Plant where the appellant was then posted. The Chief Medical Officer asked for the explanation of the appellant on September 21, 1964, but the appellant denied the allegation. Some enquiry was then held. The appellant in his appeal submits that he was not given a copy of the written complaint received from Mr. and Mrs. Holey. On October 5, 1964 some witnesses were examined in the presence of the appellant. Two days previously the statements of Mr. and Mrs. Holey were also recorded. The enquiry was being held by the Commercial Manager. The appellant then sent a notice to Mr. and Mrs. Holey charging them with defamation and actually filed a suit on November 17, 1964 demanding damages. On December 15, 1964 the General Manager terminated his services with effect from March 15, 1965, that is to say, after the expiry of three months' notice under the contract. It was stated in the order that the services were being terminated in terms of his employment.

4. The appellant thereupon filed a petition under Article 226 of the Constitution in the High Court of Madhya Pradesh claiming inter alia that his ser-

vices were wrongly terminated without giving him the protection granted by Article 311 of the Constitution. He also complained of breach of the principles of natural justice inasmuch as the enquiry was not proper. His contention was that although the action was ostensibly taken according to the terms of the contract of employment, he was really punished and he was entitled, therefore, to the protection of Article 311 of the Constitution. The Company resisted the ground by saying that Article 311 was not applicable to the appellant inasmuch as he was employed by a Corporation and neither belonged to the Civil Service of the Union nor held a Civil post under the Union. The High Court in its judgment ruled that the protection of Article 311 of the Constitution was not available in the case because the appellant was not entitled to it.

5. It appears that this was the only point urged in the High Court. In the appeal before us attempt was made to enlarge the case by arguing other points, namely, that the enquiry was not properly conducted, that the principles of natural justice were violated and that the appellant had no opportunity of defending himself. None of these points is touched upon in the High Court's judgment and it appears that in the High Court only the constitutional question was raised. Otherwise, one would expect the High Court to have said something about it, or the appellant to have said so in the application for certificate or in the proposed grounds filed with that application. We decline to allow these fresh grounds to be urged.

6. The question that arises in this case is: whether the employees of a Corporation such as the Hindustan Steel Ltd., are entitled to the protection of Article 311? This question can only be answered in favour of the appellant if we hold that the appellant held a civil post under the Union. It was conceded before us that the appellant could not be said to belong to the civil service of the Union or the State. Article 311, on which this contention is based, reads as follows:

"311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.

(1) No person who is a member of a civil service of the Union or an all-India Service or a civil service of a State or holds a civil post under the

Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him;

Provided that this clause shall not apply—

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge;

(b) where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reasons, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause; or

(c) where the President or Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to give to that person such an opportunity.

(3) If any question arises whether it is reasonably practicable to give to any person an opportunity of showing cause under clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank, as the case may be, shall be final.

7. Clause (2) of the article, which gives the protection opens with the words "no such person as aforesaid" and these words take one back to Clause (1) which describes the person or persons to whom the protection is intended to go. Clause (1) speaks of (i) persons who are members of (a) a Civil Service of the Union, or (b) an All India Service or (c) a Civil Service of a State, or (ii) hold a civil post under the Union or a State. (a), (b) and (c) refer to the standing services which have been created in the Union and the States and which are permanently maintained in strength. In addition to the standing services there are certain posts which are outside the permanent services. The last category in Article 311 (1) therefore speaks of such posts on the civil side as opposed to the military side. Incumbents of such posts also receive protection.

8. In the present case the appellant did not belong to any of the permanent services. He held a post which was not borne on any of the standing services.

It was, however, a civil post as opposed to a military post. So far the appellant's case is clear but the clause speaks further that such posts must be under the Union or a State. The question thus is whether the servant employed here can be said to have held the post under the Union or a State? The appellant contends that since Hindustan Steel Limited is entirely financed by the Government and its management is directly the responsibility of the President, the post is virtually under the Government of India.

9. This argument ignores some fundamental concepts in relation to incorporated companies. In support of the contention that the post must be regarded as one under the Union the appellant relies on some obiter observations of a single Judge in *M. Verghese v. Union of India*, AIR 1963 Cal 421. In that case the petitioners were drivers working for the Durgapur Project under Hindustan Steel Limited. The learned Judge considered the question by analysing the set up of Hindustan Steel Limited. He found that it was a Government company and a private limited company, although it did not include in its name any notice that it was a private company. He referred in detail to the various provisions in the Articles of Association as also in the Indian Companies Act, which rendered the ordinary company law inapplicable in certain respects and conferred unlimited powers of management on the President of India and his nominees. He also found that Hindustan Steel Limited was entirely owned by the Union of India. From this the learned Judge wished to infer that Hindustan Steel Limited was really a department of the Government but he did not express this opinion and decided the case on another point. The appellant contends that the conclusion which the learned single Judge did not draw in the Calcutta case is the conclusion to draw in this appeal. We must, according to him, hold that there is no difference between Hindustan Steel Limited and a Department of the Government and that the service under the Hindustan Steel Limited is a service under the Union.

10. On the other hand, in *State of Bihar v. Union of India*, Civil Appeals Nos. 512-513 of 1963, D/- 19-9-1969 (SC) Hindustan Steel Limited was not held to be a "State" for purposes of Art. 131. The question whether Hindustan Steel Limited was subject to the jurisdiction

8. Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.(4) Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California*, supra, cannot be supported, and that decision is therefore overruled.

Reversed.

SEPARATE OPINIONS

Mr. Justice BLACK, concurring.

9. I agree with the views expressed by Mr. Justice Douglas in his concurring opinion in this case that the "clear and present danger" doctrine should have no place in the interpretation of the First Amendment. I join the Court's opinion, which, as I understand it, simply cites (1951) 341 US 494, 95 L Ed 1137, 71 S Ct 857, but does not indicate any agreement on the Court's part with the "clear and present danger" doctrine on which Dennis purported to rely.

Mr. Justice DOUGLAS, concurring.

10. While I join the opinion of the Court, I desire to enter a caveat.

11. The "clear and present danger" test was adumbrated by Mr. Justice Holmes in a case arising during World War I—a war "declared" by the Congress not by the Chief Executive. The case was *Schenck v. United States*, (1918) 249 US 47, 52, 63 L Ed 470, 473, 39 S Ct 247,

with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism. . . . The trial judge's charge merely followed the language of the indictment. No construction of the statute by the Ohio courts has brought it within constitutionally permissible limits. The Ohio Supreme Court has considered the statute in only one previous case, *State v. Kassay*, 126 Ohio 177 (1932), where the constitutionality of the statute was sustained.

4. Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to eminent lawless action, for as Chief Justice Hughes wrote in *De Jonge v. Oregon*, supra, at 364, 81 L Ed at 284:

"The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." See also *United States v. Cruikshank*, 92 US 542, 552, 23 L Ed 588, 591 (1876); *Hague v. CIO*, 307 US 496, 513, 519, 83 L Ed 1423, 1435, 1438 (1939); *NAACP v. Alabama ex rel. Patterson*, 357 US 449, 460-461, 2 L Ed 2d 1488, 1498, 1499, 78 S Ct 1163 (1958).

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where the defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment. The pamphlets that were distributed urged resistance to the draft, denounced conscription, and impugned the motives of those backing the war effort. The First Amendment was tendered as a defense. Mr. Justice Holmes in rejecting that defense said:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

12. *Frohwerk v. United States*, (1918) 249 US 204, 63 L Ed 561, 39 S Ct 249, also authored by Mr. Justice Holmes, involved prosecution and punishment for publication of articles very critical of the war effort in World War I. Schenck was referred to as a conviction for obstructing security "by words of persuasion." 249 US, at 206, 63 L Ed at 564. And the conviction in *Frohwerk* was sustained because "the circulation of the papers was in quarters where a little breath would be enough to kindle a flame." 249 US at 209, 63 L Ed at 565.

13. *Debs v. United States*, (1918) 249 US 211, 63 L Ed 566, 39 S Ct 252, was the third of the trilogy of the 1918 Term. Debs was convicted of speaking in opposition to the war where his "opposition was so expressed that its natural and intended effect would be to obstruct recruiting." 249 US, at 215, 63 L Ed at 569.

"If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expression of a general and conscientious belief." Ibid.

14. In the 1919 Term, the Court applied the Schenck doctrine to affirm the convictions of other dissidents in World War I. *Abrams v. United States*, (1918) 250 US 616, 63 L Ed 1173, 40 S Ct 17, was one instance. Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, dissented. While adhering to Schenck, he did not think on the facts that a case for overriding the First Amendment had been made out:

"It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country."

15. Another instance was *Schaeffer v. United States*, (1919) 251 US 466, 64 L Ed 360, 40 S Ct 259, in which Mr. Justice Brandeis, joined by Mr. Justice Holmes,

dissented. A third was *Pierce v. United States*, (1919) 252 US 239, 64 L Ed 542, 40 S Ct 205 in which Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented.

16. Those then were the World War I cases that put the gloss of "clear and present danger" on the First Amendment. Whether the war power — the greatest lever of them all — is adequate to sustain that doctrine is debatable. The dissents in *Abrams*, *Schaeffer*, and *Pierce* show how easily "clear and present danger" is manipulated to crush what Brandeis called "the fundamental right of free men to strive for better conditions through new legislation and new institutions" by argument and discourse supra, (1919) 252 U.S. 239 at 273, 64 L Ed 542 at 558 even in time of war. Though I doubt if the "clear and present danger" test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace.

17. The Court quite properly overrules (1927) 274 US 357, 71 L Ed 1095, 47 S Ct 641, which involved advocacy for ideas which the majority of the Court deemed unsound and dangerous.

18. Mr. Justice Holmes, though never formally abandoning the "clear and present danger" test moved closer in the First Amendment ideal when he said in dissent in *Gitlow v. New York*, 268 NY 652, 673:

"Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire in reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

We have never been faithful to the philosophy of that dissent.

19. The Court in (1937) 301 US 242, 81 L Ed 1066, 57 S Ct 732, overturned a conviction for exercising First Amendment rights to incite insurrection because of lack of evidence of incitement, 301 US, at 259-261, 81 L Ed at 1075, 1076 and see *Hartzel v. United States*, (1943) 322 US 680, 83 L Ed 1534, 64 S Ct 1233. In *Bridges v. California*, (1941) 314 US 252, 261-263, 86 L Ed 192, 202, 62 S Ct 190, we approved the "clear and present danger" test in an elaborate dictum that

tightened it and confined it to a narrow category. But in (1951) 341 US 494, 95 L Ed 1137, 71 S Ct 857, we opened wide the door, distorting the "clear and present danger" test beyond recognition. (1)

20. In that case the prosecution dubbed an agreement to teach the Marxist creed — a "conspiracy." The case was submitted to a jury on a charge that the jury could not convict unless they found that defendants "intended to overthrow the government 'as speedily as circumstances would' permit." (1951) 341 US, 494 at 509-511, 95 L Ed 1137 at 1152, 1153. The Court sustained convictions under that charge, construing it to mean a determination of "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." (2) Id., 510, 95 L Ed at 1153.

21. Out of the "clear and present danger" test came other offspring. Advocacy and teaching of forcible overthrow of government as an abstract principle is immune from prosecution. (1957) 354 US 298, 318, 1 L Ed 2d 1356, 1374, 77 S Ct 1064. But an "active" member, who has a guilty knowledge and intent of the aim in overthrow the Government by violence, (1961) 367 US 290, 6 L Ed 2d 836, 81 S Ct 1517, may be prosecuted. *Scales v. United States*, (1961) 367 US 203, 228, 6 L Ed 2d 782, 800, 81 S Ct 1469. And the power to investigate, backed by the powerful sanction of contempt, includes the power to determine which of the two categories fits the particular witness. *Barenblatt v. United States*, (1958) 360 US 109, 130, 3 L Ed 2d 1115, 1131, 79 S Ct 1081. And so the investigator roams at will through all of the beliefs of the witness, ransacking his conscience and his innermost thoughts.

22. Judge Learned Hand, who wrote for the Court of Appeals in affirming the judgment in *Dennis*, coined the "hot improbable" test, 183 F 2d 201, 214, which this Court adopted and which Judge Hand preferred over the "clear and present danger" test. Indeed, in his book, *The Bill of Rights*, p. 59 (1958), in referring to Holmes' creation of the "clear and present danger" test, he said, "I cannot help thinking that for once Homer nodded."

23. My own view is quite different. I see no place in the regime of the First Amendment for any "clear and present

1. See *McKay*, *The Preference For Freedom*, 34 NYUL Rev 1182, 1203 — 1212 (1959).

2. See *Felner v. New York*, 340 US 315, 95 L Ed 295, 71 S Ct 303, where a speaker was arrested for arousing an audience when the only "clear and present danger" was that the hecklers in the audience would break up the meeting.

danger" test whether strict and tight as some would make it or free-wheeling as the Court in *Dennis* rephrased it.

24. When one reads the opinions closely and sees when and how the "clear and present danger" test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in *Dennis* as to make the trial of those teachers of Marxism an all out political trial which was part and parcel of the Cold War that has eroded substantial parts of the First Amendment.

25. Action is often a method of expression and within the protection of the First Amendment.

26. Suppose one tears up his own copy of the Constitution in eloquent protest to a decision of this Court. May he be indicted?

27. Suppose one rips his own Bible to shreds to celebrate his departure from one "faith" and his embrace of atheism. May he be indicted?

28. Last Term the Court held in *United States v. O'Brien*, (1967) 391 US 367, —, 20 L Ed 2d 672, —, 89 S Ct 63, that a registrant under Selective Service who burned his draft card in protest to the war in Vietnam could be prosecuted. The First Amendment was tendered as a defense and rejected, the Court saying:

"The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration." 391 US at 377, 20 L Ed 2d at 680.

29. But *O'Brien* was not prosecuted for not having his draft card available when asked for by a federal agent. He was indicted, tried, and convicted for burning the card. And this Court's affirmation of that conviction was not, with all respect, consistent with the First Amendment.

30. The act of praying often involves body posture and movement as well as utterances. It is nonetheless protected by the Free Exercise Clause. Picketing, as we have said on numerous occasions, is "free speech plus." See *Bakery Drivers Local v. Whol.* (1941) 315 US 769, 775, 86 L Ed 1178, 1183, 62 S Ct 816 (Douglas, J., concurring); *Giboney v. Empire Storage Co.*, (1948) 336 US 490, 501, 93 L Ed 834, 843, 69 S Ct 684; *Hughes v. Superior Court*, (1949) 339 US 460, 465, 94 L Ed 985, 992, 70 S Ct 718; *Labor Board v. Fruit Packers*,

(1963) 377 US 58, 77, 12 L Ed 2d 129, 141, 84 S Ct 1063 (Black, J., concurring), and (1963) 377 US, at 93, 12 L Ed 2d at 150 (Harlan, J., dissenting); *Cox v. Louisiana*, (1964) 379 US 559, 578, 13 L Ed 2d 487, 500, 85 S Ct 476 (opinion of Black, J.); *Food Employees v. Logan Plaza*, (1967) 391 US 308, 326, 20 L Ed 2d 603, 616, 88 S Ct 1601. That means that it can be regulated when it comes to the "plus" or "action" side of the protest. It can be regulated as to the number of pickets and the place and hours (1964) 379 US 559 = 13 L Ed 2d 487 : 85 S Ct 476 supra, because traffic and other community problems would otherwise suffer.

31. But none of these considerations are implicated in the symbolic protest to the Vietnam war in the burning of a draft card.

32. One's beliefs have long been thought to be sanctuaries which government could not invade. *Barenblatt* is one example of the ease with which that sanctuary can be violated. The lines drawn by the Court between the criminal act of being an "active" Communist and the innocent act of being a nominal or inactive Communist mark the difference only between deep and abiding belief and casual or uncertain belief. But I think that all matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by investigating committees was notoriously unconstitutional. That is the deep-seated fault in infamous loyalty-security hearings which, since 1947 when Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known.

33. The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.

34. The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.

35. This is, however, a classic case where speech is brigaded with action. See *Speiser v. Randall*, (1957) 357 US 513, 536-537, 2 L Ed 2d 1460, 1478, 1479, 78 S Ct 1332. They are indeed inseparable and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas as in *Yates* and advocacy of political action as in *Scales*. The quality of advocacy turns on the depth of the conviction; and gov-

ernment has no power to invade that sanctuary of belief and conscience.(3)

3. See Mr. Justice Black dissenting in Communications Assn. v. Douds, 339 US 382, 446, 449 et seq., 94 L Ed 925, 968, 970, 70 S Ct 874.

'AIR 1970 U.S.S.C. 52 (V 57 C 8]

STEWART, HARLAN, WHITE
AND BLACK JJ.

Ted Steven ChimeI, Petitioner v. State of California, Respondent.
(No. 770) Decided on 23-6-1969.

Constitution of India, Arts. 19 (i) (f), 20 (3) — American case — Arrest of person in his home — Search of the whole house without warrant — Contravention of 4th and 14th Amendments of American Constitution — (Criminal P. C. (1898), S. 96) — (Constitution of America, Fourth Amendment and Fourteenth Amendment). (1947) 631 U. S. 145 = 91 L Ed 1399 = 67 S Ct 1098 & (1950) 339 U. S. 56 = 94 L Ed 653 = 70 S Ct 430, Overruled; 61 Cal Rptr. 714 and 68 Cal Ed 436 = 439 P 2d 233 = 67 Cal Rptr. 421, Reversed.

The accused was arrested in his home for burglary of a coin-shop. After arrest the police conducted a search of his entire house, including the attic, the garage, a small workshop and various drawers. During his trial various items, primarily coins, which were found in the search were admitted in evidence against him. Objections by accused against such admission were overruled and the accused was convicted. Court of appeal and the State Supreme Court affirmed the conviction, holding that although the officers had no search warrants, the search of the house was justified on the ground that it had been incident to a valid arrest. Reversing the decisions of the appellate Courts, United States Supreme Court

Held (Stewart J. for the majority) that since the search of the house went far beyond the person of the accused and the area within which he might have obtained either a weapon or something that could have been used as evidence against him, and since there was no constitutional justification, in the absence of search warrant, for extending the search beyond that area, the scope of the search was unreasonable under the 4th and the 14th Amendments and that the conviction of the accused could not stand. (1947) 331 U. S. 145 = 91 L Ed 1399 = 67 S Ct 1098 & (1950) 339 U. S. 56 = 94 L Ed 653 = 70 S Ct 430, Overruled; 61 Cal Rptr. 714 & 68 Cal Ed 436 = 439 P 2d 333 = 67 Cal Rptr. 421 Reversed.

(Paras 14, 16, 17, 18, 21)

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(1969) 23 L Ed 2d 774, Jamison v. United States	40
(1969) 394 U. S. 324 = 22 L Ed 2d 311 = 89 S Ct 1095, Oroz Co. v. Texas	47
(1968) 393 U. S. 958 = 21 L Ed 2d 372 = 89 S Ct 404	4
(1968) 392 US 40 = 20 L Ed 2d 917 = 88 S Ct 1889, Sibron v. Newyork	13, 16, 32
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- (1948) 334 US 699 = 92 L Ed 1663
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- (1931) 285 US 452 = 76 L Ed 877
= 52 S Ct 420, *United States v. Lefkowitz* 7, 10, 29
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- (1927) 275 US 192 = 72 L Ed 231
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- 254 F 2d 751, *Smith v. United States* 41
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- 185 F 2d 629, *United States v. Coplon* 39
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Keith C. Monroe, for Petitioner; Ronald M. George, for Respondent.

SUMMARY

After arresting the defendant in his home for burglary of a coin shop, police officers conducted a search of his entire three-bedroom house, including the attic, the garage, a small workshop, and various drawers. Over the defendant's objection, various items—primarily coins—which were found through the search were admitted into evidence against him at his trial for burglary in a California Superior Court; he was convicted; and his conviction was affirmed by the California Court of Appeal (61 Cal Rptr 714) and the California Supreme Court (68 Cal 2d 436, 439 P 2d 333, 67 Cal Rptr 421), both Courts holding that although the officers had no search warrant, the search of the defendant's home had been justified on the ground that it had been incident to a valid arrest.

On certiorari, the United States Supreme Court reversed. In an opinion by STEWART, J., expressing the views of six members of the court, and overruling *Harris v. United States*, 331 US 145,

91 L Ed 1399, 67 S Ct 1098, and *United States v. Rabinowitz*, 339 US 56, 94 L Ed 653, 70 S Ct 430, it was held that since the search of the defendant's home went far beyond his person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him, and since there was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area, the scope of the search was unreasonable under the Fourth and Fourteenth Amendments, and the defendant's conviction could not stand.

HARLAN, J., concurring, joined the court's opinion, but expressed concern for the profound changes which the "incorporation doctrine" had wrought both in the workings of the federal system and upon the adjudicative processes of the Supreme Court.

WHITE, J., joined by BLACK, J., dissented on the ground that since there was probable cause for a broad search for evidence, and the fact of arrest supplied an exigent circumstance justifying police action without the delay of obtaining a search warrant, because of the danger of the evidence being removed in the meantime, a search without a warrant was reasonable.

OPINION OF THE COURT

MR. JUSTICE STEWART delivered the opinion of the Court.

This case raises basic questions concerning the permissible scope under the Fourth Amendment of a search incident to a lawful arrest.

2. The relevant facts are essentially undisputed. Late in the afternoon of September 13, 1965, three police officers arrived at the Santa Ana, California, home of the petitioner with a warrant authorizing his arrest for the burglary of a coin shop. The officers knocked on the door, identified themselves to the petitioner's wife, and asked if they might come inside. She ushered them into the house, where they waited 10 or 15 minutes until the petitioner returned home from work. When the petitioner entered the house, one of the officers handed him the arrest warrant and asked for permission to "look around." The petitioner objected, but was advised that "on the basis of the lawful arrest," the officers would nonetheless conduct a search. No search warrant had been issued.

3. Accompanied by the petitioner's wife, the officers then looked through the entire three-bedroom house, including house, including the attic, the garage, and a small workshop. In some rooms the search was relatively cursory. In the master bedroom and

sewing room, however, the officers directed the petitioner's wife to open drawers and "to physically move contents of the drawers from side to side so that [they] might view any items that would have come from [the] burglary." After completing the search, they seized numerous items—primarily coins, but also several medals, tokens, and a few other objects. The entire search took between 45 minutes and an hour.

4. At the petitioner's subsequent State trial on two charges of burglary, the items taken from his house were admitted into evidence against him, over his objection that they had been unconstitutionally seized. He was convicted, and the judgments of conviction were affirmed by both the California District Court of Appeal, 61 Cal Rptr 714, and the California Supreme Court, 63 Cal 2d 436, 439 P 2d 333, 67 Cal Rptr 421. Both courts accepted the petitioner's contention that the arrest warrant was invalid because the supporting affidavit was set out in conclusory terms⁽¹⁾ but held that since the arresting officers had procured the warrant "in good faith," and since in any event they had had sufficient information to constitute probable cause for the petitioner's arrest, that arrest had been lawful. From this conclusion the appellate Courts went on to hold that the search of the petitioner's home had been justified, despite the absence of a search warrant, on the ground that it had been incident to a valid arrest. We granted certiorari in order to consider the petitioner's substantial constitutional claims. 393 US 958, 21 L Ed 2d 372, 89 S Ct 404.

5. Without deciding the question, we proceed on the hypothesis that the California Courts were correct in holding that the arrest of the petitioner was valid under the Constitution. This brings us directly to the question whether the warrantless search of the petitioner's entire house can be constitutionally justified as incident to that arrest. The decisions of this Court bearing upon that question have been far from consistent, as even the most cursory review makes evident.

6. Approval of a warrantless search incident to a lawful arrest seems first to have been articulated by the Court in 1914 as dictum in *Weeks v. United States*, 232 US 383, 58 L Ed 652, 34 S Ct 341, LRA 1915 B 834, in which the Court stated:

"What then is the present case? Before answering that inquiry specifically, it may

1. The affidavit supporting the warrant is set out in the opinion of the District Court of Appeal, 61 Cal Rptr, at 715-716, n 1, and the State does not challenge its insufficiency under the principles of *Aguilar v. Texas*, 378 US 108, 12 L Ed 2d 723, 84 S Ct 1509, and *Spinelli v. United States*, 393 US 410, 21 L Ed 637, 89 S Ct 584.

be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." Id., at 392, 58 L Ed at 655, LRA 1915 B 834. That statement made no reference to any right to search the place where an arrest occurs, but was limited to a right to search the "person." Eleven years later the case of *Carroll v. United States*, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790, brought the following embellishment of the *Weeks* statement:

"When a man is legally arrested for an offense, whatever is found upon his person 'or in his control' which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." Id., at 158, 69 L Ed at 553, 39 ALR 790. (Emphasis (here in) added.) Still, that assertion too was far from a claim that the "place" where one is arrested may be searched so long as the arrest is valid. Without explanation, however, the principle emerged in expanded form a few months later in *Agnello v. United States*, 269 US 20, 70 L Ed 145, 46 S Ct 4, 51 ALR 409 — although still by way of dictum:

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed as well as weapons and other things to effect an escape from custody, is not to be doubted. See 267 US 132, 158 [69 L Ed 543, 553, 45 S Ct 280, 39 ALR 790]; 232 US 383, 392 [58 L Ed 652, 655, 34 S Ct 341, LRA 1915B 834]." 269 US at 30, 70 L Ed at 148, 51 ALR 409.

And in *Marron v. United States*, 275 US 192, 72 L Ed 231, 48 S Ct 74, two years later, the dictum of *Agnello* appeared to be the foundation of the Court's decision. In that case federal agents had secured a search warrant authorizing the seizure of liquor and certain articles used in its manufacture. When they arrived at the premises to be searched, they saw "that the place was used for retailing and drinking intoxicating liquors." Id., at 194, 72 L Ed at 236. They proceeded to arrest the person in charge and to execute the warrant. In searching a closet for the items listed in the warrant they came across an incriminating ledger, concededly not covered by the warrant, which they also seized. The Court upheld the seizure of the ledger by holding that since the agents had made a lawful arrest, "[t]hey had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise." Id., at 199, 72 L Ed at 238.

7. That the Marron opinion did not mean all that it seemed to say became evident, however, a few years later in *Go-Bart Importing Co. v. United States*, 282 US 344, 75 L Ed 374, 51 S Ct 153, and *United States v. Lefkowitz*, 285 US 452, 76 L Ed 877, 52 S Ct 420, 82 ALR 775. In both of those cases the opinion of the Court was written by Mr. Justice Butler, who had authored the opinion in *Marron*. In *Go-Bart*, agents had searched the office of persons whom they had lawfully arrested,⁽²⁾ and had taken several papers from a desk, a safe, and other parts of the office. The Court noted that no crime had been committed in the agents' presence, and that although the agent in charge "had an abundance of information and time to swear out a valid (search) warrant, he failed to do so." 282 US at 358, 75 L Ed at 383. In holding the search and seizure unlawful, the Court stated:

"Plainly the case before us is essentially different from 275 US 192 [72 L Ed 231, 48 S Ct 74]. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place." 282 US, at 358, 75 L Ed at 383. This limited characterization of *Maroon* was reiterated in *Lefkowitz*, a case in which the Court held unlawful a search of desk drawers and a cabinet despite the fact that the search had accompanied a lawful arrest. 285 US, at 465, 76 L Ed at 882, 82 ALR 775.

8. The limiting views expressed in *Go-Bart* and *Lefkowitz* were thrown to the winds, however, in *Harris v. United States*, 331 US 145, 91 L Ed 1399, 67 S Ct 1098, decided in 1947. In that case, officers had obtained a warrant for *Harris'* arrest on the basis of his alleged involvement with the cashing and interstate transportation of a forged check. He was arrested in the living room of his four-room apartment, and in an attempt to recover two canceled checks thought to have been used in effecting the forgery, the officers undertook a thorough search of the entire apartment. Inside a desk drawer they found a sealed envelope marked "George Harris; personal papers." The envelope, which was then torn open, was found to contain altered selective service documents and those documents were used to secure *Harris'* conviction for violating the Selective Training and Service Act of 1940. The Court rejected *Harris'* Fourth Amendment claim,

2. The Court assumed that the arrests were lawful. 282 US, at 356, 75 L Ed at 381.

sustaining the search as "incident to arrest." *Id.* at 151, 91 L Ed at 1406.

9. Only a year after *Harris*, however the pendulum swung again. In *Trupiano v. United States*, 334 US 699, 92 L Ed 1668, 68 S Ct 1229, agents raided the site of an illicit distillery, saw one of several conspirators operating the still, and arrested him, contemporaneously "seiz[ing] the illicit distillery." *Id.* at 702, 92 L Ed at 1667. The Court held that the arrest and others made subsequently had been valid, but that the unexplained failure of the agents to procure a search warrant — in spite of the fact that they had had more than enough time before the raid to do so — rendered the search unlawful. The opinion stated:

"It is a cardinal rule, that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. . . . This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. . . . To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement.

....

"A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest." *Id.* at 705, 708, 92 L Ed at 1669, 1671.

10. In 1950, two years after *Trupiano* (3) came *United States v. Rabinowitz*, 339 US 56, 94 L Ed 653, 70 S Ct 430, the decision upon which California primarily relies in the case now before us. In *Rabinowitz*, federal authorities had been informed that the defendant was dealing in stamps bearing forged overprints. On the basis of that information they secured a warrant for his arrest, which they executed at his one-room business office. At the time of the arrest, the officers "searched the desk, safe, and file cabinets in the office for about an hour and a half" *Id.* at 59, 94 L Ed at 656, and seized 573 stamps with forged overprints. The stamps were admitted into evidence at the defendant's trial, and this Court affirmed his conviction, rejecting the contention that the warrantless search had been unlawful. The Court held that the search in its entirety fell within the principle giving law enforcement authorities "[t]he right 'to search the place where the arrest is made in order to find and seize things connected with the crime.

3. See also *McDonald v. United States*, 335 US 451, 93 L Ed 153, 69 S Ct 191.

..... "Id., at 61, 94 L. Ed at 653. Harris was regarded as "ample authority" for that conclusion. Id., at 63, 94 L. Ed at 653. The opinion rejected the rule of *Trupiano* that "in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable." The test, said the Court, "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." Id., at 66, 94 L. Ed at 660.

11. Rabinowitz has come to stand for the proposition, *inter alia*, that a warrantless search "incident to a lawful arrest" may generally extend to the area that is considered to be in the "possession" or under the "control" of the person arrested.⁽⁴⁾ And it was on the basis of that proposition that the California Courts upheld the search of the petitioner's entire house in this case. That doctrine, however, at least in the broad sense in which it was applied by the California Courts in this case, can withstand neither historical nor rational analysis.

Even limited to its own facts, the Rabinowitz decision was, as we have seen, hardly founded on an unimpeachable line of authority. As Mr. Justice Frankfurter commented in dissent in that case, the "hint" contained in *Weeks* was, without persuasive justification, "loosely turned into dictum and finally elevated to a decision." 339 US 56 at 75, 94 L. Ed 653 at 665. And the approach taken in cases such as *Go-Bart*, *Lelkowitz*, and *Trupiano* was essentially disregarded by the Rabinowitz Court.

12. Nor is the rationale by which the State seeks here to sustain the search of the petitioner's house supported by a reasoned view of the background and purpose of the Fourth Amendment. Mr. Justice Frankfurter wisely pointed out in his Rabinowitz dissent that the Amendment's proscription of "unreasonable searches and seizures" must be read in light of "the history that gave rise to the words" — a history of "abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution." 339 US, 56 at 69, 94 L. Ed 653 at 662. The Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonies and had

helped speed the movement for independence.⁽⁵⁾ In the scheme of the Amendment, therefore, the requirement that "no Warrants shall issue, but upon probable cause," plays a crucial part. As the Court put it in *McDonald v. United States*, 335 US 451, 93 L. Ed 153, 69 S. Ct 191:

"We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." Id., at 455-456, 93 L. Ed at 158.

Even in the *Agnello* case the Court relied upon the rule that "[b]elief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." 269 US 20 at 33, 70 L. Ed 145 at 149, 51 ALR 409. Clearly, the general requirement that a search warrant be obtained is not lightly to be dispensed with, and "the burden is on those seeking [an] exemption [from the requirement] to show the need for it." *United States v. Jeffers*, 342 US 48, 51, 96 L. Ed 59, 64, 72 S. Ct 93.

13. Only last Term, in *Terry v. Ohio*, 392 US 1, 20 L. Ed 2d 869, 68 S. Ct 1068, we emphasized that "the police must, whenever, practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." Id., at 20, 20 L. Ed 2d at 905, (6) and that "[t]he scope of [a]

4. Decisions of this Court since Rabinowitz have applied the abstract doctrine of that case to various factual situations with divergent results. Compare *Ker v. California*, 374 US 23, 42, 10 L. Ed 2d 726, 743, 83 S. Ct 1623; *Abel v. United States*, 362 US 217, 4 L. Ed 2d 868, 80 S. Ct 683; and *Draper v. United States*, 358 US 307, 3 L. Ed 2d 827, 79 S. Ct 329, with *Kremen v. United States*, 353 US 346, 1 L. Ed 2d 876, 77 S. Ct 828 (per curiam). Cf. *Chapman v. United States*, 365 US 610, 5 L. Ed 2d 828, 81 S. Ct 776; *Jones v. United States*, 357 US 493, 499-500, 2 L. Ed 1514, 1519, 78 S. Ct 1253.

5. See generally *Boyd v. United States*, 116 US 616, 624-625, 29 L. Ed 746, 746, 749, 6 S. Ct 524; *Weeks v. United States*, 232 US 383, 389-391, 58 L. Ed 652, 654, 655, 34 S. Ct 341, LRA 1915B 834; *Davis v. United States*, 328 US 582, 603-605, 90 L. Ed 1453, 1463, 1466, 68 S. Ct 1256 (dissenting opinion); *Harris v. United States*, 331 US 145, 157-162, 91 L. Ed 1399, 1409-1411, 67 S. Ct 1096 (dissenting opinion); *Stanford v. Texas*, 379 US 476, 461-462, 13 L. Ed 2d 431, 435, 65 S. Ct 508.

6. See also *Davis v. Mississippi*, — US —, —, 22 L. Ed 2d 678, 69 S. Ct 1394; *Katz v. United States*, 389 US 347, 356-358, 19

search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible." *Id.*, at 19, 20 L Ed 2d at 904. The search undertaken by the officer in that "stop and frisk" case was sustained under that test, because it was no more than a "protective . . . search for weapons." *Id.*, at 29, 20 L Ed 2d at 910. But in a companion case, *Sibron v. New York*, 392 US 40, 20 L Ed 2d 917, 88 S Ct 1889, we applied the same standard to another set of facts and reached a contrary result, holding that a policeman's action in thrusting his hand into a suspect's pocket had been neither motivated by nor limited to the objective of protection.⁽⁷⁾ Rather, the search had been made in order to find narcotics, which were in fact found.

14. A similar analysis underlies the "search incident to arrest" principle, and marks its proper extent. When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for, and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

15. There is no comparable justification, however, for routinely searching rooms other than that in which an arrest occurs — or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.⁽⁸⁾ The "adherence to judicial processes" mandated by the Fourth Amendment requires no less.

16. This is the principle that underlay our decision in *Preston v. United States*, 376

L Ed 2d 576, 585, 88 S Ct 507; *Warden v. Hayden*, 387 US 294, 299, 18 L Ed 2d 782, 787, 87 S Ct 1642; *Preston v. United States*, 376 US 564, 567, 11 L Ed 2d 777, 780, 84 S Ct 881.

7. Our *Sibron* opinion dealt with two cases. We refer here to No. 63, involving the appellant *Sibron*. See *infra*, p —, 23 L Ed 2d p. 694.

8. See *Katz v. United States*, 389 US 347, 857-358, 19 L Ed 2d 576, 585, 88 S Ct 507.

US 364, 11 L Ed 2d 777, 84 S Ct 881. In that case three men had been arrested in a parked car, which had later been towed to a garage and searched by police. We held the search to have been unlawful under the Fourth Amendment, despite the contention that it had been incidental to a valid arrest. Our reasoning was straightforward:

"The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime — things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest." *Id.*, at 367, 11 L Ed 2d at 780.(9)

The same basic principle was reflected in our opinion last Term in *Sibron*. That opinion dealt with *Peters v. New York*, 392 US 40, 20 L Ed 2d 917, 88 S Ct 1889, as well as with *Sibron's* case, (1968) 392 US 40, 20 L Ed 2d 917, 88 S Ct 1889 and *Peters* involved a search that we upheld as incident to a proper arrest. We sustained the search, however, only because its scope had been "reasonably limited" by the "need to seize weapons" and "to prevent the destruction of evidence," to which *Preston* had referred. We emphasized that the arresting officer "did not engage in an unrestrained and thoroughgoing examination of *Peters* and his personal effects. He seized him to cut short his flight, and he searched him primarily for weapons." 392 US, at 67, 20 L Ed 2d at 937.

17. It is argued in the present case that it is "reasonable" to search a man's house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively "reasonable" to search a man's house when he is arrested on his front lawn — or just down the street — than it is when he happens to be in the

9. Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll v. United States*, 267 US 132, 153, 69 L Ed 543, 551, 45 S Ct 250, 39 ALR 790; see *Brinegar v. United States*, 338 US 160, 93 L Ed 1879, 69 S Ct 1302.

house at the time of arrest.(10) As Mr. Justice Frankfurter put it:

"To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an 'unreasonable search' is forbidden — that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response." 339 US, 58 at 83, 94 L Ed 653 at 669 (dissenting opinion).

Thus, although "[t]he recurring questions of the reasonableness of searches" depend upon "the facts and circumstances — the total atmosphere of the case," *Id.*, at 63, 68, 94 L Ed at 659, 660 (opinion of the Court), those facts and circumstances must be viewed in the light of established Fourth Amendment principles.

18. It would be possible, of course, to draw a line between Rabinowitz and Harris on the one hand, and this case on the other. For Rabinowitz involved a single room, and Harris a four-room apartment, while in the case before us an entire house was searched. But such a distinction would be highly artificial. The rationale that allowed the searches and seizures in Rabinowitz and Harris would allow the searches and seizures in this case. No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items.(11) The only reasoned distinction is one between a search of the person arrested and the area within his reach

10. Some courts have carried the Rabinowitz approach to just such lengths. See, e.g., *Clifton v. United States*, 224 F2d 329 (CA 4th Cir), cert denied 350 US 894, 100 L Ed 786, 76 S Ct 152 (purchaser of illicit whiskey arrested in back yard of seller; search of one room of house sustained); *United States v. Jackson*, 149 F Supp 937 (DC DC), rev'd on other grounds, 102 US App DC 109, 250 F2d 772 (suspect arrested half a block from his rented room; search of room upheld). But see *James v. Louisiana*, 382 US 36, 15 L Ed 2d 30, 88 S Ct 151 (per curiam).

11. Cf. Mr. Justice Jackson's dissenting comment in Harris:

"The difficulty with this problem for me is that once the search is allowed to go beyond the person arrested and the objects upon him or in his immediate physical control, I see no practical limit short of that set in the opinion of the Court — and that means to me no limit at all." 231 US, at 197, 91 L Ed at 1431.

on the one hand, and more extensive searches on the other.(12)

19. The petitioner correctly points out that one result of decisions such as Rabinowitz and Harris is to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere. We do not suggest that the petitioner is necessarily correct in his assertion that such a strategy was utilized here,(13) but the fact remains that had he been arrested earlier in the day, at his place of employment rather than at home, no search of his house could have been made without a search warrant. In any event, even apart from the possibility of such police tactics, the general point so forcefully made by Judge Learned Hand in *United States v. Kirschenblatt*, 16 F2d 202, remains:

"After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us

12. It is argued in dissent that so long as there is probable cause to search the place where an arrest occurs, a search of that place should be permitted even though no search warrant has been obtained. This position seems to be based principally on two premises: first, that once an arrest has been made, the additional invasion of privacy stemming from the accompanying search is "relatively minor"; and second, that the victim of the search may "shortly thereafter" obtain a judicial determination of whether the search was justified by probable cause. With respect to the second premise, one may initially question whether all of the States in fact provide the speedy suppression procedures the dissent assumes. More fundamentally, however, we cannot accept the view that Fourth Amendment interests are vindicated so long as "the rights of the criminal" are "protect[ed] against introduction of evidence seized without probable cause." The Amendment is designed to prevent, not simply to redress, unlawful police action. In any event, we cannot join in characterizing the invasion of privacy that results from a top-to-bottom search of a man's house as "minor." And we can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require.

13. Although the warrant was issued at 10:39 a. m. and the arrest was not made until late in the afternoon, the State suggests that the delay is accounted for by normal police procedures and by the heavy workload of the officer-in-charge. In addition, that officer testified that he and his colleagues went to the petitioner's house "to keep from approaching him at his place of business to cause him any problem there."

to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home." *Id.*, at 203.

20. Rabinowitz and Harris have been the subject of critical commentary for many years,⁽¹⁴⁾ and have been relied upon less and less in our own decisions.⁽¹⁵⁾ It is time, for the reasons we have stated, to hold that on their own facts, and insofar as the principles they stand for are inconsistent with those that we have endorsed today, they are no longer to be followed.

21. Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was, therefore, "unreasonable" under the Fourth and Fourteenth Amendments, and the petitioner's conviction cannot stand.⁽¹⁶⁾

22. Reversed,

14. See, e.g., *J. Landynski, Search and Seizure and the Supreme Court* 87-117 (1966); *Way, Increasing Scope of Search Incidental to Arrest*, 1959 Wash ULQ 261; *Note, Scope Limitations for Searches Incident to Arrest*, 78 Yale LJ 433 (1969); *Note, The Supreme Court 1966 Term*, 81 Harv L Rev 69, 117-122 (1967).

15. Cf. *Dyke v. Taylor Implement Mfg. Co.* 391 US 216, 220, 20 L Ed 2d 538, 542, 88 S Ct 1472; *Katz v. United States*, 389 US at 357-358, n 20, 19 L Ed 2d at 586; *Warden v. Hayden*, 387 US, at 299, 18 L Ed 2d at 787; *Stoner v. California*, 376 US 483, 487, 11 L Ed 2d 856, 859, 84 S Ct 889. But see *Cooper v. California*, 386 US 58, 62, 17 L Ed 2d 730, 733, 87 S Ct 788; *Ker v. California*, 374 US, at 42, 10 L Ed 2d at 743 (opinion of Clark, J.); cf. *Beck v. Ohio*, 379 US 89, 91, 13 L Ed 2d 142, 145, 85 S Ct 223; *Abel v. United States*, 362 US, at 236-239, 4 L Ed 2d at 684-686; *Giordencello v. United States*, 357 US 480, 488, 2 L Ed 2d 1503, 1510, 78 S Ct 1245.

16. The State has made various subsidiary contentions, including arguments that it would have been unduly burdensome to obtain a warrant specifying the coins to be seized and that introduction of the fruits of the search was harmless error. We reject those contentions as being without merit.

SEPARATE OPINIONS

MR. JUSTICE HARLAN, concurring.

23. I join the Court's opinion with these remarks concerning a factor to which the Court has not alluded. The only thing that has given me pause in voting to overrule *Harris* and *Rabinowitz* is that as a result of *Mapp v. Ohio*, (1961) 367 US 643, 6 L Ed 2d 1081, 81 S Ct 1684, 84 ALR 2d 983, and *Ker v. California*, (1963) 374 US 23, 10 L Ed 2d 726, 83 S Ct 1623, every change in Fourth Amendment law must now be obeyed by state officials facing widely different problems of local law enforcement. We simply do not know the extent to which cities and towns across the Nation are prepared to administer the greatly expanded warrant system which will be required by today's decision; nor can we say with assurance that in each and every local situation, the warrant requirement plays an essential role in the protection of those fundamental liberties protected against State infringement by the Fourteenth Amendment.

24. Thus, one is now faced with the dilemma, envisioned in my dissent to *Ker*, (1963) 374 US 23, at 45-46, 10 L Ed 2d 726, at 745, 83 S Ct 1623, of choosing between vindicating sound Fourth Amendment principles at the possible expense of State concerns, long recognized to be consonant with the Fourteenth Amendment before *Mapp* and *Ker* came on the books, or diluting the Federal Bill of Rights in the interest of leaving the States at least some elbow room in their methods of criminal law enforcement. No comparable dilemma exists, of course, with respect to the impact of today's decision within the federal system itself.

25. This federal-state factor has not been an easy one for me to resolve, but in the last analysis I cannot in good conscience vote to perpetuate bad Fourth Amendment law.

26. I add only that this case, together with *Benton v. Maryland*, (1969) 23 L Ed 2d 707; *North Carolina v. Pearce*, (1969) 23 L Ed 2d 656, serve to point up, as few other cases have, the profound changes that the "incorporation doctrine" has wrought both in the workings of our federal system and upon the adjudicative processes of this Court.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACK joins, dissenting.

27. Few areas of the law have been as subject to shifting constitutional standards over the last 50 years as that of the search "incident to an arrest." There has been a remarkable instability in this whole area, which has seen at least four major shifts in emphasis. Today's opinion makes an un-

timely fifth. In my view, the Court should not now abandon the old rule.

I.

28. The modern odyssey of doctrine in this field is detailed in the majority opinion. It began with (1914) 232 US 383, 56 L Ed 652, 34 S Ct 341, LRA 1915B 834, where the Court paused to note what the case before it was not. "It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. . . . Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest 'within the control of the accused.'" Id., at 392, 56 L Ed 655. (Emphasis (here into ' ') added.) This scope of search incident to arrest, extending to all items under the suspect's "control" was reaffirmed in a dictum in (1925) 267 US 192, 156, 69 L Ed 543, 553, 45 S Ct 280, 39 ALR 790. Accord, (1925) 269 US 20, 30-31, 70 L Ed 145, 146, 46 S Ct 4, 81 ALR 409 (holding that "the place where the arrest is made" may be searched "is not to be doubted"). The rule was reaffirmed in (1927) 275 US 192, 199, 72 L Ed 231, 236, 46 S Ct 74, where the Court asserted that authority to search incident to an arrest "extended to all parts of the premises used for the unlawful purpose."

29. Within four years, this rule was qualified by two Prohibition Act cases, (1931) 282 US 344, 356-358, 75 L Ed 674, 361-383 and (1932) 285 US 452, 463-467, 76 L Ed 677, 661-683, 52 S Ct 420, 82 ALR 775.

30. If Go-Bart and Lefkowitz represented a retreat from the rule of Weeks, Carroll, Agnello, and Marron, the vigour of the earlier rule was re-affirmed in (1947) 331 US 145, 91 L Ed 1399, 67 S Ct 1098 which has, but for one brief interlude, clearly been the law until today. The very next Term after Harris in (1946) 334 US 699, 92 L Ed 1663, 63 S Ct 1229, the Court held unjustifiable the seizure of a still incident to the arrest of a man at the still site, even though the still was contraband, had been visible through an open door before entering the premises to be "searched," and although a crime was being committed in the officers' presence. Accord, that year, (1948) 335 US 451, 93 L Ed 153, 69 S. Ct 191 (gambling game seen through transom before entry). Two years later, however, the Court returned to the Harris rule in (1950) 339 US 58, 94 L Ed 653, 70 S Ct 430, where the Court held that the reasonableness of a search does not depend upon the practicability of obtaining a search warrant, and that the fact of a valid arrest is relevant to reasonableness. *Tropiano* was promptly overruled.

31. Such rapid reversals had occurred before, (1) but they are rare. Here there had been two about-faces, one following hard upon the other. Justice Frankfurter objected in this language: "Especially ought the Court not re-enforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance — for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors." (1950) 339 US, 58 at 86, 94 L Ed 653 at 670. Since that time, the rule of Weeks, Marron, Harris, and Rabinowitz has clearly been the law. E.g., *Abel v. United States*, (1960) 362 US 217, 4 L Ed 2d 666, 80 S Ct 683 (Frankfurter, J., writing for the Court); (1963) 374 US 23, 10 L Ed 2d 720, 88 S Ct 1623.(2)

II.

32. The rule which has prevailed, but for very brief or doubtful periods of aberration, is that a search incident to an arrest may extend to those areas under the control of the defendant and where items subject to constitutional seizure may be found. The justification for this rule must, under the language of the Fourth Amendment, lie in the reasonableness of the rule. (1966) 392 US 1, 9, 20 L Ed 2d 889, 696, 66 S Ct 1666; (1966) 392 US 40, 20 L Ed 2d 917, 66 S Ct 1669; *Elkins v. United States*, (1960) 364 US 206, 222, 4 L Ed 2d 1669, 1660, 80 S Ct 1437. The Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In terms, then, the Court must decide whether a given search is reasonable. The Amendment does not proscribe "warrantless searches" but instead it proscribes "unreason-

1. *Murdock v. Pennsylvania*, 319 US 105, 87 L Ed 1292, 63 S Ct 870, 146 ALR 61 (1943) overruled *Jones v. Opelika*, 316 US 584, 86 L Ed 1691, 62 S Ct 1231, 141 ALR 514 (1942); *The Legal Tender Cases*, 12 Wall 457, 20 L Ed 287 (1871) overruled *Hepburn v. Griswold*, 8 Wall 603, 19 L Ed 513 (1870).

2. The majority cites *Kreman v. United States*, 353 US 346, 1 L Ed 2d 876, 77 S Ct 828 (1957), as suggesting an inconsistency. There, however, in a per curiam opinion the Court merely overturned a general search in which the entire contents of a cabin, which it took 11 pages of fine print for the Court to inventory, were seized. See *Abel v. United States*, 362 US 217, 239, 4 L Ed 2d 668, 686, 60 S Ct 683 (1960) (*Kreman* distinguished as a "mass seizure").

able searches" and this Court has never held nor does the majority today assert that warrantless searches are necessarily unreasonable.

33. Applying this reasonableness test to the area of searches incident to arrests, one thing is clear at the outset. Search of an arrested man and of the items within his immediate reach must in almost every case be reasonable. There is always a danger that the suspect will try to escape, seizing concealed weapons with which to overpower and injure the arresting officers, and there is a danger that he may destroy evidence vital to the prosecution. Circumstances in which these justifications would not apply are sufficiently rare that inquiry is not made into searches of this scope, which have been considered reasonable throughout.

34. The justifications which make such a search reasonable obviously do not apply to the search of areas to which the accused does not have ready physical access. This is not enough, however, to prove such searches unconstitutional. The Court has always held, and does not today deny, that when there is probable cause to search and it is "impracticable" for one reason or another to get a search warrant, then a warrantless search may be reasonable. E. g., even (1948) 334 US 699, 92 L Ed 1663, 68 S Ct 1229. This is the case whether an arrest was made at the time of the search or not.(3)

35. This is not to say that a search can be reasonable without regard to the probable cause to believe that seizable items are on the premises. But when there are exigent circumstances and probable cause, then the search may be made without a warrant, reasonably. An arrest itself may often create an emergency situation making it impracticable to obtain a warrant before embarking on a related search. Again assuming that there is probable cause to search premises at the spot where a suspect is arrested, it seems to me unreasonable to require the police to leave the scene in order to obtain a search warrant when they are already legally there to make a valid arrest, and when there must almost always be a strong possibility that confederates of the arrested man will in the meanwhile remove the items for which the police have probable cause to search. This must so often be the case that it seems to me as unreasonable to require a warrant for a search of the premises as to require a warrant for search of the person and his very immediate surroundings.

3. Even Mr. Justice Frankfurter, joined in dissent in *Rabinowitz* by Mr. Justice Jackson, admitted that there was an exception to the search-warrant requirement in cases of necessity, and noted that this applied, for example, to vehicles which could readily be moved. 339 US 56, at 73, 94 L Ed 653, at 664, 70 S Ct 430.

36. This case provides a good illustration of my point that it is unreasonable to require police to leave the scene of an arrest in order to obtain a search warrant when they already have probable cause to search and there is a clear danger that the items for which they may reasonably search will be removed before they return with a warrant. Petitioner was arrested in his home after an arrest whose validity will be explored below, but which I will now assume was valid. There was doubtless probable cause not only to arrest petitioner, but to search his house. He had obliquely admitted both to a neighbor, and to the owner of the burglarized store, that he had committed the burglary.(4) In light of this, and the fact that the neighbor had seen other admittedly stolen property in petitioner's house, there was surely probable cause on which a warrant could have issued to search the house for the stolen coins. Moreover, had the police simply arrested petitioner, taken him off to the station house, and later returned with a warrant,(5) it seems very likely that petitioner's wife, who

4. Before the burglary of the coin store, petitioner had told its owner that he was planning a big robbery, had inquired about the alarm system in the store, the state of the owner's insurance, and the location of the owner's most valuable coins. Petitioner wandered about the store the day before the burglary. After the burglary, petitioner called the store's owner and accused him of robbing the store himself for the insurance proceeds on a policy which as petitioner knew, had just been reduced from \$ 50,000 to \$ 10,000 coverage. On being told that the robbery had been sloppy, petitioner excitedly claimed that it had been "real professional" but then denied the robbery. On the night of the robbery itself petitioner declined an invitation to a bicycle ride, saying he was "going to knock over a place" and that a coin shop was "all set." After the robbery, he told the same neighbor that he had started to break into the coin shop, but had stopped, and then denied the whole incident. The neighbor had earlier seen stacks of typewriters in petitioner's house. Asked whether they were "hot" petitioner replied, "Hotter than a \$ 3 bill." On reading a newspaper description of the coin store burglary, the neighbour called the police.

5. There were three officers at the scene of the arrest one from the city where the coin burglary had occurred, and two from the city where the arrest was made. Assuming that one policeman from each city would be needed to bring the petitioner in and obtain a search warrant, one policeman could have been left to guard the house. However, if he not only could have remained in the house against petitioner's wife's will, but followed her about to assure that no evidence was being tampered with, the invasion of her privacy would be almost as great as that accompanying an actual search. Moreover,

in view of petitioner's generally garrulous nature must have known of the robbery would have removed the coins. For the police to search the house while the evidence they had probable cause to search out and seize was still there cannot be considered unreasonable.(6)

III.

37. This line of analysis, supported by the precedents of this Court, hinges on two assumptions. One is that the arrest of petitioner without a valid warrant(7) was constitutional as the majority assumes; the other is that the police were not required to obtain a search warrant in advance, even though they knew that the effect of the arrest might well be to alert petitioner's wife that the coins had better be removed soon. Thus it is necessary to examine the constitutionality of the arrest since if it was illegal, the exigent circumstances which it created may not, as the consequences of a lawless act, be used to justify the contemporaneous warrantless search. But for the arrest, the warrantless search may not be justified.(8) And if circumstances can justify the warrantless arrest, it would be strange to say that the Fourth Amendment bars the warrantless search, regardless of the circumstances, since the invasion and disruption of a man's life and privacy which stem from his arrest are ordinarily far greater than the relatively minor intrusions attending a search of his premises.

38. Congress has expressly authorized a wide range of officials to make arrests without any warrant in criminal cases. United States Marshals have long had this power,(9) which is also vested in the agents of the Federal Bureau of Investigation,(10) and in the Sec-

had the wife summoned an accomplice, one officer could not have watched them both.

8. A second arrest and search of petitioners' house occurred three days later. It relates to an entirely separate robbery of which petitioner was separately convicted and for which he was concurrently sentenced. Since no evidence was seized in the second search, nor did it in any way affect petitioner's trial so far as the record discloses, there is no occasion to consider its propriety.

7. An arrest warrant was in fact issued, but it was issued on an inadequate supporting affidavit and was therefore invalid, so that the case must be considered as though no warrant had issued.

8. This in turn assumes that where it is practicable to obtain a search warrant and the search is not contemporaneous with an arrest, a warrant must be obtained to validate the search. This is the holding of past cases and I do not question it.

9. Act of June 15, 1935, c. 259, S. 2, 49 Stat 378, as amended. 18 USC S 3053.

10. Act of June 18, 1934, c. 595, 48 Stat 1008, as amended, 18 USC S 3052.

ret Service(11) and the narcotics law enforcement agency.(12) That warrantless arrest power may apply even when there is time to get a warrant without fear that the suspect may escape is made perfectly clear by the legislative history of the statute granting arrest power to the FBI.

39. In *United States v. Coplon*, 185 F2d 629, 833-638 (CA2d Cir 1950), the Court held that an arrest and search were invalid because there was an insufficient showing of danger of escape, and therefore there was time to obtain a warrant. The opinion, written by Judge Learned Hand and joined by Judges Swan and Frank, reviewed the common-law power of arrest, which permitted arrests for felonies committed in the past "if [the officer] had reasonable ground to suppose that the person arrested had committed the felony." However, the Court concluded that this power of warrantless arrest had been limited by the congressional requirement that there must be a "likelihood of the person escaping before a warrant can be obtained for his arrest."

40. The next month the Congress was moved by this very decision to amend the law, consciously deleting the language upon which Judge Hand had relied so as to make it clear that warrantless arrests were authorized even if there was time to procure a warrant. Act of January 10, 1951, c. 1221, S. 1, 64 Stat 1239; HR Rep No. 8223, 81st Cong, 2d Sess (1950).(13) Thereupon, the Court of Appeals for the District of Columbia, passing on the very same arrest which had induced the congressional action, held that this "unmistakable" revision made it clear that there was in the FBI a power to arrest without warrant even when there was time to procure one. For this reason, the Court upheld the arrest and contemporaneous search. *Coplon v. United States*, 191 F2d 749 (CA DC Cir 1951). Certiorari was denied in both *Coplon* cases. (1951) 342 US 920, 926, 98 L Ed 688, 690, 72 S Ct 362, 363. Moreover, the statute under which the FBI exercises that power was later said by this Court to state the constitutional standard, *Henry v. United States*, (1959) 381 US 98, 100, 4 L Ed 2d 134, 137, 80 S Ct 168 since it requires "reasonable grounds to believe that the person to be arrested has committed or is committing" a felony, 18 USC S 3052, before a warrantless arrest may be made. And the Court today has declined to review a warrantless arrest under the narcotics agent statute. *Jamison v. United*

11. Pub L 89-218, 79 Stat 890, as amended, 18 USC S. 3058.

12. Act of July 18, 1953, Tit I S. 104 (a), 70 Stat 570, as amended, 28 USC S. 7607 (2).

13. Congress' expedition was possible partly because the same change had earlier been approved by a Senatorial committee. S Rep No. 2464, 81st Cong, 2d Sess (1950).

States, (1969) 23 L Ed 2d 774. See also my dissent in *Shipley v. California*, (1969) 23 L Ed 2d 732.

41. The judgment of Congress is that federal law enforcement officers may reasonably make warrantless arrests upon probable cause, and no judicial experience suggests that this judgment is infirm. Indeed, past cases suggest precisely the contrary conclusion. The validity of federal arrests was long governed by state law, *United States v. Di Re*, (1948) 332 US 581, 589-592, 92 L Ed 210, 217-219, 68 S Ct 222, and no requirement that warrants be sought whenever there is time to do so was imposed either by common-law history (14) or by decisions of this Court. This Court has upheld an executive arrest warrant for deportation, permitting the arrest to occur without prior judicial scrutiny, *Abel v. United States*, (1960) 362 US 217, 4 L Ed 2d 668, 80 S Ct 683. And this Court has regularly affirmed the validity of warrantless arrests without any indication whatever that there was no time to get a warrant, and indeed where all the circumstances pointed to the opposite conclusion. E.g., (1963) 374 US 23, 10 L Ed 2d 726, 83 S Ct 1623; *Draper v. United States*, (1959) 358 US 307, 3 L Ed 2d 327, 79 S. Ct 329. The lower federal Courts have certainly been of the view that warrants are unnecessary even where there is time to obtain them. *Dailey v. United States*, 261 F2d 870 (CA 5th Cir), cert denied, (1959) 359 US 969, 3 L Ed 2d 836, 79 S Ct 881 (statutory warrantless arrests by federal narcotics agents); *Smith v. United States*, 254 F2d 751, 755 (CA DC Cir), cert denied (1958) 357 US 937, 2 L Ed 2d 1552, 78 S Ct 1388; *Mills v. United States*, 196 F2d 600 (CA DC Cir), cert denied, (1952), 344 US 826, 97 L Ed 643, 73 S Ct 27 (sub silentio).

42. In light of the uniformity of judgment of the Congress, past judicial decisions and common practice rejecting the proposition that arrest warrants are essential wherever it is practicable to get them, the conclusion is inevitable that such arrests and accompanying searches are reasonable, at least until experience teaches the contrary. It must very often be the case that by the time probable cause to arrest a man is accumulated, the man is aware of police interest in him or for other good reasons is on

14. There was no dispute between the two Coplon Courts on this point, since it was well established that even a private person could make a warrantless arrest at common law for a felony which had actually been committed, and a peace officer could make such an arrest if he had reasonable cause to believe the offences committed. 1 Stephen, *A History of the criminal Law of England* 193 (1883); 2 Hale, *Pleas of the Crown* 71-104 (first American ed 1847).

the verge of flight. Moreover, it will likely be very difficult to determine the probability of his flight. Given this situation, it may be best in all cases simply to allow the arrest if there is probable cause, especially since that issue can be determined very shortly after the arrest.

43. Nor are the stated assumptions at all fanciful. It was precisely these facts which moved the Congress to grant to the FBI the power to arrest without a warrant without any showing of probability of flight. Both the Senate and House committees quoted the letter of the Acting Deputy Attorney General, Peter Campbell Brown, who in asking for the new legislation asserted: "Although it is recognized that in any felony case the person to be arrested may attempt to flee, it is also recognized that in any such case in which the defendant is arrested without a warrant in an emergency situation, such defendant may be able to present a rather convincing argument that he did not intend to flee," S Rep No. 2464, 81st Cong, 2d Sess, 2. (1950); HR Rep No. 3228, 81st Cong, 2d Sess, 2 (1950). Some weight should be accorded this factual judgment by law enforcement officials, adopted by the Congress,

IV.

44. If circumstances so often require the warrantless arrest that the law generally permits it, the typical situation will find the arresting officers lawfully on the premises without arrest or search warrant. Like the majority, I would permit the police to search the person of a suspect and the area under his immediate control either to assure the safety of the officers or to prevent the destruction of evidence. And like the majority, I see nothing in the arrest alone furnishing probable cause for a search of any broader scope. However, where as here the existence of probable cause is independently established and would justify a warrant for a broader search for evidence, I would follow past cases and permit such a search to be carried out without a warrant, since the fact of arrest supplies an exigent circumstance justifying police action before the evidence can be removed, and also alerts the suspect to the fact of the search so that he can immediately seek judicial determination of probable cause in an adversary proceeding, and appropriate redress.

45. This view, consistent with past cases, would not authorize the general search against which the Fourth Amendment was meant to guard, nor would it broaden or render uncertain in any way whatsoever the scope of searches permitted under the Fourth Amendment. The issue in this case is not the breadth of the search, since there was clearly probable cause for the search which was carried out. No broader search than if the officers had a warrant would be permitted. The only issue is whether a search warrant was required as a precondition to that

search. It is agreed that such a warrant would be required absent exigent circumstances.⁽¹⁵⁾ I would hold that the fact of arrest supplies such an exigent circumstance, since the police had lawfully gained entry to the premises to effect the arrest and since delaying the search to secure a warrant would have involved the risk of not recovering the fruits of the crime.

46. The majority today proscribes searches for which there is probable cause and which may prove fruitless unless carried out immediately. This rule will have no added effect whatsoever in protecting the rights of the criminal accused at trial against introduction of evidence seized without probable cause. Such evidence could not be introduced under the old rule. Nor does the majority today give any added protection to the right of privacy of those whose houses there is probable cause to search. A warrant would still be sworn out for those houses, and the privacy of their owners invaded. The only possible justification for the majority's rule is that in some instances arresting officers may search when they have no probable cause to do so and that such unlawful searches might be prevented if the officers first sought a warrant from a magistrate. Against the possible protection of privacy in that class of cases, in which the privacy of the house has already been invaded by entry to make the arrest—an entry for which the majority does not assert that any warrant is necessary—must be weighed the risk of destruction of evidence for which there is probable cause to search, as a re-

15. A search without a warrant "can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant. *Jones v. United States*, 357 US 493, 499 [2 L Ed 2d 1514, 1519, 76 S Ct 1253]; *United States v. Jeffers*, 342 US 46, 51 [90 L Ed 59, 64, 72 S Ct 93]. *Rios v. United States*, 364 US 253, 261, 4 L Ed 2d 1688, 1693, 60 S Ct 1431 (1960); *Stoner v. California*, 376 US 483, 486, 11 L Ed 2d 658, 859, 64 S Ct 689 (1964). And "a search can be incident to arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. *Agnello v. United States*, 269 US 20 [70 L Ed 145, 46 S Ct 4, 51 ALR 409]." *Stoner v. California*, supra, at 480, 11 L Ed 2d at 659; *James v. Louisiana*, 382 US 36, 37, 15 L Ed 2d 80, 81, 86 S Ct 151 (1965). There is thus no question that a warrant to search petitioner's house would have been required had he not been arrested there. In such cases, the officers are not already lawfully on the premises, and there is not so often the same risk of the destruction of evidence nor the necessity to make an immediate search without the delay involved in securing a warrant.

sult of delays in obtaining a search warrant. Without more basis for radical change than the Court's opinion reveals, I would not upset the balance of these interests which has been struck by the former decisions of this Court.

47. In considering searches incident to arrest, it must be remembered that there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search by his very presence at the scene, and having been arrested, he will soon be brought into contact with people who can explain his rights. As Mr. Justice Brennan noted in a dissenting opinion, joined by Justices Black and Douglas, and The Chief Justice, in (1960) 362 US 217, 249-250, 4 L Ed 2d 668, 692, 80 S Ct 683, a search contemporaneous with a warrantless arrest is specially safeguarded since "(s)uch an arrest may constitutionally be made only upon probable cause, the existence of which is subject to judicial examination, see *Henry v. United States*, (1959) 361 US 98, 100 = 4 L Ed 2d 134, 137 = 80 S Ct 168; and such an arrest demands the prompt bringing of the person arrested before a judicial officer, where the existence of probable cause is to be inquired into. Fed Rules Crim Proc 5 (a) and (c). . . . *Mallory v. United States*, 354 US 449 = 1 L Ed 2d 1479 = 77 S Ct 1356; *Mc Nabb v. United States*, 318 US 332 = 87 L Ed 819 = 63 S Ct 608." And since that time the Court has imposed on State and Federal officers alike the duty to warn suspects taken into custody, before questioning them, of their right to a lawyer. *Miranda v. Arizona*, (1966) 384 US 436, 16 L Ed 2d 694, 66 S Ct 1602, 10 ALR 3d 974; *Orozco v. Texas*, (1969) 394 US 324, 22 L Ed 2d 311, 89 S Ct 1095.

48. An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search in a full adversary proceeding. I would uphold the constitutionality of this search contemporaneous with an arrest since there were probable cause both for the search and for the arrest, exigent circumstances involving the removal or destruction of evidence, and a satisfactory opportunity to dispute the issues of probable cause shortly thereafter. In this case, the search was reasonable.

AIR 1970 ALLAHABAD 353 (V 57 C 54)

K. N. SRIVASTAVA, J.

Bans Bahore and others, Petitioners v. The State of Uttar Pradesh and others, Opposite Parties.

Civil Misc. Writ No. 95 of 1964, D/- 10-2-1969.

Limitation Act (1908), S. 29 (2) (b) — Applicability of Limitation Act to local Act — Proceedings governed by U.P. Zamindari Abolition & Land Reforms Act, 1950 (1 of 1951) — Provisions of Limitation Act (including S. 6) apply — (Civil P. C. (1908), Pre. — (Interpretation of Statutes — General and local law, inconsistency between) — (Tenancy Laws — U.P. Zamindari Abolition and Land Reforms Act, 1950 (1 of 1951), S. 341) — 1966 RD 323 (HC), Dissented from,

It cannot be denied that the U.P. Zamindari Abolition and Land Reforms Act is a local Act. But in S. 341 of the U.P. Act, the legislature, in its wisdom, has thought it proper to make the entire Limitation Act applicable to the aforesaid Act. No doubt, there is a prohibition in the Limitation Act, 1908, of application of all the sections of Limitation Act, 1908, except Ss. 4, 9 to 18 and 22, but the Indian Limitation Act would be deemed not to derogate from the provisions made in the local Act to the contrary. It is a general principle of law that where there is inconsistency in the general law and the local law, the local law shall prevail. In this view of the matter, the entire Limitation Act, 1908 (including S. 6) would apply to the U.P. Zamindari Abolition & Land Reforms Act, as provided under Section 341 of the Act.

(Para 10)

S. 29(2)(b). Limitation Act, does not prohibit from making a provision in the local Act for the applicability of the entire Limitation Act. If such a provision is made in the local Act, Sec. 29(2) does not take away the power of the legislature legislating the local Act from making a provision in the local Act to the contrary. In spite of Section 29(2)(b), the provisions of S. 341, U.P. Zamindari Abolition and Land Reforms Act, would apply and the provision of S. 341, U.P. Zamindari Abolition and Land Reforms Act would prevail. Section 29(2)(b) cannot override Section 341 of the U.P. Zamindari Abolition and Land Reforms Act. AIR 1964 SC 1099 & AIR 1941 Pat 499 & (1936) 163 Ind Cas 623 (Nag) & 1961 RD 153, Rel. on; Civil Misc. Writ No. 768 of 1961, D/- 28-8-1961 (All) (DB), Foll.: 1966 RD 323 (HC), Dissent. from.

(Para 16)

Cases Referred: Chronological Paras (1966) 1966 RD 323 (HC)=1966 All LJ 686, Raghubir Singh v. Board

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(1964) AIR 1964 SC 1099 (V 51)=

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(1961) 1961 RD 153, Mewa Ram v.

Khushi Ram

(1961) Civil Misc. Writ No. 768 of

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v. Board of Revenue, U. P.

Allahabad

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1941 Pat WN 183, Jagdeo Singh

v. Babu Lal Sah

(1936) 163 Ind Cas 623=18 Nag LJ

285, Mishrilal Oswal v. Ratanlal

Maheshri

Rajendra Sahai Verma, for Petitioners;

Standing Counsel, for Opposite Parties.

ORDER:— The facts giving rise to this writ petition are as follows:—

2. Chhedi, the father of Bans Bahore and Ram Bahore petitioners and their uncle Chunna were Zamindars in village Barkuiyan, Tappa Kandar, district Basti. They mortgaged their entire Zamindari property situated in the aforesaid village to Mahadeo Ram and his brothers. The disputed land was sir and khudkasht of the petitioners. The mortgagees transferred their mortgagee rights to certain persons. Shitla Prasad, Ram Prasad and Oudh Prasad, opposite parties Nos. 6 to 8 are the representatives in interest of the purchasers of part of the mortgagee rights. The contesting opposite parties are sons of Ganesh and Ram Lochan, who were also the purchasers of the mortgagee rights. The mortgage was executed in 1926. The sale of the mortgagee rights took place in 1938.

3. After enforcement of the U. P. Zamindari Abolition & Land Reforms Act, the purchasers of the mortgagee-rights partitioned the mortgagee rights amongst themselves. Opposite parties Nos. 6 to 8 who are representatives of the other part of the mortgagee rights, deposited five times of the rent of their share of the disputed land and became sirdars of the same. The other transferees of the mortgagee rights acquired bhumi-dhari rights in their share of the disputed land. In 1942, the mother of the petitioners filed a suit as their guardian for redemption of the mortgage. This suit was filed under Section 12 of the U.P. Agriculturists Relief Act. The suit was decreed on payment of certain amount. The amount was not deposited and, therefore, the mortgage could not be redeemed. In 1944, another suit was filed for redemption. This suit was filed on behalf of the minors by a person, who alleged himself to be their next friend. The suit was dismissed in default. According to the petitioners, that person who filed the second suit was not their next friend

and he had no right to file the suit. The petitioners then filed another suit for redemption on 23rd April 1959.

Meanwhile, the aforesaid village was placed under consolidation operation and the suit was stayed. Objection was filed by the petitioners before the Assistant Consolidation Officer. The Assistant Consolidation Officer allowed their objections. The opposite parties then filed six appeals before the Assistant Settlement Officer (Consolidation) Basti. The Assistant Settlement Officer (Consolidation) held that the petitioners were not entitled to the benefit of Section 6 of the Limitation Act and allowed the appeals. The order passed by the Consolidation Officer was set aside. The petitioners then filed seven appeals before the Deputy Director of Consolidation. The Deputy Director of Consolidation also held that the petitioners were not entitled to the benefit of Section 6 of the Limitation Act and, consequently, dismissed the appeal. The petitioners then filed revisions and the revisions were also dismissed. Being dissatisfied, the petitioners have filed this writ petition.

4. The learned counsel for the petitioners contended that the Assistant Settlement Officer (Consolidation), the Deputy Director of Consolidation who decreed the second appeal and the Deputy Director of Consolidation who decreed the revision were wrong in holding that Section 6 of the Limitation Act did not apply to cases under the U.P. Zamindari Abolition & Land Reforms Act, and therefore, their judgments were illegal and manifestly wrong.

5. The aforesaid consolidation authorities held that as provided under Section 29 of the Limitation Act, the provisions of Section 6 of the Indian Limitation Act were not applicable to local Acts and as the U.P. Zamindari Abolition & Land Reforms Act was a local Act, therefore, the aforesaid provision did not apply to the facts of the present case. In support of his contention, the learned counsel for the opposite parties relied on a Single Judge decision of this Court in *Raghubir Singh v. Board of Revenue, Allahabad*, 1966 RD 323 (HC). In this case, it was held that the provisions of Section 6 of the Limitation Act did not apply to the U. P. Zamindari Abolition and Land Reforms Act. As against this, the learned counsel for the petitioners contended that by virtue of Section 341 of the U. P. Zamindari Abolition and Land Reforms Act, the entire Limitation Act was made applicable to the U. P. Zamindari Abolition and Land Reforms Act, and, therefore, the view taken in *Raghubir Singh's* case, 1966 RD 323 (HC) was not correct. Before deciding this contention of the learned counsel for the parties, a reference has to be made to Section 29 of

the Limitation Act, 1908, because the suit was started when the aforesaid Limitation Act was in force. Section 29 of the Limitation Act 1908 reads as follows:—

"29. Savings.

(1) Nothing in this Act shall affect Section 25 of the Indian Contract Act, 1872.

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of Section 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—

(a) the provisions contained in Sec. 4, Ss. 9 to 18, and S. 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(b) the remaining provisions of this Act shall not apply.

(3) Nothing in this Act shall apply to suits under the Indian Divorce Act.

(4) Sections 26 and 27 and the definition of 'easement' in Section 2 shall not apply to cases arising in territories to which the Indian Easements Act, 1882, may for the time being extend."

6. As provided under the aforesaid section, only Sections 4, 9 to 18 and 22 shall apply to local or special Acts provided they are not expressly excluded by such special or local law. The remaining sections of the Limitation Act shall not, therefore, apply to the aforesaid special or local Act. It cannot be denied that U. P. Zamindari Abolition and Land Reforms Act is a local Act. This High Court has held in a number of cases that the U. P. Zamindari Abolition and Land Reforms Act is a local Act. It has, therefore, to be seen as to whether by the application of Section 341 of the U. P. Zamindari Abolition and Land Reforms Act, S. 6 of the Limitation Act can be made applicable to the U. P. Zamindari Abolition and Land Reforms Act. Section 341 of the U. P. Zamindari Abolition and Land Reforms Act reads as follows:—

"Unless otherwise expressly provided by or under this Act, the provisions of the Indian Court-fees Act 1870, the Code of Civil Procedure 1908 and the Indian Limitation Act, 1908 including Section 5 thereof shall apply in the proceedings under this Act."

7. A plain reading of Section 341 of the U. P. Zamindari Abolition and Land Reforms Act clearly goes to show that the entire Limitation Act was made applicable to the aforesaid Act. It is also not denied that the U. P. Zamindari Abolition and Land Reforms Act lays down different periods of limitation for suits and proceedings other than those mentioned in

the schedule of the Limitation Act, 1908. Under Section 253 of the U. P. Tenancy Act, 1939, only the provisions of Sec. 5 of the Limitation Act, 1908 were made applicable to the U. P. Tenancy Act. Under Section 29 of the Limitation Act, Ss. 4, 9 to 18 and 22 of the Limitation Act will be applicable to local Acts, if they are not so excluded by the local Act. Although under Sec. 29(2) (b) of the Limitation Act, 1908, the remaining provisions of the Limitation Act, 1908, were not made applicable to the local Act, yet by virtue of the provisions of Section 253 of the U. P. Tenancy Act, 1939, Section 5 of the Limitation Act was made applicable to the U. P. Tenancy Act, 1939 as well. The U. P. Zamindari Abolition and Land Reforms Act as shown above made the entire Limitation Act including Section 5 applicable to the aforesaid Act.

The words "including Section 5 thereof" were not there in Section 341 of the U. P. Zamindari Abolition and Land Reforms Act as it stood in 1952. By a subsequent amendment, it was added to Section 341 of the aforesaid Act. It was argued that if the entire Limitation Act was made applicable originally, then there was no need for making a specific amendment that that section was applicable to the U. P. Zamindari Abolition and Land Reforms Act. The word "including" is a clear reply to this argument. The use of the word "including" in Section 341 of the U. P. Zamindari Abolition and Land Reforms Act clearly goes to show that only emphasis was laid to the application of Section 5 of the Limitation Act, 1908; but the entire Limitation Act was made applicable under Section 341.

8. Under Sections 184 and 185 of the Bihar Tenancy Act, 1934, the Limitation Act of 1908 except Sections 7, 8 and 9 were made applicable to the aforesaid Act. In *Jagdeo Singh v. Babu Lal Sah*, AIR 1941 Pat 499, it was held that irrespective of the provisions of Section 29(2) of the Limitation Act, 1908, the provisions of all the sections of Limitation Act except Sections 7, 8 and 9 of the same would apply to the Bihar Tenancy Act.

9. Under Section 160 (3) of the C. P. Land Revenue Act, the provisions of Limitation Act were applied to the C. P. Land Revenue Act. In *Mishrilal Oswal v. Ratanlal Maheshri*, (1936) 163 IC 623 (Nag) the provisions of Section 6 were applied to the C. P. Land Revenue Act. While dealing with this case, it was observed as below:—

"The amended section applies to the local law certain specified sections, namely S. 4 and Ss. 9 to 18 and Section 22 unless they are expressly excluded by the local law, and further says that the rest of the provisions of the Limitation Act, in which Section 6 is included, shall not apply. Since here again Section 29 refers

back to the provisions of the local law, one must, while interpreting Cls. (a) and (b) of sub-section (2) of the S. 29, look to the provisions of the local law to see how far it excludes the operation of the Indian Limitation Act. Now turning to Sec. 160, sub-section (3) of the C. P. Land Revenue Act, one finds that it applies all the provisions of the Indian Limitation Act and does not exclude any. Here is a clear conflict between Section 29 (2) (b) which says that the remaining provisions which includes Section 6 of the Limitation Act shall not apply and Section 160 (3), C. P. Land Revenue Act which says that the provisions of the Indian Limitation Act shall apply. Now it is a well recognised principle of interpretation of statutes that the general law does not affect the particular law. The rule is that the general provisions such as those contained in the Limitation Act do not derogate from special provisions, but that the latter do derogate from the former:"

10. Section 341 of the U. P. Zamindari Abolition and Land Reforms Act applies all the provisions of the Limitation Act, 1908 to the U. P. Zamindari Abolition and Land Reforms Act without any reservation. It will mean that all the sections of the Limitation Act would apply to the U. P. Zamindari Abolition and Land Reforms Act irrespective of the fact that applications of the other sections of the Limitation Act, other than Sections 4, 9 to 18 and S. 22 were made inapplicable by virtue of Section 29 (2) (b) of the Limitation Act, 1908. In the earlier tenancy law, the Limitation Act was not applied to it, except so far as mentioned by it. In the U. P. Tenancy Act, 1939, as shown above, only Section 5 of the Limitation Act was made applicable to the aforesaid Act. The legislature, therefore, in the U. P. Tenancy Act did not intend to apply the other provisions of the Limitation Act except Section 5. In the U. P. Zamindari Abolition and Land Reforms Act, the legislature in its wisdom had thought it proper to make the entire Limitation Act applicable to the aforesaid Act. No doubt, there is a prohibition in the Limitation Act, 1908, of application of all the sections of Limitation Act, 1908, except Sections 4, 9 to 18 and 22, but the Indian Limitation Act would be deemed not to derogate from the provisions made in the local Act to the contrary. It is a general principle of law that where there is inconsistency in the general law and the local law, the local law shall prevail. In this view of the matter also, the entire Limitation Act, 1908 would apply to the U. P. Zamindari Abolition and Land Reforms Act, as provided under Section 341 of the Act.

11. The Assistant Settlement Officer (Consolidation) and the Deputy Director of Consolidation relied on certain cases

decided by the Board of Revenue and held that Section 6 of the Limitation Act did not apply to the U. P. Zamindari Abolition and Land Reforms Act. In *Mewa Ram v. Khushi Ram etc.*, 1961 RD 153, the Board of Revenue held that Section 6 of the Indian Limitation Act, 1908 was applicable to the U. P. Zamindari Abolition and Land Reforms Act. The cases referred to by the consolidation authorities in their judgments are of earlier date than *Mewa Ram's* case 1961 RD 153.

12. Relying on *Raghubir's* case 1966 RD 323 (HC) (Supra), the learned counsel for the respondents contended that Section 6, Indian Limitation Act, 1908 was not applicable to U. P. Zamindari Abolition and Land Reforms Act. In the case of *Raghubir* 1966 RD 323 (HC) (Supra) it was observed as below:—

"The only point raised in this petition by the learned counsel for the petitioner is that Section 6 of the Indian Limitation Act should have been applied in the circumstances of this case. Learned counsel has submitted that by virtue of Section 341 of the U. P. Zamindari Abolition and Land Reforms Act the whole of the Limitation Act has been made applicable to proceedings under the U. P. Zamindari Abolition and Land Reforms Act; consequently he submits that the benefit of Section 6 of the Indian Limitation Act should have been given to the petitioner. The Board while repelling this submission of the petitioner very rightly observed that by virtue of Section 341 of the U. P. Zamindari Abolition and Land Reforms Act if the entire Limitation Act has been made applicable, Section 6 as well as Section 29 of the Limitation Act must be read together....." Further on, the learned Judge observed as under:—

"Section 29 (2) (b) clearly says that the provisions contained in Section 4, Sections 9 to 18 and Section 22 of the Limitation Act would apply to Special and Local Laws unless they are expressly excluded but the remaining provisions of this Act would not apply. This would show that Section 6 of the Indian Limitation Act would be covered by Section 29 (2) (b) of the Indian Limitation Act. Even apart from this, language of Section 6 of the Act itself makes it amply clear that it cannot be held to be applicable to limitation prescribed by the U. P. Zamindari Abolition and Land Reforms Act."

Sec. 6, Limitation Act, reads as below:

"6. (1) Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an

idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the first Schedule.

(2) Where such person is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities or where, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period, after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed.

(3) Where the disability continues up to the death of such person, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

(4) Where such representative is at the date of the death affected by any such disability, the rules contained in sub-sections (1) and (2) shall apply.

13. With profound respect, I beg to differ and say that the language of Sec. 6 does not in any way indicate even the implication that Section 6 would not apply to the U. P. Zamindari Abolition and Land Reforms Act. It appears that in *Raghubir's* case, 1966 RD 323 (HC) no argument was advanced at the bar that the provisions of the Limitation Act, 1908 did not derogate from the special provision, but on the other hand the provisions of the Special Act do derogate from the former. In other words, the general statute does not affect the special provisions of the Special Act. Had this aspect been brought to the notice of my learned brother, the result certainly would have been otherwise.

14. It was next contended that sitting singly, I should respect the view taken in *Raghubir Singh's* case, 1966 RD 323 (HC). There is unreported Division Bench decision of this Court in Civil Misc. Writ No. 768 of 1961, D/- 23-8-1961 (All), *Chhote v. Board of Revenue U.P. Allahabad*. In this case the question arose about the application of Section 6 of the Limitation Act to cases under the U. P. Zamindari Abolition and Land Reforms Act. It was observed by the Bench as below:—

"We have heard learned counsel for the petitioners who has urged that two points arise in this petition. One point according to him is that Section 6 of the Limitation Act has been wrongly applied by the Board of Revenue to the suit of which the proceedings went up before the Board. Section 341 of the U. P. Zamindari Abolition and Land Reforms Act clearly applies all the provisions of the Limitation Act to proceedings under that Act. From the circumstance that under the Rules framed under the U. P. Zamindari Abolition and Land Reforms Act the period of

limitation for various kinds of suits and the time from which period of limitation starts running are prescribed no inference follows that the provisions of exceptional nature contained in Section 6 of the Limitation Act have become inapplicable. Since Section 341 of the U. P. Zamindari Abolition and Land Reforms Act in clear terms applied the whole of the Limitation Act to proceedings under the former Act, the decision of the Board of Revenue that Section 6 of the Limitation Act was applicable is perfectly correct."

15. This earlier Division Bench also supports the view which I have taken. It appears that this decision was also not brought to the notice of my learned brother in Raghubir Singh's case, 1966 RD 323 (HC) (Supra). As my view is being supported by the aforesaid unreported Division Bench case, therefore, the above argument too has no force in it.

16. In Vidyacharan Shukla v. Khubchand Baghel, AIR 1964 SC 1099, it was held that Section 29 (2) should be read as a whole and not in two parts. Reading the entire Section 29, Limitation Act the words "they are not expressly excluded" in Section 29. (2) (a) only go to show that the sections mentioned in Section 29 (2) (a) of the Limitation Act would apply if not expressly excluded by the local Act. The use of the words "shall not apply" in Section 29 (2) (b) of the Limitation Act would only mean that the other provisions of the Limitation Act except Section 4, Sections 9 to 18 and S. 22 would not apply to the local Acts if they are not applied to the local Act by express provision in the local Act.

Section 29 (2) (b) does not prohibit from making a provision in the local Act for the applicability of the entire Limitation Act. If such a provision is made in the local Act, Section 29 (2) (b) does not take away the power of the legislature legislating the local Act from making a provision in the local Act to the contrary. In spite of Section 29 (2) (b) the provisions of Section 341, U. P. Zamindari Abolition and Land Reforms Act would apply and the provision of Section 341, U. P. Zamindari Abolition and Land Reforms Act would prevail. Section 29 (2) (b) cannot override Section 341 of the U. P. Zamindari Abolition and Land Reforms Act.

It is for this reason that in the Limitation Act 1963, Section 29 (2) has been amended and Sections 4 to 24 (inclusive) of the Limitation Act have been applied uniformly to all local Acts unless excluded by them. I am, therefore, of the opinion that Section 6 of the Limitation Act applies to the U. P. Zamindari Abolition and Land Reforms Act and the Assistant Settlement Officer (Consolidation) and the Deputy Director of Consolidation acted illegally in holding otherwise. In the result, the writ petition succeeds.

17. The writ petition is allowed with costs. The judgment passed by the Assistant Settlement Officer (Consolidation) dated 10-9-1962, the judgment passed by the Deputy Director of Consolidation, U. P. Lucknow in second appeal dated 31-1-1963 and the judgment passed by the Deputy Director of Consolidation Basti in revision dated 16-9-1963 are quashed.

Petition allowed.

AIR 1970 ALLAHABAD 357 (V 57 C 55)
R. S. PATHAK AND R. L. GULATI, JJ.

Government of India and another, Appellants v. Smt. Sahodra Devi and others, Respondents.

Special Appeal No. 464 of 1968, D/- 11-4-1969, from Judgment of Satish Chandra, J. in Civil Misc. Writ Petn. No. 1744 of 1967, D/- 8-4-1968.

(A) Cantonments Act (1924), S. 280 — Rules framed under — Cantonments Land Administration Rules (1937), Rr. 16 to 27 — Person already holding site in cantonment land — Grant of lease in his favour — Provisions of Rr. 16 to 26 cannot be invoked — Rule 27 is attracted.

Neither the provisions of Rr. 16 to 26 nor the non obstante clause in Rule 27 can lead to the conclusion that the provisions of Rules 16 to 26 can be invoked where a person already holds a site in Cantonment land. The case of such a person attracts the provisions of Rule 27. AIR 1954 SC 596 & AIR 1956 SC 105, Rel. on. (Para 15)

A lease contemplated by Rules 16 to 24 is granted where the land is not already in the occupation of a grantee entitled to occupy it. The very circumstance that the lease is auctioned tends to this conclusion. If the auction is of land already occupied by a grantee entitled to occupy it, there could conceivably be a case where the right to possession of the accepted bidder conflicts with the right of occupation enjoyed by the sitting grantee. Though under Rule 26 a lease can be granted by private agreement, it cannot be said that a sitting occupant can be granted a lease by private agreement without being exposed to the jeopardy which an auction might entail. Rule 26 operates merely as an alternative to the scheme embodied in Rules 16 to 24. It is intended to operate in the same field in which Rules 16 to 26 operate. For that reason, Rule 26 cannot be invoked. (Paras 12, 13)

It cannot be said that the non obstante clause "notwithstanding anything contained in Rules 16 to 26" with which R. 27 opens indicates that but for Rule 27 the cases covered by it would ordinarily fall within the scope of Rules 16 to 26, and

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the use of the non obstante clause demonstrates that cases of old grants could be the recipients of leases under Rules 16 to 26. (Para 14)

(B) Cantonments Act (1924), S. 280 — Rules framed under — Cantonment Land Administration Rules (1937), R. 27 — Grant of lease is discretionary — Applicant has no absolute right to the grant of such lease. Civil Misc. Writ Petn. No. 1744 of 1967, D/ 8-4-1968 (All), Reversed.

An applicant for a lease under Rule 27 has no absolute right to the grant of such lease. The grant of lease under Rule 27 is a matter to be decided within the discretion of the authorities mentioned in that rule. The discretion must be exercised on considerations pertinent to military necessity and military security and all those other considerations relating to the effective discharge of the duties of the Central Government in respect of military administration. Civil Misc. Writ Petn. No. 1744 of 1967, D/- 8-4-1968 (All) Reversed. (Para 19)

(C) Constitution of India, Art. 226 — Matter falling to be decided within discretion of an authority — Invalid order made by such authority may be quashed but Court cannot assume itself functions conferred upon such authority. Civil Misc. Writ Petn. No. 1744 of 1967, D - 8-4-1968 (All), Reversed. AIR 1965 SC 532, Rel. on. (Para 20)

Cases Referred: Chronological Paras

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| (1965) AIR 1965 SC 532 (V 52) = | |
| (1965) 1 SCJ 702, State of Mysore v. K. N. Chandrasekhara | 20 |
| (1956) AIR 1956 SC 105 (V 43) = | |
| 1955-2 SCR 977, Kanwar Raj Nath v. Pramod | 14 |
| (1954) AIR 1954 SC 596 (V 41) = | |
| 1955 SCR 206, Dominion of India v. Shrinbai | 14 |
| (1939) AIR 1939 FC 58 (V 26) = | |
| 40 Cri LJ 403, United Provinces v. Governor General | 17 |
| (1912) ILR 36 Bom 1 = 38 Ind App 204 (PC), Kalkhusru v. Secy. of State | 17 |

H. N. Seth, for Appellants, Keshav Sahai and Shah C. P. Agarwal, for Respondents.

PATHAK, J.:— On April 30, 1958 the respondents purchased from Messrs. Dost Mohammad Private Limited the property described as No. 45 Tagore Road situated in the Cantonment at Kanpur. It comprises of a bungalow and land. The building site on which the bungalow stands, is referred to as survey No. 100. Admittedly, the lease or written grant under which survey No. 100 was given is not traceable. But it is recorded in the General Land Register as "occupancy land on old grant terms".

2. On May 19, 1958 the respondents applied to the Cantonment Authorities for

mutation of their names, but before the request was granted the respondents were required to admit that the land comprised in the property belonged to the Government. On September 13, 1961 the property was mutated in the names of the respondents and on September 15, 1961 the respondents executed a deed admitting that the site appurtenant to the property and forming its compound belonged to the Government of India and was held by them subject to the conditions, limitations and disabilities laid down in the Governor General's Order No. 179 dated September 12, 1836.

3. The respondents, anxious to obtain a lease of the land in their favour from the Cantonment Authorities, wrote in January 1966 for a blank form of the application set out in Schedule V of the Cantonment Land Administration Rules, 1937 for the purpose of applying for a lease of land. The Military Estates Officer, Lucknow, directed the issue of such form. On April 12, 1966, however, the respondents wrote to the Military Estates Officer stating that they were owners of the bungalow, that the property was recorded in the General Land Register as "occupancy land on old grant terms", that no written document defining the rights of the Government was available and, therefore, the respondents' occupation be regularized by the execution of a lease in accordance with Rule 27 in the form set out in Schedule 7. The Military Estates Officer taking the view that the respondents, by applying for a blank form in Schedule 5, wanted the grant of a fresh lease, took no action on this application. On August 27, 1966 the respondents wrote to the Minister for Defence Government of India, praying for a lease under Rule 27 in the form set out in Schedule 7, but inexplicably again applied to the Military, Estates Officer on October 15, 1966 for a blank form of the application set out in Schedule 5. On October 25, 1966 the Military Estates Officer sent the form and informed the respondents that "this also disposes of the letter dated 12-4-1966". Meanwhile, the Ministry of Defence informed the respondents that the Government was prepared to grant them a lease under Rule 28 in the form set out in Schedule 8 but was not prepared to grant a lease under Rule 27. Considerable correspondence ensued. The Ministry of Defence, however, remained firm. On February 28, 1967 the respondents sent a formal notice calling upon the Military Estates Officer, Lucknow, and the Government of India, in the Ministry of Defence, to grant a lease under Rule 27. There being no satisfactory response, the respondents then filed a petition under Article 226 of the Constitution praying for

mandamus directing the appellants to execute a lease under Rule 27.

4. The petition came on for hearing before Satish Chandra, J. He allowed the petition and directed the grant of a lease under Rule 27.

5. The Military Estates Officer and the Government of India appeal.

6. Before passing on to the submissions of the parties, we might with advantage refer to the statute and the relevant rules.

7. Section 280 of the Cantonments Act, 1924 confers upon the Central Government power to make rules to carry out the purposes and objects of the Act, and in particular the rules may provide for

"(a) the manner in which, and the authority to which, application for permission to occupy land belonging to the Crown in a Cantonment is to be made;

(b) the authority by which such permission may be granted and the conditions to be annexed to the grant of such permission."

In exercise of that power, the Central Government framed the Cantonment Land Administration Rules, 1937. Rule 3 provides for the maintenance of a General Land Register of all land in the Cantonment. The land is divided into different classes, and in Class B (3) land is defined as land

"which is held by any private person under the provisions of these rules, or which is held or may be presumed to be held under the provisions of the Cantonment Code of 1899, or 1912, or under any executive orders previously in force, subject to conditions under which the Central Government reserve, or have, reserved, to themselves the proprietary rights in the soil."

Under R. 9 the management of such land has been entrusted ordinarily to the Military Estates Officer.

8. The Rules provide for the grant of leases. Different kinds of leases are envisaged, and each kind of lease has its own conditions and terms. Rule 16 provides for a lease for a minimum period of thirty years renewable at equal intervals upto a maximum period of ninety years. The lease is subject to the payment of an initial premium and to an annual rent. Rules 17 to 24 provide for the mode of granting such a lease. Upon application made to the Military Estates Officer in the form prescribed in Schedule V, the site is surveyed and demarcated and the annual rent for it is fixed. Thereafter proceedings are taken for auctioning the land to the highest bidder. Upon acceptance of the bid, the successful applicant is required under Rule 28 to execute the lease in the form prescribed in Schedule VIII.

9. As an alternative to auctioning the lease, Rule 26 empowers the Military Estates Officer in exceptional cases and

subject to the approval of the Central Government to lease a site by private agreement.

10. Then follows R. 27 which reads: "Special lease for the regularisation of old grants:

Notwithstanding anything contained in Rules 16 to 26, the Military Estates Officer, in any case where a site is held without a regular lease, may on application by the holder, grant, with the approval of the Central Government or such other authority as the Central Government may appoint for this purpose, a lease of the said land in the form set out in Sch. VII." Leases for a period not exceeding thirty years and leases in perpetuity are covered by Rule 31.

11. The appellants contend that it is open to them to grant a lease to the respondents under Rules 16 to 26 and 28. The appellants further say that even if Rule 27 is attracted the grant of a lease thereunder is discretionary and the respondents are not entitled as of right to such a lease.

12. It is not disputed that the respondents enjoy a right to occupy the land. The deed executed by the respondents on September 15, 1961 at the instance of the appellants contains the statement that the site is held subject to "the conditions, limitations and disabilities laid down in the G. G. O. No. 179 dated 12th September 1836." The order dated September 12, 1836 was issued by the Governor General-in-Council and provides for the conditions upon which land situated within the limits of a military Cantonment may be occupied. A grant of land is made upon application made in that behalf. It is made subject to the power of the Government to resume the land at any time on giving one month's notice and paying the value of such buildings the erection of which was authorised. So long as the Government does not exercise the power of resumption there is a right to continue in occupation of the land. If this be borne in mind, it will appear at once that the first contention of the appellants is not well founded.

Because in our opinion, a lease contemplated by Rules 16 to 24 is granted where the land is not already in the occupation of a grantee entitled to occupy it. The very circumstance that the lease is auctioned tends to this conclusion. If the auction is of land already occupied by a grantee entitled to occupy it, there could conceivably be a case where the right to possession of the accepted bidder conflicts with the right of occupation enjoyed by the sitting grantee. We find it difficult to accept that this clash of rights was intended.

13. The appellants point out that the auction of a lease is not the only mode of

granting it. It is pointed out that R. 26 provides an alternative. Under that rule a lease can be granted by private agreement. The appellants say that a sitting occupant can be granted a lease under R. 26 by private agreement without being exposed to the jeopardy which an auction might entail. Rule 26 provides:

"Disposal of lease by Private Agreement.— Notwithstanding anything contained in Rules 16 to 24, the Military Estates Officer may, in exceptional cases for exceptional reasons to be recorded in writing, and subject to the approval of the Central Government, or such other authority as the Central Government may appoint for this purpose, dispense with the deposit of the cost of survey and demarcation, as prescribed by R. 20, or with the auction of the lease, as prescribed by Rule 28 or with both, and may lease any site by private agreement, at such rate of rent, and on payment of such premium, as the Central Government or the appointed authority may approve in each case.

Provided that the concurrence of the Collector and the approval by the Officer Commanding the Station shall be obtained before application is made for the approval of the Central Government or the appointed authority."

It is plain from the terms of Rule 26 that it operates merely as an alternative to the scheme embodied in Rules 16 to 24. It is intended to operate in the same field in which Rules 16 to 24 operate, namely in the class of cases where the land is not already occupied by a grantee with a present right to occupy it. For that reason, we cannot accept that Rule 26 can be invoked in this case.

14. Rule 27 contemplates those cases where the site is held without a regular lease. A site is "held" by a person who has a right in law to hold it. What is envisaged here is an existing right to hold the site but without a regular lease. A person holding a site subject to the provisions of the Governor General's Order No. 179 dated September 12, 1836 would fall within that description. The marginal note itself suggests that Rule 27 has been made for the regularisation of old grants. The lease under Rule 27 is in the form set out in Schedule VII, and unlike the lease contemplated by Rules 16 to 24 no rent is charged. Only a nominal premium of Rs. 5 is payable, evidencing the intention of merely regularizing the occupation by a lease incorporating specific terms and conditions. The appellants urge that the non obstante clause "notwithstanding anything contained in Rules 16 to 26" with which Rule 27 opens indicates that but for Rule 27 the cases covered by it would ordinarily fall within the scope of Rules 16 to 26, and the use of the non obstante clause demonstrates that cases of old

grants could be the recipients of leases under Rules 16 to 26.

It seems to us that the plea would have substance only if it could be said that Rule 27 operated wholly or in part over the field covered by Rules 16 to 26. Reading Rule 27 as we do, we think it does not. It is not uncommon to come across cases where a non obstante clause has been inserted *ex abundanti cautela* for the purpose of clarification. In *Dominion of India v. Shrinbal*, AIR 1954 SC 596 the Supreme Court pointed out that a non obstante clause may be read

"as clarifying the whole position and must be understood to have been incorporated in the enactment by the Legislature by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment."

In *Kanwar Raj Nath v. Pramod*, AIR 1956 SC 105 also, the Supreme Court held that the non obstante clause had been inserted, *ex abundanti cautela*. Having regard to the scope of Rule 27 plainly indicated by its terms we have no hesitation in declining to read in the non obstante clause the meaning and effect to which the appellants seek to persuade us.

15. We are of opinion that neither the provisions of Rules 16 to 26 nor the non obstante clause in Rule 27 can lead to the conclusion that the provisions of Rr. 16 to 26 can be invoked where a person already holds a site in Cantonment land. It seems to us that the case of such a person attracts the provisions of Rule 27.

16. The next question is whether the appellants are obliged to grant a lease under Rule 27 in every case where an application is made for such a lease. The learned single Judge has held that the respondents have an absolute right to a lease under Rule 27 and has accordingly directed the appellants to grant them a lease in the form set out in Schedule VII. It appears to us that the learned single Judge is in error.

17. Rule 27 requires the approval of the Central Government, or of an authority appointed by it, before a lease is granted by the Military Estates Officer under that provision. Even if the Military Estates Officer considers that it is a case where a lease under Rule 27 should be granted, it is for the Central Government to decide whether the grant should be made. Whether the approval should be given is a matter to be determined in its discretion. It will be pertinent to recall that in the case of a grant under the Governor General's Order dated September 12, 1836 no absolute right to occupy the land was recognised in the grantee, because under the terms and conditions laid down by that order the grant of the land was made in the

discretion of the Military authorities. Rule 27, which appears to continue the tenor of the grant with certain modifications, has provided for a lease in which, like the terms of the grant, no rent is chargeable. The premium stipulated is in the nominal sum of Rs. 5. The lease is a lease in perpetuity. In this respect, the terms of the lease contemplated by Rule 27 are substantially as liberal as those of the grant. Indeed, they are even more generous. Whereas under the terms of the grant, the Government was entitled to resume the land at any time unfettered by any conditions, a lease under Rule 27 can be terminated only where the land or buildings are required for a public purpose. In the circumstances, the grant of a lease in perpetuity has to be made with the utmost circumspection. There are many considerations which necessitate this. They are all those considerations which relate to the effective discharge of the duties of the Central Government in respect of military administration. Not the least of these are the pressures of military necessity and military security, pressures which have not lessened with the years. Dealing with a claim to ownership in fee in Cantonment land, the Judicial Committee in *Kaikhusr v. Secretary of State*, (1912) ILR 36 Bom 1 (PC) observed:

"It is unnecessary to go in detail through the numerous succeeding regulations which show how strictly the military authorities asserted their proprietary rights. They are summarised in Aitchison's Cantonment Code of 1836, and in Jameson's Cantonment Code of 1850, and they make it clear that, though permission to occupy ground was frequently given, especially for the building of officers' houses or bungalows, such permission carried with it no sort of proprietary right, and the buildings were liable to expropriation at a price to be fixed by the authorities....."

In this state of things it is impossible to say that mere possession or occupation of the bungalow on this site affords any presumption whatever that he or his predecessors in title were owners in fee. The presumption is all the other way and that adverse presumption is strengthened when the history of the site comes to be examined"

The Judicial Committee regarded the appellants in the case as mere licencees and held that the Government was entitled to resume the land. And in the *United Provinces v. Governor General*, AIR 1939 FC 58 Gwyer, C. J. pointed out:

"..... The administration of cantonment areas, almost from their first establishment has been for obvious military reasons subject to special regulations"

18. An analysis of the rules before us demonstrates that throughout the Government has considered it necessary to retain careful control over land within the Cantonment. It is not possible to enumerate all the reasons which emerge out of considerations of military necessity and military security which render it desirable that such control be retained. That is a matter which in greater or lesser degree, varies with the military policy of the time. It cannot be forgotten that even CL B (3) land is retained in the Cantonment for the effective discharge of governmental duties in respect of military administration. It is land, the management of which is entrusted ordinarily to the Military Estates Officer and not to the Cantonment Board.

19. Upon the aforesaid considerations, it seems clear that the grant of a lease under Rule 27 is a matter to be decided within the discretion of the authorities mentioned in that rule. The discretion must be exercised on considerations pertinent to military necessity and military security and all those other considerations relating to the effective discharge of the duties of the Central Government in respect of military administration. It is not possible to accept the view that an application (sic applicant?) for a lease under Rule 27 has an absolute right to the grant of such lease.

20. The learned single Judge has directed the appellants to grant a lease to the respondents under Rule 27. When the grant of such lease is, as we have held above, in the discretion of the appellants, we are unable to sustain that direction. The matter is one which must be determined by the appellants who under R. 27 have been entrusted with that function. We think it settled law that in a matter falling to be decided within the discretion of an authority, an invalid order made by the authority may be quashed by the Court under Art. 226 of the Constitution but it is not open to the Court to assume to itself the function conferred upon that authority and exercise a discretion which the law in its wisdom has vested in that authority. *State of Mysore v. K. N. Chandrasekhara*, AIR 1965 SC 532.

21. The appeal is allowed in part. We set aside the order of the learned single Judge directing the appellants to grant a lease to the respondents under Rule 27 of the Cantonment Land Administration Rules, 1937. We direct the appellants to consider the application of the respondents made under Rule 27 and to dispose of it in accordance with law. In the circumstances of the case, there is no order as to costs.

Appeal partly allowed.

AIR 1970 ALLAHABAD 362 (V 57 C 56)

FULL BENCH

R. S. PATHAK, M. H. BEG AND
H. C. P. TRIPATHI, JJ.

J. K. Manufacturers Ltd. (Formerly J. K. Cotton Manufacturers Ltd.), Petitioner v. The Sales Tax Officer, Sector II, Kanpur and others, Respondents.

Civil Misc. Writ No. 265 of 1966, D/- 8-5-1969.

(A) Sales Tax — U.P. Sales Tax Act (15 of 1948), S. 9(1) — U.P. Sales Tax Rules, Rule 66(1) — Appeal — Payment of admitted tax — Not mentioned in memorandum of appeal — Does not render it non-entertainable — Memorandum can be amended later on to include the statement of payment of admitted tax.

Per Pathak, J.:— There is nothing in the Act or Rules which requires that there should be a statement in the memorandum of appeal as to the amount of tax admitted to be due and paid. An erroneous statement made in that regard cannot be a ground for rejecting the appeal as defective and cannot preclude the appellant from establishing at any time before the appeal is entertained that the admitted tax has been deposited. (Para 3)

Per Beg, J.:— A mere statement in a memorandum of appeal with nothing more than a formal communication of some information which may be needed is capable of elucidation even at the stage of the hearing of the appeal. The appellant cannot be denied a decision on merits unless there is an incurable defect of such a nature in the memorandum of appeal that it can be held that there is no appeal at all before the appellate authority.

(Amendment of memorandum of appeal to include statement that admitted tax has been paid allowed to be made at the stage of hearing of the appeal). (Para 50)

(B) Sales Tax — U.P. Sales Tax Rules, Rule 12-A — U.P. Sales Tax Act, S. 3-AA (2) — Furnishing of Form III-A — Whether mandatory or directory — Purchase for resale — Presumption — Validity of Rule 12-A — Forms filed during assessment proceedings may be entertained in exceptional cases — Rule 12-A, notwithstanding the use of the word "unless" must be construed to provide merely a convenient mode of proving that the purchase of the goods is for resale in the same condition and not as laying down that the only mode of proving this is by furnishing Form III-A — To read Rule 12-A in this way alone will enable it to survive. (1962) 13 STC 898 (All), Dissented from.

Per Beg, J.:— Rule 12-A, in addition to preventing the commission of fraud or introducing administra-

tive convenience, is designed to facilitate the task of the selling dealer. It is therefore reasonable and valid and does not go beyond the objects of S. 3-AA. But the rule, while making certification by the purchasing dealers essential evidence of conditions of sales to them does not make the filing of certificates themselves absolutely indispensable in every case. In exceptional and extraordinary cases, like loss due to destruction by fire or flood, satisfactory proof that the sales were duly supported by the prescribed certificates furnished by the purchasing dealers, will still meet the requirements of the rule. Thus certification can take place in exceptional cases, even after assessment proceedings have commenced. (Paras 36 & 38)

Per Pathak and Tripathi, JJ.:— The certificates produced during the assessment proceedings which were genuine and legally valid, ought to have been taken into consideration by the Sales Tax Officer and not rejected on the ground that they were not filed with the quarterly returns. AIR 1966 SC 12 Explained and distinguished; (1962) 13 STC 898 (All), Dissented from.

(Para 6, 16 to 18 & 22)

(C) Civil P. C. (1908), S. 9 — Tribunal — Jurisdiction — Vires of statutory rule — Cannot be challenged before statutory tribunal.

Although the Supreme Court has not specifically held in any case that an authority created by a statute cannot question the validity of even a rule purporting to be made under the statute, yet after the pronouncements in very wide terms of the Supreme Court in *K. S. Venkataraman & Co. (P.) Ltd.'s case*, (AIR 1966 SC 1089) and the subsequent cases, statutory authorities cannot be expected to decide whether a rule purporting to be made under a statutory provision declaring rules made thereunder to have the same effect as if enacted by the legislature, is valid. (Para 28)

(D) Constitution of India, Art. 226 — Writ of certiorari — Existence of alternative remedy when a bar — Validity of statutory rule impugned by petitioner — Question can only be agitated in writ proceedings and existence of remedy by way of appeal to higher statutory authorities is no ground for refusing writ. (Paras 2 & 28)

(E) Constitution of India, Art. 226 — Writ of certiorari — Existence of alternative remedy, when a bar — Petitioner attacking reported decision of Single Judge of High Court binding on statutory authorities — Writ petition held maintainable and remedy by way of appeal to higher statutory authorities is no ground for refusing writ. (Paras 2 & 29)

(F) Sales Tax — U.P. Sales Tax Rules,

Rule 12-A — Vires of Rule cannot be challenged before authority constituted under U.P. Sales Tax Act (15 of 1948).

(Para 2)

(G) Constitution of India, Art. 226 — Writ petition — Question raised affecting large number of appeals pending — High Court in public interest should adjudicate on it expeditiously to afford guidance to statutory authorities. (Para 2)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 78 (V 56)= 21 STC (SN) 5, Dhulabhai v. State of Madhya Pradesh 27

(1969) AIR 1969 All 200 (V 56)= 1968 All LJ 547 (FB). Janta Cycle Motor Mart v. Asst. Commr. Sales Tax 53

(1969) STR No. 255 of 1966, D/- 2-5-1969 (All), Commr. of Sales Tax v. M/s. Lary Leather Agency 12

(1969) STR 256 of 1966, D/- 2-5-1969 (All), Commr. of Sales Tax v. Society Leather Stores 12

(1969) STR 257 of 1966, D/- 2-5-1969 (All), Commr. of Sales Tax v. Star Leather Agencies 12

(1969) STR 258 of 1966, D/- 2-5-1969 (All), Commr. of Sales Tax v. Abdul Razzaq Leather Stores 12

(1969) Special Appeal No. 374 of 1963, D/- 12-8-1969 (All), Sales Tax Officer, Sector V, Kanpur v. Shahbuddin Zakir Hussain & Co. 6

(1968) AIR 1968 SC 488 (V 55)= (1968) 21 STC 154, Lakshmiratan Engineering Works Ltd. v. Asst. Sales Tax, Commr. 3, 15, 29, 51, 53

(1967) 19 STC 66 (SC), Circo's Coffee Co. v. State of Mysore 27

(1966) AIR 1966 SC 12 (V 53)= (1965) 16 STC 607, Kedarnath Jute Manufacturing Co., Ltd. v. Commercial Tax Officer 16, 36

(1966) AIR 1966 SC 1089 (V 53)= 17 STC 418, K. S. Venkataraman and Co. (P) Ltd. v. State of Madras 27

(1966) 17 STC 508=(1966) 60 ITR 260 (SC), Behari Lal Shyam Sunder v. Sales Tax Officer, Cuttack 2, 27

(1963) 14 STC 518 (All), Swastika Tannery of Jaimau v. Commr. of Sales Tax, U.P. Lucknow 52

(1962) 13 STC 898 (All), Mansey Lakhansay and Co. v. State of U.P. 5, 18, 29, 37

(1961) AIR 1961 SC 832 (V 48)= (1961) 2 SCR 918; J. D. Bhargava v. J. L. Bhargava 49

(1960) AIR 1960 Bom 61 (V 47)= ILR (1959) Bom 1603, Khatizabai v. Controller of Estate Duty Bombay D

(1957) AIR 1957 SC 540 (V 44)= 1957 SCR 488, Garikapati Veeraya v. Subbiah Choudhry 48

(1956) AIR 1956 SC 29 (V 43)= (1955) 2 SCR 872, Daji Saheb v. Shankar Rao Vithalrao Mane 48

(1956) AIR 1956 SC 367 (V 43)= 1956 SCR 166, Mela Ram and Sons v. Commr. of Income Tax, Punjab 49

(1955) 1955-6 STC 386 (All), Firm Jaswant Rai Jai Narain v. Sales Tax Officer 23

R. L. Gulati, for Petitioner; Chief Standing Counsel, for Respondents.

PATHAK, J.:— I have had the benefit of perusing the Judgment prepared by my brother Beg, J. and I agree with the order proposed by him.

2. I agree that the preliminary objection raised by the respondents on the ground that the petitioner should be referred to his statutory remedies under the U.P. Sales Tax Act should be rejected. The writ petitions were filed against the assessment orders and while they were pending the petitioner also filed appeals against these assessment orders. The appeals were dismissed as being defective. The writ petitions were amended to include a prayer for relief against the appellate orders. One of the grounds taken in these cases before us is that Rule 12-A is ultra vires. That is a ground which cannot be entertained by the authorities constituted under the U.P. Sales Tax Act. In Behari Lal Shyam Sunder v. Sales Tax Officer, Cuttack (1966) 17 STC 508 (SC) the imposition of sales tax was challenged on the ground that a rule was ultra vires, and the Supreme Court repelled the contention that the question could have been examined and decided by the authorities constituted under the statute. Then there is the circumstance that the questions raised in these writ petitions are questions which should be decided authoritatively at the earliest as they affect a large number of cases where appeals are filed and are rejected because of apparent non-compliance with the rules. It is in the public interest that such questions should be resolved by adjudication by this Court expeditiously so that the statutory authorities are afforded adequate guidance in respect of matters which arise daily before them.

3. The appeals have been dismissed as defective because in all the three memoranda the petitioner failed to disclose the tax admittedly due. In the memoranda originally filed the petitioner stated that the tax admitted to be due was nil, and thereafter sought permission to amend the memoranda by inserting the figures of the admitted tax. The appellate authority rejected the prayer for amendment on the ground that it was not competent to permit any amendment. I agree with my brother Beg J. that the appellate authority has made an order which cannot be sustained. The right of appeal against

the assessment order is conferred by Section 9(1) of the U.P. Sales Tax Act and the proviso to that sub-section declares that no appeal shall be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due or of such instalment thereof as may have become payable. The Supreme Court in *Lakshmi Ratan Engineering Works Ltd. v. Asst. Sales Tax Commr.*, AIR 1963 SC 488=21 STC 154 has laid down that it is open to an appellant to adduce satisfactory proof of such payment at any time before the appeal is entertained, and the appeal is 'entertained' when it is first taken up for judicial consideration. What the appellant has to establish is that he has paid the amount of admitted tax. There is nothing in the U.P. Sales Tax Act or Rules which requires that there should be a statement in the memorandum of appeal as to the amount of tax admitted to be due and paid. Rule 66 which mentions what should be contained in the memorandum of appeal does not contemplate such a statement. It merely requires that as regards the admitted tax liability it shall be accompanied by the challan showing deposit in the treasury of the admitted tax. The Supreme Court has held in *Lakshmi Ratan Engineering Works Ltd.*, AIR 1963 SC 488=21 STC 154 (supra) that even this requirement is directory only and that it is open to an appellant to prove by producing the challan or by any other mode available to him that the admitted tax has been paid, and he may do this at any stage before the appeal is entertained. The statement in the memorandum of appeal that the admitted tax has been paid, therefore, is not a requirement contemplated by the Act or the Rules, and if it is open to an appellant to prove at any time before the appeal is entertained that the admitted tax has been deposited, it is necessarily implied that he can at any stage before the appeal is entertained show what is the amount of admitted tax and that it has been paid. An erroneous statement made in the memorandum of appeal in that regard cannot be made a ground for rejecting the appeal as defective and cannot preclude the appellant from establishing at any time before the appeal is entertained that the admitted tax has been deposited. In this view of the matter, the appellate authority was wrong in holding that it was not open to the petitioner to show that the statement made in the memoranda of appeal was incorrect. In my opinion, the question whether the appellate authority enjoys the power to permit an amendment of the memorandum of appeal does not arise because the statement which the petitioner sought to correct is not a statement required by the Act and the Rules to be

mentioned in a memorandum of appeal. *Shri K. N. Singh*, the learned Chief Standing Counsel for the respondents, fairly concedes that the appellate order is erroneous and is liable to be quashed. The matter could have ended there so far as we are concerned. The consequence of the finding that the appellate orders are erroneous and must be quashed is that the appellate authority must now take up the appeals again and dispose them of in accordance with law.

4. But two questions have been raised on the merits. One is whether the assessing authority was justified in refusing to consider the Form III-A filed by the petitioner during the assessment proceedings. Those Forms were filed not with the quarterly returns but some time after. It is not in dispute that they were filed before the assessment order was made. In my opinion the assessing authority erred in not taking those forms into consideration merely on the ground that they were not filed with the quarterly returns. I think the position is now well settled in this Court that the Forms may be filed by an assessee at any time before the assessment order is made.

5. Certain observations have been made by my brother Beg on the question whether the decision in *Mansey Lakhansay and Co. v. State of U.P.*, (1962) 13 STC 898 (All) lays down the correct law in regard to the interpretation of R. 12-A which provides for Form III-A. With great respect to my learned brother, I find myself unable to agree with all that he has said in that regard.

6. In my opinion, Rule 12-A must be construed to provide merely a convenient mode of proving that the purchase of the goods is for resale in the same condition. It does not lay down that the only mode of proving this is by furnishing Form III-A. That is the opinion expressed by me in *Sales Tax Officer, Sector V, Kanpur v. Shahbuddin Zakir Hussain & Co.*, Special Appeal No. 374 of 1963, D/-12-8-1969 (All), and I shall reproduce my reasons for coming to that opinion.

7. Sub-section (1) of Section 2-AA provides that the turnover of the goods specified therein will be liable to tax at the point of sale by the dealer to the consumer. Sub-section (2) provides that unless the dealer proves otherwise every sale by a dealer shall for the purposes of sub-section (1) be presumed to be to a consumer. The Explanation which follows declares that a sale to a registered dealer who purchased the goods for resale in the same condition in which he has purchased them or to an unregistered dealer shall, for the purposes of the section, be deemed to be a sale to the consumer.

8. Rule 12-A says:
"Exemption of Sales under Section 3-AAi

A sale of any of the goods specified in Section 3-AA shall be deemed to be a sale to the consumer, unless it is to a dealer who furnishes a certificate in Form III-A to the effect that the goods purchased are for re-sale in the same condition. Details of all such certificates shall be furnished by the selling dealer with his return in Form IV."

9. There is no difficulty in appreciating what is ordinarily meant when we speak of a sale to the consumer. The Explanation to Section 3-AA has added two categories. One is where the sale is made to a registered dealer who does not purchase them for sale in the same condition in which he has purchased them, but sells them after processing them or altering them to produce a new article. The other is where the sale is made to an unregistered dealer. Both categories are deemed for the purpose of Section 3-AA to be sales made to the consumer. There can be little doubt that the word "deemed" in the Explanation has been used to give an extended meaning to the ordinary connotation of the expression "sale to the consumer". That the word "deemed" can be so used is now well settled. *Khatizabai v. Controller of Estate Duty*, AIR 1960 Bom 61 at p. 70.

10. Now, one thing is clear, and that is that the tax is levied only at the point of sale by the dealer to the consumer. In construing the provisions of Section 3-AA and Rule 12-A that must be kept clearly in mind. The Legislature appears to have anticipated that there would be considerable difficulty in determining whether a particular sale was made to the consumer. To obviate that difficulty, the Legislature enacted sub-section (2) of Section 3-AA. It provides that unless the dealer proves otherwise every sale by him would, for the purposes of sub-section (1) of Section 3-AA, be presumed to be to the consumer. The burden is thrown upon the dealer to show that the sale was not made to the consumer. It is manifest that sub-section (2) merely enacts a rule of evidence for the purpose of giving effect to the substantive provision in sub-section (1). Sub-section (2), it will be noticed, does not indicate what should be the nature and mode of proof by which the dealer may establish that the sale made by him is not to the consumer. That has been left entirely to the choice of the dealer. In short, therefore, sub-section (2) lays the burden of proof on the dealer and leaves it to him to determine how he discharges that burden.

11. And so we come to Rule 12-A. At first blush, the rule gives the impression that unless the selling dealer is armed with a certificate in Form III-A from the purchasing dealer the sale made by him

must be considered to be a sale to the consumer. On further consideration, however, I am unable to read the Rule to mean that. To my mind, the Rule suggests a convenient mode to the selling dealer for proving that the goods have not been sold to the consumer. It provides for no more than that. The certificate in Form III-A is one mode in which the selling dealer may establish that he has not sold the goods to the consumer. But that is not the only mode. If the contrary view is accepted, it will limit the selling dealer to that mode alone and will preclude from adopting any other mode of proof. It must not be forgotten that Rule 12-A has been framed for giving effect to the purposes of Section 3-AA. If it seeks to limit the selling dealer to a specific mode of proof it clearly attempts to impose restriction which was not contemplated by sub-section (2). It may have been a different matter if sub-section (2) had read, "unless the dealer proves otherwise in the manner prescribed.....", when it could have been legitimately contended that the only mode of proof available to the dealer was the mode prescribed in Rule 12-A. But that the Legislature did not enact,

12. There is another aspect of the matter. If Rule 12-A provides the only mode for a selling dealer to prove that the sale by him is not to the consumer there will be cases where the Rule may operate to nullify the object of S. 3-AA. An illustration will demonstrate this. A registered dealer sells goods to another registered dealer. The goods are purchased by the purchasing dealer for re-sale in the same condition in which he purchased them. He sells them to a consumer. Inasmuch as the sale by him is a sale to the consumer, it is the purchasing dealer who is liable to tax. Ordinarily, the purchasing dealer would furnish a Form III-A to the selling dealer and on production of that Form the selling dealer could establish that he was not liable to tax. But there may be cases where the purchasing dealer does not furnish the Form III-A to the selling dealer. In four Sales Tax References Commr. of Sales Tax v. Lary Leather Agency, STR No. 255 of 1966, D/- 2-5-1969 (All), Commr. of Sales Tax v. Society Leather Stores, STR No. 256 of 1966, D/- 2-5-1969 (All), Commr. of Sales Tax v. Star Leather Agencies, STR No. 257 of 1966, D/- 2-5-1969 (All) and Commr. of Sales Tax v. Abdul Razzaq Leather Stores, STR No. 258 of 1966, D/- 2-5-1969 (All), this Court had recently to consider a situation where the assessee had admittedly made the sale to the consumer and had not furnished Form III-A to the dealer from whom he had purchased the goods. The contention of the assessee in each case

was that as the selling dealer could not furnish Form III-A the tax should be levied on the selling dealer, and the tax having been levied on the selling dealer it could not be levied upon him because it was a single-point levy. It is important to note that the statute places no obligation on the purchasing dealer to furnish the Form to the selling dealer. In that event, if Rule 12-A can be said to provide the only roode for proving that the sale is not to the consumer, the selling dealer cannot establish that the sale by him is not to the consumer, and he will be liable to tax. By an act of his own volition, namely refusing to furnish the certificate in Form III-A, the purchasing dealer who sells to the consumer can cause the liability which sub-section (1) imposes on him to be visited instead on the dealer from whom he had purchased the goods, and escape the liability himself on the argument that the tax cannot be levied at more than one point. A construction such as this would enable a dealer, who sells to the consumer, to subvert the operation of sub-section (1) and make its application depend on his individual decision as to whether he furnishes Form III-A to the selling dealer or not. It could never have been contemplated by the Legislature that the application and operation of sub-section (1) should turn on the volition of an individual who could divert the course of the levy by withholding Form III-A. The conduct of such an individual is not controlled by the statute, there being no obligation on him to furnish the Form.

13. The illustration may be carried further. Consider a case where the goods are the subject of sale in a series of sales by many successive dealers. Let us assume that it is only the last sale where the goods are not purchased for resale in the same condition but are intended to be manufactured into a different commercial commodity. Clearly, in the light of the explanation to Section 3-AA it is only the last sale which must be deemed to be a sale to the consumer and which, therefore, attracts the tax under sub-section (1). If Form III-A is the only mode of proving that the sale is not to the consumer, and, for whatever reason, each selling dealer is not given the Form by the corresponding purchasing dealer, then all these selling dealers will be liable to tax on the sale made by them on the ground that they have not produced Form III-A before the assessing authority. It is immaterial that there is an understanding between the dealers that the purchasing dealer will furnish Form III-A to the selling dealer or even that there is a contract between them to that effect. Breach of contract is not unknown, and there will always be a case, no matter what the understanding or the

circumstances, where Form III-A is not supplied by the purchasing dealer to the selling dealer. If Form III-A is the only proof permitted by the law to the selling dealer, then on his failure to produce it, it will be presumed that the sale by him is to the consumer. In the case taken by me of many successive dealers, the Sales Tax Officer will be bound to levy the tax at as many points of sale as there are selling dealers who have not been given form III-A by their purchasing dealer. There can be little dispute that thus an essential requirement of sub-section (1), namely that the tax be levied at single point, will be flagrantly violated.

14. Rule 12-A, it must be remembered, embodies a rule of evidence. Provisions relating to evidence, specially those made in the exercise of a rule-making power, cannot be so construed as to limit or defeat the statutory provision laying down the substantive law. Rule 12-A, it is true, has been made in the exercise of the power conferred on the State Government under Section 24, sub-section (4) of which provides that the rules shall have effect as if enacted in the Act. But that consequence accrues only if the rules are made within the confines of the powers conferred by sub-section (1) of Section 24. See *Chief Inspector of Mines v. Karam Chand Thapar*. Sub-section (1) empowers the State Government to make rules "to carry out the purposes of this Act", and no rule can be made in the exercise of that power which nullifies the purposes of the Act or of any of its provisions. It cannot be forgotten that a rule is merely subordinate legislation, subordinate to the statute under which it is made. If Rule 12-A is construed as laying down that Form III-A is the only mode of proving that the sale is not to the consumer, it will, as I have attempted to show, defeat the provisions of Section 3-AA and be invalid on that ground. It is well settled that if a Rule can reasonably be so construed as to avoid it being declared invalid that construction must be given to it. If Rule 12-A is construed as laying down a convenient mode only that the goods are purchased for resale in the same condition and not as laying down the only mode of proof, then, in my opinion, it can be considered as a rule made for the purposes of Sec. 3-AA, and not made in violation of it.

15. I may refer to the decision of the Supreme Court in AIR 1968 SC 488—(1968) 21 STC 154. The proviso to Sec. 9 of the U.P. Sales Tax Act provides that no appeal against an assessment shall be entertained unless it is accompanied by satisfactory proof of payment of the amount of tax admitted by the appellant to be due. Rule 66(2) of the U.P. Sales Tax Rules provides that the memorandum

of appeal shall be accompanied by the challan showing deposit in the treasury of the admitted tax. Before the Supreme Court it was contended that Rule 66 (2) provided the only mode of proving that the admitted tax had been deposited. The Supreme Court held that the terms of the proviso to Section 9 were general; all that the proviso required was satisfactory proof, and it was not open to a Rule to make the section narrower by prescribing a particular mode. The Supreme Court observed:

"The rule lays down one uncontestable mode of proof which the Court will always accept but it does not exclude the operation of the proviso when equally satisfactory proof is made available to the officer hearing the appeal and it is proved to his satisfaction that the payment of the tax has been duly made and in time. In this sense, the rule can be regarded as directory since it lays down one of those modes which will be unquestioned for its validity. The other modes of proof are not necessarily shut out." And I might here add the Supreme Court's further observation:

"It is to be remembered that all rules of procedure are intended to advance justice and not to defeat it."

16. What we must not forget, I think, is that the provision for proof by furnishing Form III-A has been made by a Rule and not by a Section of the Act itself. Had that not been so, the problem would have taken on a different complexion, as is to be found in Section 8(4) of the Central Sales Tax Act and Section 5 (2) (a) (ii) of the Bengal Finance (Sales Tax) Act, where the Legislature itself declares that the exemption contemplated there will not be conferred unless the prescribed form is furnished. As I have already said, a rule is subservient to the Act and should not be so construed as to conflict with the Act. Section 5 (2) (a) (ii) of the Bengal Act was considered by the Supreme Court in *Kedarnath Jute Manufacturing Co., Ltd. v. Commercial Tax Officer*, AIR 1966 SC 12=(1965) 16 STC 607, which held the provision to be mandatory. That was a case where the statute exempted sales made to a registered dealer of goods of the class or classes specified in the registration certificate of the assessee dealer. It was a case of the statute conferring an exemption simply, without anything more. The position under Section 3-AA is more complex. The mischief is far greater. The impact is felt not merely at the point of sale by the assessee dealer who is unable to produce Form III-A, but its repercussions extend over succeeding sales, which because of the single point levy, can be claimed to be exempt from tax. The position is complicated by the existence

of the directive in sub-section (1) that the tax shall be levied at one point only, viz. at the point of sale by a dealer to the consumer. It is an injunction which cannot be disobeyed by the assessing authority. Disobedience of that injunction will result in the diversion of the levy to a point not considered taxable by the Legislature. In the example I have already given, if one or more successive selling dealers are unable to get Form III-A from their purchasing dealer, the sales made by them will attract the tax instead of the sale which has been actually made to the consumer. Because it is a single-point levy, the latter sale, which the Legislature has made taxable, escapes the tax. It must be remembered that the burden is not on the assessing authority to investigate and find out which is the sale to the consumer. The burden of proof has, by sub-section (2) of S. 3-AA, been cast on the assessee. If Rule 12-A is mandatory, then unless Form III-A is produced by the assessee, the sale by him will be treated as the sale to the consumer. As the position arising under Section 3-AA of the U.P. Sales Tax Act is materially different from that obtaining under Section 5(2)(a)(ii) of the Bengal Act, the observations of the Supreme Court in *Kedarnath Jute Manufacturing Co., Ltd.*, AIR 1966 SC 12=(1965) 16 STC 607 (supra) do not, in my opinion, apply to the case before us.

17. It has been said that the word "unless" in Rule 12-A makes the filing of Form III-A mandatory. That may be so in the usual kind of case, where it is a case of obtaining an exemption merely and the impact of that exemption is confined to the point of sale by the particular assessee dealer. But I feel great difficulty in agreeing, where that construction would lead to a conflict between the Rule and the Section and where it would lead to results opposed to the very intent of the Legislature. If Rule 12-A is not open to the construction I have suggested then, in my opinion, it will have to be struck down. To read it in the way I have done will enable it to survive and to provide a convenient mode for the assessee to discharge the burden of proof cast upon him by sub-section (2) of Section 3-AA.

18. The respondent relied upon (1962) 13 STC 898 (All) where a learned single Judge construed Rule 12-A to the contrary. With respect, I am unable to agree with the opinion expressed in that case.

19. On the other question, namely whether the blankets under consideration are entitled to exemption from tax it was stated on behalf of the petitioner that it was a matter which could properly be disposed of by the authorities constituted under the Act. It is not necessary there-

fore, to express any opinion in respect of that question.

20. The petitioner urges that the assessment orders should be quashed by this Court and the cases sent down to the Sales Tax Officer for reassessment. Inasmuch as the petitioner deliberately chose the forum of appeal during the pendency of these writ petitions, and we have been invited to consider whether the orders of the appellate authority dismissing the appeals are well founded in law I think it only right that having held that the appellate orders are erroneous the cases should go back to the appellate authority for reconsideration and decision in accordance with law. There is also the undertaking given by the learned Chief Standing Counsel for the respondents, and accepted by us, that the petitioner will not be treated as being in default in respect of the balance of the tax assessed against it for the three assessment years so long as the appeals remain pending before the appellate authority.

21. I would quash the orders of the appellate authority dismissing the appeals and direct it to hear them again and dispose them of in accordance with law. In the circumstances, the parties should bear their own costs.

22. H. C. P. TRIPATHI, J.: I agree, with the judgment proposed by Hon'ble Pathak, J.

23. M. H. BEG, J.: Three connected writ petitions challenging a common assessment order for the three assessment years 1961-62 and 1962-63 and 1963-64 passed by the Sales Tax Officer, Sector II, Kanpur, opposite party No. 1, against the petitioning company, have been referred to this Full Bench for decision of the whole case. The petitions raised three common questions. One of these questions was whether sales of cotton blankets by the petitioning company, for Rs. 15, 63, 351-14 P. in the assessment year 1961-62, for Rs. 13,28,382-91 P. in the assessment year 1962-63, and for Rs. 30,60,437-84 P. in the assessment year 1963-64, could be exempted from tax under Section 3-AA of the U.P. Sales Tax Act (hereinafter referred to as the Act). It was indicated in the referring order that this question could be more appropriately decided on evidence on record by the Sales Tax authorities themselves. This question resolved itself into: Did the blankets, after having been cut into convenient sizes, borders of another material stitched on at two ends, constitute garments when they were sold, as was held by a Division Bench of this Court in *Firm, Jaswant Ram Jal Narain v. Sales Tax Officer*, (1955) 6 STC 386 (All) with regard to saris, lihapais, phards, and bed-covers, or, did they still fall under the classification "cotton fabrics of all varieties" which are generally measur-

ed and cut at the time of sale? This question has not been argued before us by either side as it was assumed that it is to be decided by the Sales Tax authorities themselves on facts of the case. We, therefore, refrain from deciding it.

24. Two other questions, which have been argued before us remain to be decided by us. The first is whether the Sales Tax Officer was right in refusing exemption to sales of yarn, to the extent of Rs. 59,38,364-83 P. for the assessment year 1961-62, of Rs. 63,13,981-01 P. for the assessment year 1962-63 and of Rs. 60,59,755-30 P. for the assessment year 1963-64, on the ground that the petitioner had not submitted certificates in Form III-A, showing that these goods were sold to a dealer for re-sale in the same condition, either with its quarterly returns in Form IV or within a time obtained especially for filing them although the petitioning company had submitted these certificates long before the completion of the assessment proceedings on 30th November, 1964. The second question is whether the Commissioner, Sales Tax, U.P., added as an opposite party after the filing of the writ petitions, rightly rejected the appeals of the petitioning assessee against the orders of the Sales Tax Officer solely on the ground that the memorandum of appeal in each case did not disclose the tax admitted to be due with the result that the memoranda of appeals were defective.

25. A preliminary objection was taken by Mr. K. N. Singh, the Chief Standing Counsel for the State, that the writ petitions are liable to be dismissed on the ground that the petitioner had filed the writ petitions on 31st January 1966, during the pendency of the appeals before the Assistant Commissioner, Sales Tax who rejected the appeals on a preliminary ground, as indicated above on 21st February, 1966. The petitioner had thereafter filed amendment applications to implead the Assistant Commissioner Sales Tax, and had prayed for quashing of the common orders made by the Assistant Commissioner on common grounds in all the three appeals. This Court had allowed the amendment and permitted addition of grounds directed against the orders of the Assistant Commissioner as well. The learned counsel for the opposite parties submitted that there was, nevertheless, an alternative remedy open to the petitioner by means of an application for revision under Sec. 10 of the Act, and, thereafter, by means of a reference to this Court under Sec. 11 of the Act in each case. It was submitted that the petitioner, not having availed itself of these modes of redress, should not be allowed to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution.

26. In reply to the above mentioned preliminary objection, Mr. Jagdish Swarup, appearing on behalf of the petitioner, pointed out that the validity of R. 12-A of the Rules made under the Act had been questioned by the petitioner. It was submitted that no relief could be given to the petitioner for such a grievance even by this Court when deciding a reference under Sec. 11 of the Act inasmuch as the limitations imposed by Sec. 11 of the Act upon the jurisdiction of this Court will preclude a consideration of the validity of either any provision of the Act or any rule made thereunder.

27. In *K. S. Venkataraman and Co. (P) Ltd. v. State of Madras*, 17 STC 418=AIR 1966 SC 1089 the view of the majority of their Lordships of the Supreme Court, expressed by Subba Rao, J., with regard to the jurisdiction exercised under Sec. 66 of the Income Tax Act, 1922, was: "It has been held by this Court that the jurisdiction conferred upon the High Court by Sec. 66 of the Income-tax Act is a special advisory jurisdiction and its scope is strictly limited by the section conferring the jurisdiction. It can only decide questions of law that arise out of the order of the Tribunal and that are referred to it. Can it be said that a question whether a provision of the Act is ultra vires of the Legislature arises out of the Tribunal's order? As the Tribunal is a creature of the statute, it can only decide the dispute between the assessee and the Commissioner in terms of the provisions of the Act. The question of ultra vires is foreign to the scope of its jurisdiction. In (1966) 17 STC 508 (SC) the question raised was whether an imposition of tax was "without authority of law or ultra vires the Sales Tax Act and the Rules". The precise form in which the validity of the imposition of a tax was questioned does not appear from the judgment. It was not specifically stated there whether the validity of any statutory provision or of any statutory rule had been questioned. But, their Lordships, following their earlier decision in *Venkataraman Co.'s case* (supra) held, in general terms, with regard to the power of the sales tax authority, that the question of ultra vires was foreign to its jurisdiction." Therefore, it was held that a writ petition could not be thrown out on the ground that an alternative remedy was open in such a case. Again, in *Circo's Coffee Co. v. State of Mysore*, (1967) 19 STC 66 (SC), following *Venkataraman Co.'s case* (supra), the Supreme Court held that "the question as to the vires of a statute which a taxing officer has to administer cannot be raised before him". Similar views were expressed in *Dhulabhai v. State of Madhya Pradesh*, 21 STC (Short Notes) 5 = (AIR 1969 SC 78).

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28. Although the Supreme Court has not specifically held in any case brought to our notice that an authority created by a statute cannot question the validity of even a rule purporting to be made under the Statute, yet, after the pronouncements of the Supreme Court, in the wide terms indicated above, Sales Tax authorities could not be expected to decide whether a rule, purporting to be made under a statutory provision declaring rules made thereunder to have the same effect as if enacted by the legislature, is valid.

29. An alternative reply to the preliminary objection was also given by learned counsel for the petitioner. This is that Rule 12-A having been held to be valid in a single judge decision of this Court, (1962) 13 STC 898 (All), which was binding upon the Assistant Commissioner, the petitioner could only get an adjudication within a reasonable time on the question raised by it upon a petition under Article 226 of the Constitution. Learned counsel pointed out that the Supreme Court, in AIR 1968 SC 488=1968-21 STC 154 had, in a similar situation, refused to apply the principle that the existence of an alternative remedy bars relief by interference on grant of special leave to appeal under Article 136 of the Constitution. Moreover, as the referring order indicates, the questions raised by the petitioner before us are of sufficient importance to deserve an early authoritative pronouncement by this Court. We, therefore, overrule the preliminary objection.

30. Now, taking up the first of the two questions we have to decide, the impugned Rule 12-A, relied upon by the Sales Tax Officer, may be quoted. It reads as follows:

"12-A. Exemption of Sales under Section 12-A.—A sale of any of the goods specified in Sec. 3-AA shall be deemed to be a sale to the consumer, unless it is delivered to a dealer who furnishes a certificate in Form III-A to the effect that the goods purchased are for resale in the same condition. Details of all such certificates shall be furnished by the selling dealer with his return in Form IV". This is clearly a rule of evidence made for the purpose of enabling a satisfactory adjudication on the statutory right given by Sec. 3-AA(1) of the Act to obtain an exemption of certain sales of goods, including those of cotton yarn, from sales tax "except at the point of the sale by a dealer to the consumer" and that too at a rate not exceeding two naya paise per rupee. Thus, a dealer selling to another dealer and not directly to a consumer will not pay any sales tax on the sale if he proves that it is a sale "for resale in the same condition."

31. Before determining the scope and meaning of Rule 12-A we must notice

Sec. 12-AA(2) of the Act where the legislature itself has enacted a presumption of law, against the dealer claiming the benefit of Sec. 3-AA(1), in the following terms: "Unless the dealer proves otherwise, every sale by a dealer shall for purposes of sub-section (1), be presumed to a consumer." The Explanation to Section 3-AA adds: "A sale of any of the goods specified in sub-section (1) to a registered dealer who does not purchase them for resale in the same condition in which he has purchased them, or to an unregistered dealer shall, for purposes of this Section, be deemed to be a sale—to the consumer." It may well be that, with these stringent provisions with which the right to obtain an exemption of certain sales from taxation is hedged round, it was considered necessary to relieve the dealer claiming exemption from the rigour of the law provided he takes certain steps to safeguard his interests in selling to other dealers for resale of goods in the same condition. Viewed in this light, Rule 12-A would appear to be meant to protect the interests of dealers who comply with its terms and not to impair their rights.

32. Rule 12-A was made under Sec. 24 of the Act to carry out the purposes of the Act and not to defeat them. Section 24 (4) gives rules made under S. 24 the same effect as the provisions of the Act. It is significant that Rule 12-A, while reiterating the presumption found in Section 3-AA (2), in a slightly different language, indicates the mode of rebutting it by means of the prescribed certificates. The language of the Rule certainly indicates that the mode prescribed here is the only method of rebutting the presumption. The question was, therefore, raised whether R. 12-A does not unduly curtail the right to an exemption found in S. 3-AA (1) and even circumscribe the means of rebutting a presumption which would be left open to the dealer to choose if Section 3-AA (2) was the only provision to be considered.

33. As already indicated by me, R. 12-A could very well be meant to aid a dealer claiming exemption in surmounting a presumption which would otherwise operate against him. It does not really conflict with Section 3-AA (2), but fills a gap on a matter on which Section 3-AA (2) is silent. Its effect is that the dealer is obliged to obtain the best and most convenient form of evidence, to show that he is entitled to get an exemption, at a time and in a manner which ensure that it is above suspicion and is not lost. The last sentence of the Rule which directs the dealer to furnish details of prescribed certificates with his returns in Form IV seems also intended to guard against spurious certificates supplied later and to

enable authorities to check up in time the correctness of details given. The selling dealer can certainly refuse to sell without charging sales tax unless and until the purchasing dealer either certifies or undertakes to certify in prescribed form.

34. I am unable to see how prescribing the most convenient and reasonable mode of proof, in the circumstances of the case, so as to safeguard the interests of dealers as well as of the revenues of the State, can be prohibited even if, by prescribing such a mode of proof only, other modes of proof are necessarily barred by implication. Statutory provisions requiring certain transactions to be evidenced by writing are not unfamiliar. And, when transactions are reduced to writing, Section 91 of the Evidence Act, containing the best evidence rule, prohibits reception of oral evidence to prove the terms of the transactions. The position is, therefore, not novel. It is a part of the basic norms of our law of Evidence. The Rule, viewed as a whole, reflects and satisfies two well recognised principles found in our law of Evidence: that of natural, ordinary, logical but optional presumptions of fact converted into obligatory rebuttable presumptions of law, and, the best evidence rule.

35. After having had the advantage of going through the judgment of my learned brother, R. S. Pathak, J., I reconsidered the question whether R. 12-A could be interpreted as laying down only one of the possible ways of rebutting a statutory presumption. I find that the primary object and the plain meaning of Rule 12-A is to prescribe certification by the purchasing dealer as the only means of protection for the selling dealer which enables him to repel the statutory presumption most conveniently. The use of the word "unless" in the Rule shows that the conditions in which the statutory presumption can be repelled are exhausted by the Rule although the language of the Rule leaves room for proof of certification in exceptional cases by methods other than filing certificates obtained which may have been lost. So long as certification is proved, a merely defective form of it will not matter. To go beyond this appears to me, with great respect for my learned brother's opinion, to be not open to us. If the effect of the Rule, as it stands, is that it goes beyond the provisions of Section 3-AA and results in absurdities, we can declare it to be void on that ground. But, we cannot rewrite it or reconstruct it or interpret it out of existence if its meaning is, as it appears to me to be, clear and explicit.

36. In AIR 1966 SC 12 at p. 14 = 1965-16 STC 607 the Supreme Court, dealing with a statutory provision the meaning of which appeared to be clear and unambiguous to it, observed that it was for the Legislature and the rule making authority

and not for the Court to soften the possible rigour of the provisions. It explained that the object of a proviso, prescribing the only mode of obtaining an exemption from sales tax by furnishing a declaration form, could not be defeated by so interpreting it that it become redundant and otiose. It rejected the submission that the proviso meant: "if the declaration form is furnished well and good; but, if not furnished, other evidence could be produced." The ground given for rejecting such a contention was that the clause could not be rewritten so as to ignore the proviso. In my opinion, the word "unless", used in Rule 12-A, clearly gives to what follows after it an effect exactly similar to that of the proviso considered by the Supreme Court. Such a conclusion appears inescapable to me on the language of the rule. In *Kedaranath, J. M. Co.'s case* (Supra) the Supreme Court, after explaining the object of the proviso considered there, observed: "The liberal construction suggested will facilitate the commission of fraud and introduce administrative inconveniences, both of which the provision of the said clause seeks to avoid." It seems to me that Rule 12-A, in addition to serving these very objects, was designed to facilitate the task of the dealer who sells. It is, therefore, reasonable and valid and does not go beyond the objects of Section 3-AA of the Act even on the strict and narrow construction I have adopted.

37. In (1962) 13 STC 898 (All) *Brijlal Gupta, J.*, held: "So far as Rule 12-A is concerned, it in no way takes away from him the right or the opportunity to rebut the presumption. All that that rule does is to lay down that in order to rebut the presumption and to prove a contrary state of facts to exist, a certificate in Form III-A will be the only material or evidence. Thus, while the section deals with the right or the opportunity to prove or disprove a particular fact, the rule deals with the materials on the basis of which the fact might be proved or disproved. It follows that the subject-matter of Section 3-AA and of Rule 12-A is quite distinct. It must, therefore, be held that Rule 12-A does not in any way abridge or take away the right conferred by Section 3-AA The proceeding for assessment has to be initiated, and in due course, to be concluded. In the course of the proceeding, certain conclusions have to be reached on the basis of the evidence and the materials produced therein. From this it is quite clear that a rule providing for the mode of proof or providing for materials on the basis of which a particular fact might be established or a particular presumption rebutted is a rule for carrying out the purposes of the Act, and can be validly made under sub-section (1) of Section 24 in the exercise of the generality of the rule-making power. Further

it seems to me that the impugned rule also falls within the ambit of the particular powers envisaged under Section 24 (2) (c) and (f). In either view, it appears to me to be quite clear that the rule-making authority was fully empowered to make Rule 12-A in the exercise of the power conferred on it under the Act."

38. I would respectfully accept the statement of reasons given above for holding that Rule 12-A is valid after making a slight possible modification, resulting from the language of the Rule 12-A, in stating the effect of the Rule, if this statement of the law really means that the prescribed certificates must invariably be produced in evidence. The rule, while making certification by the purchasing dealers essential evidence of conditions of sales to them, does not, on the language used, make the filing of certificates themselves absolutely indispensable in every case. It leaves room for giving evidence of certification in very exceptional cases where, due to no fault of the assessee, the sales, though shown to have been certified, cannot be supported by the prescribed certificates at the time of assessment e.g. due to destruction by fire or a flood. Satisfactory proof, in such extraordinary cases, that the sales were duly supported by the prescribed certificates furnished by the purchasing dealers, will still meet the requirements of the Rule. The Rule as it stands, certainly has the effect of compelling an assessee who claims the benefit of Section 3-AA of the Act to prove certification by purchasing dealers. But, the rule cannot, in my opinion, be held to be ultra vires on this ground alone. The obligation imposed on assesseees is quite reasonable and necessary. Even if a hypothetical situation, which has not arisen in any case before us, were to arise in which a purchasing dealer wrongly or dishonestly refuses to certify a purchase which is for resale in the same condition, the Sales' Tax Officer is not powerless. The power, impliedly contained in Section 14 (2) (h) of the Act, can be used, in such eventualities, to compel the purchasing dealer either to certify or to show cause why he does not do so. Thus, certification can take place, in exceptional cases, even after assessment proceedings have commenced.

39. This brings me to questions raised by the Sales' Tax Officer's orders about the stage and the precise form in which the assessee could prove certification. Rule 12-A clearly does not require the assessee to file certificates in Form 3-A also with his quarterly returns in Form 4. It certainly does not subject the assessee to the penalty of exclusion of these certificates from evidence altogether if they are submitted afterwards, or, if they are not in prescribed form.

The last sentence of the rule apparently bears the character of a directory note appended to the first and essential part of the Rule. It indicates what returns in Form 4 should contain when exemption is claimed. It has to be read in conjunction with Form 4 which contains five columns to be filled in under the heading: "Details in respect of sale of goods specified in Section 3-AA on which exemption is claimed". These columns in Form IV require: Name and address of the purchasing dealer; Registration certificate no. if any; Date of sale; Sale price; No. of certificate in Form III-A. If these columns in Form IV are duly filled up, the requirements of the last sentence of R. 12-A are fully met. There is no additional obligation imposed by Rule 12-A, as the Sales Tax Officer erroneously assumed, that the prescribed certificates in Form III-A must also accompany the returns in Form IV or can be filed later only if time is especially obtained for the purpose of filing the certificates but not otherwise.

40. The Sales Tax Officer adopted what may be characterised not only as a Draconian but also an entirely unwarranted and unreasonable view, on the language of Rule 12-A itself, that the assessee could not file even the prescribed certificates long before the assessment proceedings were concluded simply because the certificates were neither filed with returns in Form IV nor within a time obtained from him for the purpose. If Rule 12-A were to have that effect, it would unreasonably curtail the assessee's right to obtain an exemption under Section 3-AA and become void. It is a well-established rule of construction that, even where two views are possible, a view which validates a legislative provision must be preferred. There is, however, no need here to resort to this principle. On the clear and explicit language of R. 12-A, all that the assessee need do, when filing his returns, is to fill up the columns giving the required particulars. Rule 12-A could not be held to be invalid simply because it makes a supply of this information in Form IV obligatory on an assessee. It does not go so far as to lay down that the presumption found in the earlier part of Rule 12-A cannot be rebutted if the obligation imposed by the last sentence of Rule 12-A is not discharged. On the language of Rule 12-A itself, a distinction must be drawn between the results of assessee's failure to discharge the obligation to prove certification, which means that the presumption raised is unrebutted, and of a non-compliance with the last sentence, the effect of which is not given by the Rule but is left to be determined by the Sales Tax Officer.

41. The question whether the fair and reasonable but obligatory presumption,

raised by Section 3-AA (2) read with the first part of Rule 12-A, is rebutted or not, can only be decided, on the totality of evidence before the Sales Tax Officer, when the evidence has to be weighed and an assessment order has to be passed. At that time, the Sales Tax Officer may fairly use non-compliance with the last part of Rule 12-A as a piece of evidence for concluding that some certificates filed before him in assessment proceedings are not genuine. Although the prescribed certificate may provide prima facie evidence protecting the selling dealer it is not conclusive. Rule 12-A specifies the kind of evidence which is required for rebutting the presumption, but it does not purport to regulate the question of time at which this evidence should be admitted in the course of assessment proceedings. Nor does it deal with evidence for other purposes which may be needed for assessment. The Sales Tax Officer can only act on legally sustainable grounds in excluding or admitting evidence.

42. In the cases before us, the Sales Tax Officer gave no legally acceptable ground for excluding the certificates filed by the assessee before him. There is no finding that the returns in Form IV were not duly filled up. Nor is there any finding that the certificates filed did not appear to be genuine. The Sales Tax Officer unreasonably restricted the assessee's right to rebut a presumption of law. The learned Officer illegally imposed a time limit and an unwarranted condition upon the submission of certificates in Form III-A. He failed to adjudicate upon their effect by excluding relevant evidence upon a clear misconception of the scope and meaning of Rule 12-A. Therefore, we conclude that, although, Rule 12-A is quite reasonable and valid, yet, the Sales Tax Officer has misapplied it in rejecting the certificates submitted and has erred in refusing exemption on the ground given by him. Our conclusion does not, we would like to clarify, preclude the Sales Tax authorities from rejecting the certificates before them on any other legally valid ground which may exist.

43. Turning now to the second question before us, I find that the Assistant Commissioner of Sales Tax treated the memorandum of appeal in each of the three cases as defective because the petitioner had put down the word "nil" against the third of the five statements given by the assessee in each memorandum of appeal before setting out the grounds of appeal. To illustrate what was done by the petitioner the five statements made in the memorandum of appeal against the order under Rule 41 (5) of the U. P. Sales Tax Act for the assessment year 1961-62 may be reproduced.

They are as follows:—

Taxed turn-over, which is objected to	Rs. 75,01,716
Tax assessed on above, not admitted payable.	1,50,034
Tax admitted payable thereon and paid since the aforesaid order	Nil
Date of receipt of order	10-2-1965.
Court-fee stamp affixed.	50

Subsequently, the petitioner filed a supplementary memorandum of appeal in each case giving an amended form in which the third head was altered into: "Tax admitted payable and already paid". After this change of caption, the assessee mentioned the actual sum paid in each case. To give an example, again from the case for assessment year 1961-62, the exact form of the amended statement is given as follows:—

"Tax admitted payable and already paid: Rs. 978-25". This was the only amendment the assessee wanted to make in the memoranda of appeals.

44. The Assistant Commissioner Sales Tax held that he had no power to allow an amendment of the original memorandum of appeal in each case by reason of the 2nd proviso to Section 9 of the Act which reads as follows:—

"Provided, secondly, that the appellate authority shall not exercise any powers or perform any other function except those conferred on or entrusted to him as such authority."

The Assistant Commissioner held that, as neither the Act nor the rules framed thereunder conferred any specific power of allowing an amendment of a memorandum of appeal upon the appellate authority, the memorandum must be rejected in each case. Accordingly, each appeal was rejected on this preliminary ground without going into the merits of the case.

45. The memorandum of appeal in each case had been admitted, whether rightly or wrongly, under Rule 67 (3) and (4) and a date had been fixed for hearing in each of the three appeals. Sub-rules (3) and (4) of Rule 67 read as follows:—

"(3) If the memorandum of appeal is not in order it may be rejected or be returned, after the necessary endorsement on its back about its presentation and return, to the applicant for correction and representation within the time to be fixed by the Assistant Commissioner (Judicial) or be amended then and there.

(4) On admission of an appeal, the Assistant Commissioner (Judicial) shall fix a date for hearing the appeal, and may send for the record, if necessary."

46. It will be seen that there is a power of amendment of the memorandum of appeal contained in Rule 67 (3) set out above. This power of amendment could,

according to this rule, be exercised at the time of admission of the appeal. Even if it is assumed that this power could not be exercised afterwards on the ground that the second proviso to Section 9 (1) set out above negatives the existence of such a power, yet, the appeals of the petitioner, having been admitted, it could be urged that there was no power to review the order admitting an appeal left in the Assistant Commissioner by reason of the provisions of the second proviso to Section 9 (1) of the Act itself.

47. It may be mentioned here that R. 66 framed under the Act setting out the form and contents of memorandum of appeal does not contain any set form for making the kind of statement which the appellant wanted to amend in each case. Rule 66 (1) and (2) runs as follows:

"66. Contents of memorandum of appeal— (1) The memorandum of appeal shall specify the name and address of the appellant, shall set forth concisely and under distinct heads the grounds of objection and the relief prayed for, and shall be signed by the appellant or his lawyer or his duly authorised agent and verified in the form given below:—
the appellant

I _____ do hereby

on behalf of the appellant declare that the contents of this memorandum are true to the best of my knowledge and belief.

(2) The memorandum of appeal shall be accompanied by adequate proof of payment of the fee and a certified copy of the order appealed against and the chalan showing deposit in the treasury of the tax admitted by the appellant to be due, or of such instalments thereof as might have become payable."

48. It has been contended before us, on behalf of the petitioner, that even if it is assumed that there was a defect in each memorandum of appeal, the appeal itself would not become incompetent. It has been held by the Supreme Court, in *Garikpati Veerraya v. Subbiah Choudhry*, AIR 1957 SC 540 and also in *Daji Saheb v. Shanker Rao Vitharao Mane*, AIR 1956 SC 29, that a statutory right of appeal is a vested right. Such a right cannot, therefore, be taken away indirectly by making a rule prescribing the kind of statement which the petitioner appellant had made in each of the memoranda of appeals and which the petitioner wanted to amend. But, there is no rule, as already observed, which prescribed the form of such a statement in the memorandum of appeal. Rule 66 (1) indicates the form in very broad and general terms.

49. Learned counsel for the petitioner relied on *Mela Ram and Sons v. Commr. of Income-tax*, AIR 1956 SC 367 where it was held that even an appeal presented beyond time, though liable to be dismissed,

sed in limine, was, nevertheless, an appeal in the eye of law. Again, J. D. Bhargava v. J. L. Bhargava, AIR 1961 SC 832 was cited before us to contend that even the infringement of mandatory requirement, contained in O. 41, R. 11, Civil P. C., a certified copy of the decree must accompany the memorandum of appeal, did not make the appeal incompetent. It was held there that the defect could be removed even after the appeal had been admitted for hearing under O. 41, R. 11, Civil P. C.

50. These authorities were cited on the assumption that the memorandum of appeal, as filed in each case before the Assistant Commissioner, was really defective on account of a wrong statement in each memorandum. But, the petitioner also contends that the first statement, that no tax was admitted to be payable and that none was paid since the passing of the assessment order appealed against, was quite correct. It is explained that the petitioner meant that whatever was admitted to be due had been paid before the assessment order so that nothing was payable after the assessment order and nothing was paid after it. According to the petitioner, the amended statement merely clarified the position and stated what the admitted tax, which had already been paid before the assessment, actually was. Therefore, the petitioner urged that there was no conflict at all between the two statements. It is the petitioner who could best explain the meanings of the two statements made by the petitioner on this matter at two different times. The explanation given appears to be quite satisfactory. The supposed amendment did not seek to introduce anything new or contradictory. A mere statement, in a memorandum of appeal, which is nothing more than a formal communication of some information which may be needed, should be capable of elucidation even at the stage of hearing of the appeal. The statement which the petitioner wanted to elucidate did not affect the maintainability of the appeals. Its elucidation, even by further evidence, which is permissible under Rule 68 (8), was possible as part of the right of hearing given to the appellant. Moreover Section 9 (5) of the Act confers the power upon the appellate authority specifically of admitting even time-barred appeals where sufficient cause for condonation of delay is shown as required by Sec. 5, Limitation Act. For all these reasons, the memoranda of appeals could not be rejected on the ground given by the Assistant Commissioner. The appellant could not be denied a decision on merits unless there was an incurable defect of such a character in the memoranda of appeals that it could be held that there were no appeals at all before the Assistant Commissioner.

51. The more important question about which the Assistant Commissioner of Sales Tax said nothing was whether the provisions of Rule 66 (2), set out above, had been complied with. Apparently, this rule has been made so as to give effect to a statutory obligation of the assessee to satisfy, the Court that the appeal is maintainable on a ground apart from either the form of the appeal or the merits of the questions raised by the appellant in the grounds of appeal. This statutory requirement is imposed by the first proviso to Section 9 (1) in the following terms:—

"Provided that no appeal against an assessment shall be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due, or of such instalments thereof as may have become payable."

The proviso does restrict the right of appeal itself. In *Laxmi Ratan Engineering Works'* case, AIR 1968 SC 488 = (1968) 21 STC 154 (Supra), the Supreme Court dealt with what constitutes "entertaining" an appeal as contemplated by proviso to Section 9 (1) in the light of the decided cases interpreting such provisions. Their Lordships said:

"In our opinion these cases have taken a correct view of the word "entertain" which according to Dictionary also means 'admit to consideration'. It would therefore, appear that the direction to the Court in the proviso to Section 9 is that the Court shall not proceed to admit to consideration an appeal which is not accompanied by satisfactory proof of the payment of the admitted tax."

52. In this case, the Supreme Court also held that Rule 66 (2) was only directory and not mandatory. Thus the view expressed by a Division Bench of this Court in *Swastika Tannery of Jaimau v. Commr. of Sales Tax U. P., Lucknow*, (1953) 14 STC 518 (All), must be held to have been overruled by the Supreme Court in *Laxmi Ratan Engineering Works'* case (Supra). In other words, even if the memorandum of appeal is not accompanied by the challan showing deposits in the Treasury of the tax admitted by the appellant to be due or such instalments thereof which might have become payable, satisfactory proof of it can be given afterwards before the appeal is actually heard. What is required is satisfactory proof, at the time of "entertainment" of the appeal, that the admitted tax has been paid. This "entertainment" may be either at the time of admission or at the hearing whenever it is taken up "for consideration". In the cases before us the appeals came up "for consideration" when arguments were heard by the Assistant Commissioner. At that time the mind of the appellate authority was ap-

plied to the relevant facts and considerations for the first time.

53. Although the proof of deposit of tax admitted to be due may be submitted before the hearing of the appeal and after its formal admission, yet, an appellant's right to be heard in appeal and the maintainability of the appeal are certainly curtailed by the first proviso to Section 9, sub-section (1). If this provision is not complied with, in the sense that the appellant does not give satisfactory proof of payment of the admitted amount of tax within the time given by law, an appeal has to be rejected on this ground. This is what a Full Bench of this Court held recently in *Janta Cycle Motor Mart v. Asst. Commr., Sales Tax*, 1968 All LJ 547 = (AIR 1969 All 200 (FB)) following the law declared by the Supreme Court in *Laxmi Ratan Engineering Works' case*, AIR 1968 SC 488 = (1968) 21 STC 154 (Supra). This question does not, therefore, require detailed consideration by us now.

54. Mr. K. N. Singh, the Chief Standing Counsel, appearing for the opposite parties, very rightly and properly, conceded that the order of the Assistant Commissioner, Sales Tax, could not stand. He, however, prayed that the case should be sent back for a decision by the Assistant Commissioner, before hearing each appeal, whether the appeal was competent and could be heard in view of the first proviso to Section 9, sub-section (1) of the Act. If the admitted tax had not been paid within the time prescribed by law, the appeal itself would be incompetent and could be rejected even if wrongly admitted for hearing. Such a shortcoming would, unlike errors in drawing up the memorandum of appeal, affect the competence and maintainability of the appeal itself. Learned counsel for the petitioner, on the other hand, urged that it is more appropriate that we should quash the assessment order in each case as well as the order of the Assistant Commissioner so that fresh assessments may be made in the light of our decisions on the first of the two questions considered above.

55. Although the writ petitions were entertained against the assessment orders, the petitioner had already chosen an appropriate mode of redress and filed appeals before the Assistant Commissioner. The writ petitions were admitted because, *inter alia*, the assessee alleged that unreasonable terms had been imposed for stay of realisation of the whole tax assessed so that the petitioner's business was likely to be ruined. It was quite possible that the Assistant Commissioner, without considering the validity of the rule, may have placed the same interpretation on Rule 12-A as we have adopted in this case if merits of the appeals could have been examined by the Assistant Commissioner.

Moreover, the difficulty caused by the questions of law which arose having been removed by us now, it seems just and proper that the petitioner should be relegated to the remedy which the law provides under S. 9, sub-section (1) of the Act against any errors which may have been committed by the Sales Tax Officer on merits. There is no reason why the appeals, which would become pending appeals as soon as the orders of the Assistant Commissioner are quashed, should not be heard. In our opinion, the petitioner has not established any justice or equity for sending the cases back to the Sales Tax Officer. If we were to send them to the Sales Tax Officer, it may involve either unnecessary multiplicity of legal proceedings or helping the petitioner to overcome a legal obstacle in the way of the hearing of his appeals which may be there due to not depositing the tax admitted to be due. The petitioner had no sufficient ground to overlook such an obstacle. The provisions of the first proviso to Section 9 are quite clear on the requirements of law. It has been repeatedly held that equitable considerations, outside the statute, are not relevant in applying laws dealing with taxation.

56. For the reasons given above, the orders of the Asst. Commr., Sales Tax must be quashed and a direction must also issue so that the appeals pending before the Sales Tax Commissioner now may be heard and disposed of in accordance with law in the light of the questions decided above. The interim order must also be vacated in each case in view of the undertaking of the learned counsel for the Opposite Parties that no further amounts of tax assessed for the three years will be realized from the petitioner until its appeals are disposed of by the Assistant Commissioner. The parties will bear their own costs.

57. **BY THE COURT:** For the reasons set out in our respective judgments we allow the writ petitions in part and quash the orders of the Assistant Commissioner (Judicial) I, Sales Tax, Kanpur Range, Kanpur dated February 21, 1966 dismissing the appeals of the petitioner and direct him to hear them again and dispose them of in accordance with law. We also accept the undertaking given by the learned Chief Standing Counsel for the respondents that during the pendency of the aforesaid appeals the petitioner shall not be treated as being in default in respect of the balance of the sales tax assessed against it for the assessment years 1961-62, 1962-63 and 1963-64. The parties shall bear their own costs.

Petitions allowed in part.

AIR 1970 ALLAHABAD 376 (V 57 C 57)

FULL BENCH

S. N. DWIVEDI, S. N. SINGH AND
A. K. KIRTY, JJ.

Zila Parishad, Budaud and others, Appellants v. Brahma Rishi Sharma, Respondent.

First Appeals from Orders Nos. 152 of 1967 and 170 of 1966 connected with Civil Revn. No. 1625 of 1965, D/- 17-11-1969.

(A) Civil P. C. (1908), O. 43, R. 1 (r) and O. 39, Rr. 1 and 2—Injunction granted ex parte under O. 39 — Order is appealable. 1960 All LJ 124, Overruled.

An ex parte order issuing temporary injunction under O. 39, Rr. 1 and 2, against the defendants is appealable under O. 43, R. 1(r). AIR 1951 All 558, Approved, 1960 All LJ 124, Overruled. Case law discussed. (Para 21)

The language and the object of R. 1(r) of Order 43 and the scheme of Rules 1 to 4 of Order 39 show that an appeal also lies against the ex parte order of injunction. As soon as an interim injunction is issued and the party affected thereby is apprised of it, he has two remedies: (1) he can either get the ex parte injunction order discharged, varied or set aside under Rule 4 of Order 39 and if unsuccessful avail the right of appeal as provided for under Order 43, Rule 1(r); or (2) straightway file an appeal under Order 43, Rule 1(r) against the injunction order passed under Rules 1 and 2 of Order 39, C.P.C. It is not unusual to provide for alternative remedies.

(Para 16)

Further, once the Court, after perusing the application and affidavit, comes to the conclusion that the case is a fit one in which temporary injunction should be issued ex parte the Court takes a final decision in the matter for the time being and the expression of this decision is a final order for the duration it is passed. Such an order is contemplated by Rules 1 and 2 of Order 39, C.P.C. (Para 18)

(B) Civil P. C. (1908), O. 41, R. 27 and O. 39, Rr. 1 and 2 — Appeal from ex parte order passed under O. 39, Rr. 1 and 2 — Appellant as a matter of right cannot rely on fresh evidence in appeal which was not before trial Court until it is admitted by appellate Court under O. 41, R. 27. (Para 23)

(C) Civil P. C. (1908), S. 151 and O. 39, R. 1 — Grant of temporary injunction ex parte under S. 151 — No appeal lies. (Obiter). (Para 20)

(D) Civil P. C. (1908), Preamble — Interpretation of statutes — Remedial statute.

Courts should lean in favour of an interpretation which expands rather than shrinks a remedial right. A remedial

provision of law is generally construed liberally. Rule 1(r) of O. 43, Civil P. C. creates a remedial right of appeal for protection of substantial and substantive rights. Rule 1(r) of Order 43 does not say that an appeal shall lie from a final order under Rule 1 or Rule 2 of Order XXXIX. There is no adequate reason for interpolating the word 'final' before 'order' in Rule 1(r). Courts do not ordinarily make additions in enactments. That is a legislative function.

(Paras 11, 12)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 799 (V 54)=

(1967) 1 SCR 310, Central Bank of India Ltd. v. Gokal Chand 17

(1965) AIR 1965 SC 507 (V 52)=

(1964) 1 SCR 717, Shankarlal Aggarwal v. Shankarlal Poddar 17

(1960) 1960 All LJ 124=1960 All

WR (HC) 111, Raja Deo Singh v. Kr. Shambho Krishna

Narain 1, 6, 20, 21

(1957) AIR 1957 SC 389 (V 44)=

1957 Cri LJ 567, State of Bihar v. Ram Naresh Pandey 27

(1953) AIR 1953 Hyd 138 (V 40)=

ILR (1953) Hyd 77, Ramulu v. Gangaram 19

(1953) AIR 1953 Trav Co 240 (V 40)

=1953 Ker LT 334, Devasahayam v. Arumukhan 19

(1951) AIR 1951 All 558 (V 38)=

1950 All LJ 795, L. D. Meston School Society v. Kashi Nath 1, 19, 20, 21

(1934) AIR 1934 Lah 79 (2) (V 21)=

36 Pun LR 142, Hari Chand v. Mt. Durga Devi 20

(1933) AIR 1933 All 86 (V 20)=

1932 All LJ 803, District Board, Farrukhabad v. Ikhlauque Husain 19

(1933) AIR 1933 Lah 282 (V 20)=

149 Ind Cas 642, Balabh Das v. Muhammad Ishaq 19

(1924) AIR 1924 Pat 713 (V 11)=

6 Pat LT 201, Shyam Behari Singh v. Biseswar Dayal Singh 19

(1922) AIR 1922 All 441 (1) (V 9)=

66 Ind Cas 509, Ganesh Prasad Sahu v. Dukh Haran Sahu 19

(1913) ILR 35 All 425=11 All LJ

613, Lachmi Narain v. Ram Charan Das 19

(1885) ILR 7 All 550=1885 All WN

128, Amolak Ram v. Sahib Singh 19, 20

G. P. Mathur, Ambika Prasad, for Appellants; Keshav Sahai, for Respondent.

S. N. SINGH, J.:—The above three cases have come before this Bench in view of an apparent conflict between the decisions of two Division Benches of this Court (L. D. Meston School Society v. Kashi Nath Misra, AIR 1951 All 558 and Raja Deo Singh v. Kr. Shambho Krishna Narain, 1960 All LJ 124.) Before advert-

ing to the question of law involved in these three cases it is necessary to give in brief the facts of each case.

2. First Appeal from Order No. 152 of 1967 arises out of a suit brought by the plaintiff who claims to be an Abhiyanta in the service of Zila Parishad, Budaun for a perpetual injunction requiring the defendants not to enforce an order of suspension dated the 29th of April 1967 said to have been issued under the signature of Adhyaksh, Zila Parishad, Budaun. It was also prayed that the defendants be restrained from interfering in the discharge of his duty as Abhiyanta of the Parishad. In this suit the plaintiff moved an application supported by an affidavit for the issue of an ad interim injunction under Order 39, C.P.C. The Civil Judge considered this application and passed the following order:

"Issue notice to the defendants, their employees, agents, workmen etc. to show cause why they should not be restrained from enforcing the order of suspension dated 29-4-1967 and from interfering in the discharge of the plaintiff's duty as Engineer and from calling upon the plaintiff to hand over charge of his post of Engineer.

In the meantime the defendants, their employees, agents, workmen etc. are restrained pending the disposal of the suit from enforcing the order of suspension dated 29-4-1967 from interfering in the discharge of the plaintiff's duties as Abhiyanta of the Zila Parishad and from calling upon the plaintiff to hand over charge of the post of Abhiyanta. The plaintiff will continue to receive his pay and allowances from the Zila Parishad as admissible under the rules".

3. Against the above ex parte order passed by the Civil Judge, Budaun, First Appeal from Order No. 152 of 1967 was filed in this Court. When this appeal was listed for hearing, one of us (S. N. Singh, J.) finding apparent conflict between the two Division Bench cases mentioned above referred the following questions to a larger Bench:—

(1) Whether the ex parte order issuing injunction against the defendants is appealable in the circumstances of this case?

(2) If the order is appealable can the appellant rely on fresh evidence which was not before the trial Court?

4. First Appeal from Order No. 170 of 1966 arises out of Suit No. 14 of 1966 which was instituted by the plaintiffs against the defendants for possession over the cinema house Sunder Talkies along with its machinery and furniture and for a decree for Rs. 10,600/- as arrears of lease money and also for a decree for mesne profits at the rate of Rs. 1,000/- per month from 1st April 1966 in the Court of Civil Judge, Basti. In this suit the plaintiffs filed an application for injunction supported by an affidavit and

prayed that an ad interim injunction be issued restraining the defendants from using the cinema house, machinery and furniture and holding the cinema shows. They also prayed for the appointment of a commissioner to make an inventory of all the articles and for giving the same in Supurdagi of some reliable person.

5. The Civil Judge, Basti, passed the following order:

"Let ad interim injunction, as prayed, be issued restraining the defendants first set from using the cinema house, its machinery and furniture and from performing the cinema show till further orders as mentioned in the application 9-C".

Against this ex parte order First Appeal from Order No. 170 of 1966 was filed in this Court and it came for hearing before one of us (Kirty, J.). In this case a preliminary objection was raised as to the maintainability of the appeal. Finding apparent conflict between the two Division Bench cases referred to above this case was also directed to be listed along with First Appeal from Order No. 152 of 1967 for the decision of the preliminary point raised.

6. Civil Revision No. 1625 of 1965 was instituted against an order of the District Judge, Saharanpur, who dismissed an appeal against an ex parte injunction order passed by the Munsif as not maintainable in view of the case of 1960 All LJ 124. This revision was also connected with First Appeal from Orders Nos. 152 of 1967 and 170 of 1966.

7. All the above three cases raise the common question as to whether an appeal lies against an ex parte ad interim injunction order or not. Before answering the question raised, it is necessary to notice the relevant provisions of law on the point. Order 39 of the Code of Civil Procedure deals with temporary injunctions and interlocutory orders. Under the heading "temporary injunctions" we find that Rules 1 to 5 have been mentioned. Temporary injunctions are issued under Rules 1 and 2. The relevant portions of these rules are given below:

"1. Where in any suit it is proved by affidavit or otherwise:—

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court

thinks fit, 'until the disposal of the suit or until further orders'." (emphasis (here into ' ') added).

"2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, 'on such terms as to the duration of the injunction', keeping an account giving security, or otherwise, as the Court thinks fit.

(3) x x x x
(4) x x x x

(Emphasis (here into ' ') added).

8. Rule 3 provides that notice will be issued before the grant of injunction unless the Court considers that the object of granting the injunction would be defeated by the delay in issuing notice. Rule 4 gives a right to the defendant to get an injunction discharged, varied or set aside by moving an application after the grant of an ad interim injunction.

9. Order 43, Rule 1(r) pertinently reads:

"An appeal shall lie froman order under Rule 1, Rule 2..... of Order XXXIX."

10. Re. Question (1): It is now to be seen whether an ex parte order of injunction falls within the purview of Rule 1(r) of Order 43.

11. Two things deserve notice at threshold. Firstly, the language of Rule 1(r) is unhedged and broad. Secondly, courts should lean in favour of an interpretation which expands rather than shrinks a remedial right. A remedial provision of law is generally construed liberally. Rule 1(r) creates a remedial right of appeal for protection of substantial and substantive rights.

12. An ad interim injunction may be granted under Order XXXIX or Sec. 151 in some cases. No appeal lies against an order under Section 151, be it ex parte or otherwise. An ex parte order of injunction made under Order XXXIX will fall either under Rule 1 or Rule 2. There is no other provision under which such an order can be made. Rule 1(r) of Order 43 does not say that an appeal shall lie from a final order under Rule 1 or Rule 2 of Order XXXIX. No adequate reason is shown for interpolating the word 'final' before 'order' in Rule 1(r). Courts do not ordinarily make additions

in enactments. That is a legislative function.

13. Let us now examine the scheme of Rules 1 to 4 of Order XXXIX. Rules 1 and 2 provide for the making of an interim order of injunction. Rule 3 firstly provides that an interim injunction should ordinarily be granted after notice to the adversary party. Secondly, it provides that notice may be dispensed with where the court is satisfied that it would defeat the purpose of granting an injunction. Rule 4 provides that an order of injunction may be discharged or varied or set aside on an application made by the party dissatisfied with such order.

14. Three things follow from these provisions. The law does not require the issue of notice when an ex parte injunction is made, although courts, as a matter of caution, issue a notice. The service of the ex parte order of injunction itself is adequate notice. Again, Rule 4 shows that an order of injunction may be discharged, varied or set aside on the application of the adversary party. Such application may be given when the order is ex parte or even after it has been made absolute. Until it is discharged or varied or set aside on such an application, either written or oral, the ex parte order operates with full vigour and stands on its own feet, provided it has not expired earlier. Thirdly, the provisions of Order XXXIX do not classify orders of injunction into (1) an ex parte order of injunction and (2) a final order of injunction. Courts have coined this dichotomy for the sake of convenience of speech and expressions. In the eye of law an 'ex parte' order is as much an order under Rule 1 or 2 as a 'final' order. Both orders last for the period each is granted or till each of them is discharged or varied or set aside under Rule 4. The temporal life of each may be shorter than the life of the suit.

15. An injunction interferes with substantial and substantive rights of a person. The object of Rule 1(r) of Order 43 is to provide a remedy for improper or invalid interference with his rights. If we restrict this rule to only final orders of injunction, the object of the rule will not be fully achieved. For instance, where a grievance of the party affected by the ex parte interim injunction is that the court granting it has also acted from bias against him, it is meaningless to force him to go to that very Court in the first instance. It shall only prolong the suspension of his valuable rights. In many cases he may get no relief in the end. Similarly, where the order of injunction is founded on an Act challenged as unconstitutional, appeal may yield quicker relief.

16. The language and the object of Rule 1(r) of Order 43 and the scheme of

Rules 1 to 4 of Order 39 show that an appeal also lies against the ex parte order of injunction. As soon as an interim injunction is issued and the party affected thereby is apprised of it, he has two remedies: (1) he can either get the ex parte injunction order discharged or varied or set aside under Rule 4 of O. 39 and if unsuccessful avail the right of appeal as provided for under Order 43, Rule 1 (r), or (2) straightway file an appeal under Order 43, Rule 1(r) against the injunction order passed under Rules 1 and 2 of Order 39, C.P.C. It is not unusual to provide for alternative remedies. For instance, when an ex parte decree is passed against a person, he has two remedies: either he may go up in appeal against the ex parte decree or he may seek to get the ex parte decree set aside by the same court.

17. It has been argued on behalf of the respondents in the two first appeals from order that an appeal is contemplated only from a final order disposing of an application for ad interim injunction after contest. According to the learned counsel when notice is issued and the Court invites objections, the Court keeps the injunction application pending and passes the final order only after contest by the adversary party. It is only the passing of the final order which gives a right of appeal to the aggrieved party. According to the learned counsel the ex parte interim order is merely an interlocutory order not subject to appeal. Learned counsel invited our attention to S. 2 (14) of the Code of Civil Procedure and submitted that an ex parte interim order does not fall under Section 2(14). It should not therefore be considered to be an order under Rules 1 and 2 of Order 39. Reliance was placed on the State of Bihar v. Ram Naresh Pandey, AIR 1957 SC 389, Shanker Lal Aggarwal v. Shankarlal Poddar, AIR 1965 SC 507 and the Central Bank of India Ltd. v. Gokal Chand, AIR 1967 SC 799.

18. We are unable to accept this submission of the learned counsel for the respondents. As already discussed above, once the Court, after perusing the application and affidavit, comes to the conclusion that the case is a fit one in which temporary injunction should be issued ex parte the Court takes a final decision in the matter for the time being and the expression of this decision in our opinion is a final order for the duration it is passed. Such an order is contemplated by Rules 1 and 2 of Order 39, C.P.C. We have looked into the authorities referred to above, but they are not applicable to the facts of this case and they have little bearing on the precise point raised by the learned counsel for the respondents.

19. The question of the appealability of an ex parte order was the subject

matter of decision by this Court as well as by other courts and consensus of opinion is in favour of the appealability of such an order. The cases which have held such orders to be appealable are *Amolak Ram v. Sahib Singh*, (1885) ILR 7 All 550; *Lachmi Narain v. Ram Charan Das*, (1913) ILR 35 All 425; *Ganesh Prasad Sahu v. Dukh Haran Sahu*, AIR 1922 All 441 (1); *District Board of Farrukhabad v. Ikhlauque Husain*, AIR 1933 All 86; *AIR 1951 All 558*; *Shyam Behari Singh v. Biseswar Dayal Singh*, AIR 1924 Pat 713; *Balabh Das v. Muhammad Ishaq*, AIR 1933 Lah 282; *Devasahayam v. Arumukhan*, AIR 1953 Trav Co 240 and *Ramulu v. Ganga Ram*, AIR 1953 Hyd 138. We are in agreement with the view expressed in the above cases.

20. The contrary view has been taken in the cases of 1960 All LJ 124 and *Hari Chand v. Mst. Durga Devi*, AIR 1934 Lah 79 (2). We have looked into these two cases and find that in the case of 1960 All LJ 124 the decisions of this Court ranging from the case of ILR 7 All 550 to the case of AIR 1951 All 558 referred to above were not brought to the notice of the Division Bench which decided this case. In this case the relevant provisions bearing on the subject have also not been noticed or discussed. This decision, in our opinion, does not lay down correct law. The case of AIR 1934 Lah 79 (2) is clearly distinguishable on fact. In that case it was held that the impugned order fell not under Rules 1 and 2 of Order 39, C.P.C. but under Section 151, C.P.C. It is obvious that if an order is passed under Section 151, C.P.C., no appeal lies.

21. On a review of the authorities mentioned above and the relevant provisions of Order 39, Rules 1 and 2 and Order 43, Rule 1(r), C.P.C. we are of opinion that the case of AIR 1951 All 558 lays down the correct law on the point and that the case of 1960 All LJ 124 does not lay down the correct law.

22. Re. Question 2: Ordinarily an appellant is confined to the evidence already on record prepared by the lower Court. It is open to him to request the appellate Court to admit fresh evidence under Order 41, Rule 27, C. P. C. Where permission is granted and fresh evidence is admitted under the aforesaid provision, the appellant can rely on that evidence as well. Learned counsel for the appellants has not been able to cite any authority to show that an appellant as of right, can rely on fresh or additional evidence in appeal from an ex parte order passed under Order 39, Rule 1 or 2, C.P.C.

23. In view of the above discussion our answer to the first question formulated in First Appeal from Order No. 152 of 1967 is in the 'affirmative'. Our answer to question No. 2 is as follows:—

"The appellant as a matter of right cannot rely on fresh evidence in appeal which was not before the trial Court until it is admitted by the appellate Court under Order 41, Rule 27, C.P.C.

24. As a result of the answers given above the two First Appeals from Orders Nos. 152 of 1967 and 170 of 1966 will be listed before the respective Benches for final disposal. Civil Revision No. 1625 of 1965 is hereby allowed but without costs. The order of the District Judge, Saharanpur, dated 11th October 1965, is set aside and the case is remanded to the District Judge with a direction to readmit the appeal to its original number and decide the same on merits in accordance with law.

Order accordingly.

AIR 1970 ALLAHABAD 380 (V 57 C 58)

B. D. GUPTA, J.

Chhotey and others, Applicants v. Ram Prasad and another, Opposite Parties.

Criminal Revn. No. 787 of 1966, D/-18-9-1969, against order of S. J., Mathura, D/- 27-4-1966.

(A) Criminal P. C. (1893), Ss. 561-A and 439 — Name of counsel appearing in a revision petition not shown in cause list — Petition decided in absence of that counsel — Same Judge who decided that petition has ample power under S. 561-A to order a rehearing. (Paras 2 and 3)

(B) Criminal P. C. (1893), S. 209 — Duty of enquiring magistrate.

A Magistrate enquiring into a complaint alleging offences exclusively triable by Sessions does not function as a trial Court. It is not his function to weigh the pros and cons of the evidence before him and discharge the accused if the evidence of the prosecution appears to be unreliable or partial. He has only to find out whether there is evidence which if believed, will establish a prima facie case. AIR 1962 SC 1195 & AIR 1967 SC 740, Foll.

(Para 5)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 740 (V 54) = 1967 Cri LJ 653, K. P. Raghavan v. M. H. Abbas 5

(1962) AIR 1962 SC 1195 (V 49) = 1962 (2) Cri LJ 276, Bipat Gope v. State of Bihar 5

(1959) AIR 1959 All 315 (V 46) = 1959 Cri LJ 543 (FB), Raj Narain v. State 3

J. N. Chaturvedi and Jagdish Singh, for Applicants; R. P. Goel and S. N. Mulla, for Opposite Parties.

ORDER:— One Ram Prasad filed a complaint against ten persons who are arrayed as the applicants in Criminal Revision

No. 787 of 1966. In the complaint it was alleged that these ten persons had committed offences punishable under Sections 147, 148, 307/149 and 302/149, I. P. C. As some of the offences alleged were exclusively triable by a Court of Session the Additional District Magistrate proceeded to enquire into the matter and recorded evidence led by the parties and, by order dated the 24th of February, 1966, he discharged all the ten persons. Against the aforesaid order the complainant approached the learned Sessions Judge in revision. By order dated the 27th of April, 1966, the learned Sessions Judge set aside the order of the Additional District Magistrate and directed the Magistrate to commit the case to the Sessions. Against the order of the learned Sessions Judge the ten accused persons approached this Court praying for an order of this Court setting aside the order passed by the learned Sessions Judge and restoring that passed by the learned Additional District Magistrate.

Only two parties were arrayed as opposite parties in the memo of revision. Opposite party No. 1 was Ram Prasad, the complainant, whereas the second opposite-party was the State. The above revision was admitted and registered as Criminal Revision No. 787 of 1966 and further proceedings were directed to remain stayed. There is no controversy that in the aforesaid revision Mr. S. N. Mulla, Bar-at-Law, practising as an Advocate in this Court, put in his appearance on behalf of the complainant Ram Prasad sometime early in October, 1966. The revision was listed in the Cause List for the 22nd of October, 1967, before Hon. Rajeshwari Prasad, J., but the name of Mr. S. N. Mulla was not shown in the Cause List as appearing in the case. The case was again listed in the Cause list for the 23rd of November, 1967, as a part-heard case. In that Cause List also the name of Mr. S. N. Mulla was not shown. The case was again listed in the Cause List for the 24th of November, 1967, for judgment, but again the Cause List did not show the name of Mr. S. N. Mulla. By order dated the 24th of November, 1967, Hon. Rajeshwari Prasad, J. allowed the revision, set aside the order passed by the learned Sessions Judge and affirmed that passed by the learned Additional District Magistrate.

Thereafter, on the 7th of February, 1968, an application, under Section 561-A, Criminal P. C., was moved on behalf of the complainant Ram Prasad setting forward the aforesaid facts together with the grievance that, in the circumstances, the decision of the revision had been arrived at without any opportunity to Mr. S. N. Mulla to be heard in support of the order passed by the learned Sessions Judge. All the ten applicants in Criminal Revision No. 787 of 1966 were arrayed, in this application, as opposite-parties and the ap-

plication was registered as Criminal Miscellaneous Case No. 292 of 1968. By order dated the 13th of December, 1968, Hon. Rajeshwari Prasad, J. allowed the application, set aside the order passed by him on the 24th of November, 1967, and directed Criminal Revision No. 787 of 1966 to be listed again for hearing in due course. On the 29th of August, 1969, an application was moved on behalf of the ten accused persons who are the applicants in Criminal Revision No. 787 of 1966, praying that it may be held that the order passed by Hon. Rajeshwari Prasad, J. on the 24th of November, 1967, had become final and that the order dated the 13th of December, 1968, mentioned above was a nullity. Thus, I have before me Criminal Revision No. 787 of 1966 and the above application made on the 29th of August, 1969. I have heard learned counsel for the parties in regard to the application made on the 29th of August, 1969, as also in regard to the merits of Criminal Revision No. 787 of 1966. I proceed, in the first instance, to deal with the application made on the 29th of August, 1969.

2. It has been urged in support of the aforesaid application that since the order of Hon. Rajeshwari Prasad, J. dated the 24th of November, 1967, had been passed after considering the merits of the matter, it was not open to the learned Judge to set aside the decision contained in that order by reason merely of the circumstance that counsel for the complainant had no opportunity to be heard on account of the omission of his name from the Cause List. I find myself unable to accept this contention. The age-long procedure followed in this Court has been that a cause list is prepared for each day. That list contains the list of cases which may be heard by different benches of the Court as also the hour at which and the room in which the bench shall sit. The cause list so prepared is printed and distributed to all members of the Bar who subscribe to it as also to Judges, Readers of each court-room, etc. It contains the reference of each case on the list together with the names of learned counsel appearing for the parties. The list printed as above is distributed early in the morning and it is with the aid of that list that learned counsel learn of the cases on the cause list of the Court in which they are appearing.

As already observed, there is no controversy that in regard to Criminal Revision No. 787 of 1966 the name of Mr. S. N. Mulla, who had put in appearance on behalf of the complainant Ram Prasad was not printed in the cause list for either of the dates on which the case was listed for hearing and taken up by the Court, and it has not been suggested that Mr. Mulla had information about the case being on the cause list through any other medium.

There is no controversy that non-appearance of Mr. Mulla at the hearing of the revision was the result of the omission of Mr. Mulla's name from the cause lists for the relevant dates.

3. Section 561-A of the Code of Criminal Procedure contains statutory recognition of the power of this Court to make such orders as may be necessary, inter alia, "to prevent abuse of the process of any Court or otherwise to secure the ends of justice". The procedure that has obtained in this Court in exercising its jurisdiction has been the procedure described earlier and, though it may very well be that no provision of law has been infringed by deciding a criminal revision without hearing learned counsel, the hearing and decision of a revision without an opportunity having been afforded to learned counsel, who has put in appearance, by reason merely of inadvertence on the part of the Press in the matter of printing names of learned counsel appearing for the cases shown in the cause list, is calculated to encourage abuse of the procedure that has obtained in this Court. I have no doubt that, in the circumstances of this case, Hon. Rajeshwari Prasad, J. had ample power, under Section 561-A, Cr. P. C., to pass an order providing for a decision of the revision after a re-hearing of the case. Reference may be made to the opinion recorded by a Full Bench of this Court in the case of *Raj Narain v. State*, AIR 1959 All 315.

4. The first contention of learned counsel must, therefore, fail and the application made on the 29th of August, 1969, praying that it must be held that the order of Hon. Rajeshwari Prasad, J. dated the 13th of December, 1968, was a nullity, must be dismissed.

5. As regards the merits of the revision itself, having perused the order dated the 24th of February, 1966, passed by the learned Additional District Magistrate, and the order dated the 27th of April, 1966, passed by the learned Sessions Judge, I am satisfied that the view taken by the learned Sessions Judge was perfectly correct. It does not appear desirable to discuss the merits of the matter for that might prejudice the case of either party at the trial which is due to commence in pursuance of the direction of the learned Sessions Judge.

Suffice it to say that the order passed by the learned Additional District Magistrate makes it clear that he seems to have overlooked the fact that he was not functioning as a court of trial but merely as a court enquiring into allegations of commission of offences exclusively triable by a court of Session. In the course of such an enquiry, though the Magistrate does not act merely as a post office, it is not his function to weigh pros and cons of

the evidence before him and discharge the accused on the ground merely that the evidence led by the prosecution appeared to be unreliable or partial. In such an enquiry the learned Magistrate has only to find out whether there is evidence which, if believed, would establish a prima facie case. Reference may be made to the decisions of the Supreme Court in the case of Binat Gope v. State of Bihar, AIR 1962 SC 1195, and in the case of K. P. Raghavan v. M. H. Abbas, AIR 1967 SC 740.

6. The order passed by the learned Sessions Judge dated the 27th of April, 1966, is well supported and does not suffer from any error and this revision must fail.

7. Accordingly the revision is dismissed and the direction staying further proceedings is vacated.

8. Let the record be now immediately sent down to the court concerned to enable it to proceed with the case.

Petitions dismissed.

AIR 1970 ALLAHABAD 382 (V 57 C 59)

H. C. P. TRIPATHI, J.

Balbir Singh, Plaintiff-Appellant v. Smt. Sulochana Devi, Defendant-Respondent.

F. A. F. O. No. 17 of 1967, D/- 30-10-1968, from order of Addl. Dist. J., Lucknow, D/- 22-9-1966.

Civil P. C. (1908), O. 23, R. 1(2) — Probate proceeding — Permission to withdraw and file a fresh proceeding sought — Formal defects stated to be the reason — Court permitting withdrawal but refusing permission to file fresh proceeding — Prayer in the application, held, could not be so split — He could either accept the application or reject it in toto. AIR 1951 Mad 715 & AIR 1932 Mad 155 (1) & AIR 1926 Cal 233, Foll. — (Succession Act (1925), S. 276). (Paras 3 & 8)

Cases Referred: Chronological Paras (1951) AIR 1951 Mad 715 (V 38) —

1951-1 Mad LJ 194, Veeraswami v. Lakshminudra 5

(1932) AIR 1932 Mad 155 (1) (V 19) — 1931 Mad WN 1148, Marudachala Nadar v. Chinnu Muthu Nadar 6

(1926) AIR 1926 Cal 233 (V 13) — 42 Cal LJ 219, Kamini Kumar Roy v. Rajendra Nath 7

S. C. Mathur, for Appellant; B. C. Bajpai, for Respondent.

JUDGMENT:— Appellant Balbir Singh had filed a petition for probate under Section 276 of the Indian Succession Act on 5-3-1963. On the basis of a will which was alleged to have been executed by

one Gopal Narain Fadnis on 18th May, 1961, Gopal Narain Fadnis died on 19-1-1963 leaving his only daughter Smt. Sulochana as his survivor. Smt. Sulochana filed a written statement in the case and *inter alia* pleaded that the application for probate was not maintainable. Issues were framed, parties led evidence and the case was argued on their behalf on several dates before the trial Judge. Before the conclusion of the arguments however an application for amendment was made by the appellant which was rejected by the Judge on 16-9-1966.

2. On 19-9-1966 an application was filed by the appellant before the District Judge, Lucknow praying that he may be permitted to withdraw the above probate application with liberty to bring any other proceeding or suit as "he may be advised" on the ground that "the above probate proceeding is defective for some formal defects" and "the applicant does not want to further prosecute the above application owing to the defects and for other reasons".

The defendant filed an objection praying that the application be rejected. After hearing the counsel for the parties at considerable length and taking into account the facts and circumstances of the case the learned Addl. District Judge *inter alia* observed "that the plaintiff has not disclosed in his application the nature of the formal defect and because of the fact that it was argued on behalf of the plaintiff that the provisions of Order 23, Rule 1 do not apply to probate proceedings I permit the plaintiff to withdraw the suit, but withhold the permission to file a fresh suit or proceeding as he may be advised." Aggrieved by the order the plaintiff has come up in appeal before this Court.

3. I have heard the learned counsel for the parties. There can be no doubt that on the facts and circumstances of the case the learned trial Judge was fully justified in refusing permission to the plaintiff to file a fresh suit or proceeding as he may be advised. It was, however, not open to the learned Judge in law to split up the plaintiff's prayer for withdrawal of the suit with permission to file a fresh suit in two parts. He could have either accepted the application or rejected it in toto. This is obvious from the fact that the plaintiff's prayer to withdraw the probate application was based on his further prayer that he should be permitted to file any other proceeding or suit as he may be advised. It was joint prayer which could have been either accepted or rejected in toto as stated above. The trial Judge, in my opinion, had no jurisdiction to split it up in two parts and to grant one and refuse the other.

4. However, I am satisfied that the trial Judge's refusal to permit the plain-

tiff appellant to file a fresh suit or proceeding is fully justified. It is not necessary to interfere with that order.

5. In the case of *Veeraswami v. Lakshmudu*, AIR 1951 Mad 715 it was held that "where a plaintiff files a petition to withdraw the suit with permission to file a fresh suit regarding the same subject-matter The court cannot divide the petition into two and accept the withdrawal and refuse the liberty in the same order."

6. In the case of *Marudachala Nadar v. Chinna Muthu Nadar*, AIR 1932 Mad 155 (1) it was held that "an application under O. 23, R. 1(2) for permission to withdraw from suit with liberty to institute a fresh suit on the same subject-matter must be treated as an indivisible whole, and if a party is not allowed liberty to institute a fresh suit, his pending suit should not be dismissed, but the application should be refused altogether and the suit should be retained on the file."

7. The same view was taken by a learned single Judge of the Calcutta High Court in *Kamini Kumar Roy v. Rajendra Nath*, AIR 1926 Cal 233. I find myself in respectful agreement with the dictum laid in the aforesaid cases.

8. In the result this appeal is allowed in part. The order passed by the learned Additional District Judge will be varied by substituting therefor an order in these terms "that the application for permission to withdraw the above probate with liberty to bring any other proceeding or suit as the plaintiff may be advised is dismissed with costs". The result will be that the probate proceeding shall be restored to the file of the trial Judge who will dispose it of in accordance with law. In the circumstances of the case the parties shall bear their own costs of this appeal.

Appeal partly allowed.

AIR 1970 ALLAHABAD 383 (V 57 C 60)

LAKSHMI PRASAD, J.

Dr. A. J. Faridi, Petitioner v. Union of India, Opposite Party.

Writ Petn. No. 712 of 1966, D/- 10-1-1969.

(A) Constitution of India, Arts 14 and 359 (1) — Applicability — Article 14 cannot be invoked in respect of action taken at a time when the Article stood suspended by order of President under Art. 359 (1); AIR 1968 SC 765, Foll.

(Para 7)

(B) Constitution of India, Art. 14 — Applicability — Action taken according to law against defaulter — That on earlier occasion similar action had not been taken in respect of similar default is no

defence — Art. 14 is not applicable in such circumstances. (Para 7)

(C) Defence of India Rules (1962), Rr. 45 and 35(6) — Scope — Opinion of Government under R. 45 — Opinion is subjective and is not revisable — Government need not specify particular sub-cl. of Cl. (6) of R. 35 which defines "prejudicial acts" — If action taken is strictly according to law, S. 44 of Defence of India Act is of no effect.

It is abundantly clear from the language of R. 45 that the Central Government is competent to take action thereunder once it forms an opinion that the document in respect of which action is proposed contains one of the three matters stated therein. The action is thus to be taken on the subjective satisfaction of the Central Government. It is wholly immaterial, if the opinion of the Central Government on which proceeds the action under Rule 45, is a reasonable opinion or otherwise. This opinion of the Central Government is not revisable by any authority: AIR 1950 SC 222, Rel. on.

(Para 8)

In accordance with R. 45, the Government becomes competent to proscribe a booklet, the moment it forms an opinion that it contains prejudicial reports and the Government is under no obligation to provide any objective test for the formulation of its opinion that the booklet in question contains prejudicial reports while passing an order under R. 45 in relation to it on the score that in its opinion it contains prejudicial reports. It may be that the definition of the expression "prejudicial act" which one has to see in order to understand the meaning of the expression "prejudicial reports" consists of various sub-clauses and a particular case may fall only under one of such sub-clauses, still it does not place the authority acting under R. 45 under any obligation to say anything more than what is required by R. 45 for taking action thereunder. Of course if the opinion formulated by the authority acting under R. 45 is so absurd as to say that two and two make five then it may be possible to strike down the action taken under R. 45 on the ground that the authority acted without applying its mind to the matter and hence mala fide: AIR 1966 SC 1140, Disting.

In so far as it is not possible to say that the impugned action is taken otherwise than in accordance with the strict requirement of the letter of law, the petitioner cannot get any assistance from S. 44 of the Act. (Para 9)

(D) Defence of India Rules (1962), Rr. 35(6) (g) and 45 — Scope — Expression "likely to disturb communal harmony" — Meaning of — It envisages engenderment of feeling of enmity and hatred under R. 35(6) (g).

"Likely to disturb communal harmony" is not the same thing as "Likely to result in lack of communal harmony". It is true that "lack of harmony" does not necessarily mean promotion of feelings of enmity and hatred. But the same is not true when it is said that it is likely to disturb communal harmony. Lack of harmony simpliciter means cessation of feelings of friendship but there can be no disturbance of communal harmony in the absence of feelings of enmity and hatred. The expression "likely to disturb communal harmony" is stronger than what one finds in sub-clause (g) of clause (6) of R. 35. The expression "likely to disturb communal harmony" envisages the result of engenderment of feelings of enmity and hatred.

Where, therefore, the expression "Likely to disturb communal harmony" is used in the counter-affidavit, it cannot be said that the satisfaction of the Central Government was not in respect of the matter actually provided in sub-clause (g) of clause (6) of R. 35 and that there existed no basis for taking action under R. 45: AIR 1966 SC 740, Disting. (Para 10)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 765 (V 55) =

1968 Cri LJ 972, Mohd. Yaqub v. State of Jammu and Kashmir 7

(1966) AIR 1966 SC 740 (V 53) =

1966 Cri LJ 608, Ram Manohar Lohia v. State of Bihar 10

(1966) AIR 1966 SC 1140 (V 53) =

1966 Cri LJ 817, Jagannath Misra v. State of Orissa 8

(1950) AIR 1950 SC 222 (V 37) =

1950 SCR 621, Province of Bombay v. Khushaldas S. Advani 8

Mohd. Husain, M. A. Haider, Bishnu Singh, S. P. Sinha, B. C. Agarwal, Ramesh Singh and Saghir Ahmed, for Petitioner; K. S. Verma, for Opposite Party.

ORDER:—This is a petition under Article 226 of the Constitution. The prayer in the petition is that the following notification dated 18th August, 1966 published in the Gazette of India dated 27th August, 1966 be quashed:

"Whereas in the opinion of the Central Government the book entitled 'Tashkent Declaration and the Problem of Indo-Pak Minorities' written by Dr. A. J. Faridi, and printed at Chowdhury Press, 7 Zamir Mansion, Gwynne Road, Lucknow, contains prejudicial reports as defined in clause (7) of Rule 35 of the Defence of India Rules, 1962;

Now, therefore, in exercise of the powers conferred by Rule 45 of the Defence of India Rules, 1962, the Central Government hereby—

(a) prohibits the sale or distribution of the said book or any extract therefrom or of any translation thereof, and declares the said book and every copy or translation thereof or extract therefrom, to be forfeited to Government; and

(b) directs every person possessing any copy of the said book to deliver the same to the local police authorities."

It is a matter of common knowledge that on September 8, 1962 the Chinese attacked the northern border of India and that constituted a threat to the security of India. That is why on October 26, 1962 the President issued a Proclamation under Article 352 of the Constitution. This Proclamation declared that a "grave emergency existed whereby the security of India was threatened by external aggression. On the same day the Ordinance was promulgated by the President. This Ordinance was amended by Ordinance No. 6 of 1962 promulgated on November 3, 1962. On this day, the President issued the Order under Art. 359(1), suspending the rights of citizens to move any Court for the enforcement of the rights conferred by Articles 21 and 22 of the Constitution for the period during which the proclamation of emergency issued on October 26, 1962 would be in force. On November 6, 1962 the rules framed by the Central Government were published. Then followed an amendment of the Presidential Order on November 11, 1962. By this amendment for the words and figures "Article 21" the words and figures "Articles 14 and 21" were substituted. On December 6, 1962 Rule 37 as originally framed was amended and Rule 30-A added. Last came the Act on December 12, 1962. Section 48(1) of the Act has provided for the repeal of the Ordinance Nos. 4 and 6 of 1962. Sec. 48(2) provides that notwithstanding such repeal, any rules made, anything done or any action taken under the aforesaid two Ordinances shall be deemed to have been made, done or taken under the Act as if this Act had commenced on October 26, 1962. That is how the rules made under the Ordinance continued to be the rules under the Act and it is under Rule 45 that the impugned action was taken when the emergency was still in force. It may here be noted that the emergency came to an end in January, 1968.

2. As is well known Indo-Pakistan war broke out in September, 1965. It came to an end as a result of an agreement reached between India and Pakistan in January, 1966 popularly called "Tashkent Declaration". The petitioner published the booklet entitled "Tashkent Declaration and the Problem of Indo-Pak Minorities" in February, 1966. According to the petitioner, Jan Sangh which is a communal body, started propaganda against the said booklet so much so that a calling attention motion regarding it was admitted by the Speaker of the U.P. Legislative Assembly on 11th April, 1966. Organizer, a weekly newspaper issued from Delhi commented adversely on this

booklet in its issue dated 12th June, 1966 characterising it as a communal propaganda. Sri Atal Behari Bajpayee, one of the leaders of the Jan Sangh party and a member of the Rajya Sabha gave notice on 20th June, 1966 of the question reproduced in paragraph 17 of the petition to be answered on the floor of the Rajya Sabha. The Deputy Minister answered that question on 20th August, 1966 stating that the Government of India had proscribed the booklet. The impugned notification was actually published subsequent thereto on August 27, 1966. From these facts the inference drawn by the petitioner as formulated in paragraph 21 of the petition is that the Central Government in taking the impugned action was influenced by the propaganda carried on by the Jan Sangh party and its action was arbitrary and mala fide.

3. The above is one set of facts as set forth in the petition. The other set of facts is to be gathered from what is stated in paragraph 22 onwards. Briefly stated the case of the petitioner is that he incurred the displeasure of Sri Syed Ali Zaheer, the then Minister for Justice in the U.P. Government, by insisting on the Nagar Mahapalika to take action against Sri Syed Ali Zaheer for the removal of the encroachment committed by him by making his boundary wall after including a portion of the municipal land within the same. As stated in the petition, questions regarding the alleged encroachment by Sri Syed Ali Zaheer were put on the floor of the U.P. Assembly on 19th February 1965 and Sri Syed Ali Zaheer got a letter published in the National Herald dated 17th March, 1965 explaining his position in regard to the accusations made against him in respect of the alleged encroachment of municipal land. It is further pointed out that before the booklet was actually proscribed by the Central Government, it was in consultation with the Law Department of the State Government of which Sri Syed Ali Zaheer was in charge in capacity of Minister for Justice and, according to the petitioner, the Law Department of the State of Uttar Pradesh after examining the book found it objectionable and recommended action against the petitioner with the result that it came to be proscribed in accordance with that recommendation.

4. The petitioner alleges that the booklet in question does not contain any objectionable matter and no reasonable person on its examination can come to a conclusion that it contains prejudicial reports as defined in clause (7) of Rule 35 of the Defence of India Rules, 1962. In his affidavit dated 6th September, 1968 the petitioner points out that much worse publications extracts from which have been filed as annexures 'A' to 'F' to the

said affidavit escaped action at the hands of the Central Government and accordingly the impugned action deserves to be struck down as discriminatory. The main ground on which the impugned notification is challenged is that the Central Government issued it without applying its mind and, as such, acted mala fide.

5. The petition is opposed by the Union of India, the sole opposite party in the case. A counter-affidavit sworn by Sri G. S. Kapoor, Under Secretary, Government of India, Ministry of Home Affairs, has been filed on behalf of the opposite party. In paragraph 14 of the Counter-Affidavit it is asserted that the action of the Central Government in proscribing the booklet was a bona fide exercise of the powers of the Government and the suggestion that the action of the Central Government was provoked by the question sent by Sri Atal Behari Bajpayee is denied. It is further stated that the book was under examination of Government of India long before notice of the said question was given and "action was taken after Government was satisfied that the contents of the booklet are such as are likely to disturb communal harmony". As regards the allegations made in paragraphs 33 to 39 of the petition which concern Sri Syed Ali Zaheer paragraph 22 of the counter-affidavit says that the same do not concern the opposite party and do not call for any reply from it. Then it is said:

"It is, however, stated that there is nothing on the record of the opposite party that Sri Syed Ali Zaheer took any initiative in the matter."

6. I have heard the learned counsel for the petitioner and the learned Chief Standing Counsel appearing for the opposite party. The argument of the learned counsel for the petitioner has been twofold. His first contention is that the impugned action deserves to be struck down as mala fide for the simple reason that a perusal of the impugned notification itself shows that the Central Government issued it in a casual manner without applying its mind. The other contention is that because of the failure of the opposite party to take action against worse publications referred to in the petitioner's affidavit dated 6th September, 1968 the impugned action is hit by Article 14 of the Constitution.

7. So far as the second contention is concerned, it appears to be wholly untenable. I have already shown above that the impugned action was taken when the emergency was still in force and Article 14 stood suspended by virtue of President's Order under Article 359(1) of the Constitution. As ruled by the Supreme Court in the case of Mohd. Yaqub v. State of Jammu and Kashmir, AIR 1968 SC

765. Article 14 of the Constitution could not be invoked in respect of an action taken at a time when the Article stood suspended by an Order of the President under Article 359(1) of the Constitution. Apart from that, the contention is also without any substance on merit. For an action taken according to law against a defaulter it is no answer that on some earlier occasion a similar action had not been taken in respect of a similar default. Article 14 of the Constitution is of no assistance in such circumstances. So in any view of the matter the contention being without any substance is rejected.

8. Coming to the other contention, I may at once say that there is no material before the court on the basis of which it may be possible to say that the Government acted mala fide in the matter. In view of what is specifically stated in paragraph 14 of the counter-affidavit, it is not possible to hold that in taking the impugned action the Central Government was influenced by external consideration and not by its own opinion formulated on an examination of the booklet in question. Learned counsel was at pains to show that the impugned notification itself furnished evidence of the fact that the Central Government did not apply its mind. He read the notification more than once and contended that whereas its first paragraph was only descriptive, the other paragraph was operative and that there was nothing in it to show as to which matters, if any, discussed in the booklet appeared to the Central Government to be prejudicial reports so as to entitle it to take action under Rule 45 of the Defence of India Rules, 1962. Another argument raised in this connection was that the definition of the expression "prejudicial report" in clause (7) of the Defence of India Rules refers to "prejudicial act" which expression is in its turn defined in clause (6) of Rule 35 and the said clause (6) consists of as many as sub-clauses (a) to (s); and that being so it was obligatory on the Central Government to indicate that in its opinion the booklet contained prejudicial reports because it contained matter covered by such and such sub-clause or sub-clauses of clause (6) of Rule 35. In support of the contention learned counsel placed strong reliance, on the case of Jagannath Misra v. State of Orissa, AIR 1966 SC 1140. That was a case of preventive detention under Rule 30(1) (b) of the Defence of India Rules, 1962. In that case the order of detention was passed on the basis that:

"That State Government is satisfied that with a view to preventing from acting in any manner prejudicial to this defence of India and Civil defence, the public safety, the maintenance of Public order, India's relations with foreign powers, the maintenance of peaceful con-

ditions in any part of India or the efficient conduct of military operations, it is necessary so to do."

The use of conjunction 'or' in the relevant notification directing detention of the petitioner before the Supreme Court went a long way to indicate that in all probability the order had been passed by the Government without applying its mind to the requirement of the rule under which detention was being ordered. Obviously satisfaction is in respect of a specific matter. Rule 30 mentions various grounds on the basis of any or more of which it enables the competent authority to pass an order of detention. In a given case the competent authority may be satisfied with regard to the existence of any one or more of such grounds. It is difficult to see as to how in any case the competent authority can be satisfied in regard to the existence of some such grounds in the alternative. That appears to be the reason why the Supreme Court in that case directed an affidavit to be filed by the Minister concerned. When that affidavit was filed, it made matters worse in so far as it disclosed that even though the notification mentioned a number of grounds, the satisfaction of the Minister was only in respect of two of those grounds, namely, safety of India and the maintenance of public order. It was in these circumstances that the Supreme Court observes on page 1142:

"In these circumstances there can be little doubt that the authority concerned did not apply its mind properly before the order in question was passed in the present case. Such discrepancy between the grounds mentioned in the order and the grounds stated in the affidavit of the authority concerned can only show an amount of casualness in passing the order of detention against the provisions of Section 44 of the Act. The casualness also shows that the mind of the authority concerned was really not applied to the question of detention of the petitioner in the present case. In this view of the matter we are of opinion that the petitioner is entitled to release as the order by which he was detained is no order under the Rules for it was passed without the application of the mind of the authority concerned."

In any view, this case has no application whatsoever to the facts of the case in hand. Here the notification does not appear to suffer from any inherent defect whatsoever. Rule 45 under which action has been taken says in its sub-rule (1):—

"Where in the opinion of the Central Government or the State Government any document made, printed or published, whether before or after the Ordinance came into force, contains any confidential

information, any information likely to assist the enemy or any prejudicial report, that Government may, by order....." It shall thus appear that under Rule 45 one of the actions enumerated therein is to be taken as soon as in the opinion of the competent authority the document made, printed or published contains one of the three, namely, (1) any confidential information, (2) any information likely to assist the enemy and (3) any prejudicial report. Here the impugned notification clearly indicates that the booklet in question contains prejudicial reports in the opinion of the Central Government. So, prima facie the notification appears to fulfil all that is required by law. It is abundantly clear from the language of Rule 45 that the Central Government is competent to take action thereunder once it forms an opinion that the document in respect of which action is proposed contains one of the three matters stated above. The action is thus to be taken on the subjective satisfaction of the Central Government. It is wholly immaterial, if the opinion of the Central Government on which proceeds the action under Rule 45, is a reasonable opinion or otherwise. This opinion of the Central Government is not revisable by any authority. In this connection I may refer to the case of *Province of Bombay v. Khushaldas S. Advani*, AIR 1950 SC 222. In that case action taken under the provisions of Bombay Land Requisition Ordinance V of 1947 had been challenged. The Government had in that case requisitioned certain land on formulating the opinion that it was necessary so to do for a certain purpose which was a public purpose. The argument raised before the Supreme Court was that the determination by the Government that a certain purpose was a public purpose was a quasi-judicial and was, as such, amenable to a writ of certiorari. The majority view repelled the contention. It is summarised in the headnote in the following words:

"The decision of the Government about a public purpose is a fact which it has to ascertain or decide, and thereafter the order of requisition has to follow. The decision of the Provincial Government as to the public purpose contains no judicial element in it. The enquiries mentioned in Sections 10 and 12 are only permissive and the Government is not obliged to make them. Moreover, they do not relate to the purpose for which the land may be required. They are in respect of the condition of the land and such other matters affecting land. The words of Section 3 read with the proviso and the words of Section 4 taken along with the scheme of the whole Ordinance, do not import into the decision of the public purpose, the judicial element required to make the decision judicial or quasi-judi-

cial. The decision of the Provincial Government about public purpose is, therefore, an administrative act, and there is no scope for an application for a writ of certiorari."

Kania C. J. observes on page 225:—

"Indeed in the judgment of the lower Court, while it is stated at one place that if the act done by the inferior body is a judicial act, as distinguished from a ministerial act, certiorari will lie, a little later the idea has got mixed up where it is broadly stated that when the fact has to be determined by an objective test and when that decision affects rights of someone, the decision or act is quasi-judicial. This last statement overlooks the aspect that every decision of the executive generally is a decision of fact and in most cases affects the rights of someone or the other. Because an executive authority has to determine certain objective facts as a preliminary step to the discharge of an executive function, it does not follow that it must determine those facts judicially. When the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative character and are not amenable to the writ of certiorari."

9. Again Das, J. observes on page 256:

"To summarise: It is abundantly clear from the authorities cited above that questions of fact such as the existence of a public purpose or the interest of the public safety or the defence of the realm or the efficient prosecution of the war, or the maintenance of essential supplies and the like may well be and, indeed, are often left to the subjective opinion or satisfaction of the executive authority. Merely because such a matter involves a question of fact it does not follow at all that it must always, and irrespective of the language of the particular enactment, be determined judicially as an objective fact. When the Legislature leaves it to an executive authority to form an opinion on or to be satisfied about such a matter as a condition for the exercise of any power conferred on it and to act upon such opinion, what is condition precedent is, not the actual existence of the matter but, the subjective opinion or satisfaction of the executive authority that it exists." Interpreting the language of Rule 45 in the light of the principles indicated above, there is no escape from the conclusion that in accordance with rule 45 the Central Government became competent to proscribe the booklet in question, the moment it formed an opinion that it contained prejudicial reports and the Central Government was under no obligation to provide any objective test for the formu-

lation of its opinion that the booklet in question contained prejudicial reports while passing an order under Rule 45 in relation to it on the score that in its opinion it contained prejudicial reports. It may be that the definition of the expression "prejudicial act" which one has to see in order to understand the meaning of the expression "prejudicial reports" consists of various sub-clauses and a particular case may fall only under one of such sub-clauses, still it does not, in my opinion, place the authority acting under Rule 45 under any obligation to say anything more than what is required by Rule 45 for taking action thereunder. Of course if the opinion formulated by the authority acting under Rule 45 is so absurd as to say that two and two make five then it may be possible to strike down the action taken under Rule 45 on the ground that the authority acted without applying its mind to the matter and hence mala fide. Such is not the position in the present case. I have been taken through the various portions of the booklet by the learned counsel on either side. On going through it, I am not prepared to say that the opinion the Central Government has indicated in the impugned notification is so abundantly absurd and unreasonable as to lead one to the conclusion that in all probability the Central Government did not at all apply its mind. It is certainly a possible view. Section 44 of the Defence of India Act, 1962, to which reference was made during the course of arguments by the learned counsel for the petitioner, no doubt provides that any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of India and civil defence, but I fail to see as to how that provision assists the petitioner in the present case. All that can be inferred from it is that the Legislature emphasised that whenever an action is taken under the provisions of the Act or the rules made thereunder and which action is to interfere with the ordinary avocations of life and the enjoyment of property, care be taken to take such action strictly in accordance with the letter of law. In so far as I am unable to say that the impugned action has been taken otherwise than in accordance with the strict requirement of the letter of law, I fail to see as to what assistance the petitioner gets from Section 44 of the Act.

10. There was yet another argument raised by the learned counsel for the petitioner and it was with reference to paragraph 14 of the counter-affidavit material portion of which I have reproduced above. It is said therein that the Central Government took action because after an exa-

mination of the booklet it was satisfied "that the contents of the booklet are such as are likely to disturb communal harmony." The argument is that if the satisfaction was that the contents of the booklet were such as were likely to disturb communal harmony then it could not be said that the booklet contained prejudicial reports because in order to constitute prejudicial report the contents should have been such as are likely "to promote feelings of enmity and hatred between different classes of persons in India" as envisaged by sub-clause (g) of clause (6) of Rule 35. In this connection reliance is placed on *Ram Manohar Lohia v. The State of Bihar*, AIR 1966 SC 740. There the order of detention passed under Rule 30(1) (b) of the Defence of India Rules, 1962 purported to indicate that the detention was necessary "with a view to preventing from acting in any manner prejudicial to the public safety and the maintenance of law and order". Maintenance of law and order is not one of the grounds enumerated in Rule 30 as a basis for preventive detention. On the other hand, the expression used in s. 30 is "the maintenance of public order". The Supreme Court by majority, as summarised in the headnote, held:—

"Where a man can be deprived of his liberty under a rule by the simple process of the making of a certain order, he can only be so deprived if the order is in terms of the rule. Strict compliance with the letter of the rule is the essence of the matter. The Defence of India Rules drastically interfere with the personal liberty of people and Courts are prevented from going behind the order passed under the Rules. In these circumstances it would be legitimate to require strict observance of the rules and if there is any doubt whether the rules have been strictly observed, that doubt must be resolved in favour of the detenu." It is thus argued that in so far as, according to the counter-affidavit itself, satisfaction of the Central Government was not in respect of the matter actually provided in sub-clause (g) of clause (6) of Rule 35. It must be held that there existed no basis for taking action under R. 45. The argument would have been acceptable, had it been possible to hold that the expression used in the counter-affidavit, namely, "likely to disturb communal harmony" does not convey what is conveyed by sub-clause (g) of clause (6) of Rule 35 which defines any act as prejudicial act that is likely to promote feelings of enmity and hatred between different classes of persons in India. "Likely to disturb communal harmony" is not the same thing as "likely to result in lack of communal harmony". It is true that "lack of harmony" does not necessarily mean promotion of feelings of enmity and

hatred. But the same is not true when it is said that it is likely to disturb communal harmony. Lack of harmony simpliciter means cessation of feelings of friendship but there can be no disturbance of communal harmony in the absence of feelings of enmity and hatred. If at all the expression "likely to disturb communal harmony" is stronger than what one finds in sub-clause (g) of clause (6) of Rule 35. As I view the expression used in paragraph 14 of the counter-affidavit, I am of opinion that it envisages the result of engenderment of feelings of enmity and hatred. So, it is not possible to accept the contention of the learned counsel that there is something in paragraph 14 of the counter-affidavit which takes the case of the booklet in question out of the purview of sub-clause (g) of clause (6) of Rule 35.

11. No other point was urged. The petition must fail and is accordingly hereby dismissed with costs.

Petition dismissed.

AIR 1970 ALLAHABAD 389 (V. 57 C 61)
(LUCKNOW BENCH)

G. S. LAL, J.

Smt. Vishnawati, Defendant, Appellant
v. Bhagwat Vithu Chowdhry, Plaintiff,
Respondent.

Second Appeal No. 74 of 1968, D/- 26-2-1969, against judgment and Decree of 2nd Addl. Civil J., Lucknow, D/- 6-1-1968.

Transfer of Property Act (1882), S. 106 — Monthly tenancy — Heritability — Death of tenant — Heirs take as tenants-in-common and not as joint-tenants except in case of coparceners under Hindu Law — Service of notice — Requirement of — Co-tenants — Notice addressed to one and served upon him is sufficient if intention to terminate tenancy as a whole is clear. AIR 1968 Ker 229, Dissented from.

A monthly tenancy is heritable and on the tenant's death his heirs inherit the property demised as 'tenants-in-common' and not as 'joint tenants' except in the case of coparceners in a joint Hindu family under the Hindu Law. As between themselves the interest which the heirs of a deceased tenant inherit will itself be heritable and will not pass by survivorship and in that sense they cannot be said to hold it as "joint tenants". That is why the expression "joint tenants" used in dealing with a case of more than one person holding together the tenancy either by original lease in their favour or by inheritance from a deceased tenant is meant to convey nothing more than the idea that such persons hold the tenancy as one entity and not that they hold that

kind of estate which is governed by the rule of passing by survivorship. AIR 1940 Cal 89 & AIR 1966 Cal 447 & AIR 1937 Nag 321, Rel. on. (Para 10)

It is well settled that a notice to quit under Section 106 addressed to all the co-tenants but served upon one of them only is valid and sufficient to terminate the tenancy. 1956 All LJ 650 & AIR 1964 All 52 & AIR 1965 All 287 & AIR 1929 Cal 651 & AIR 1966 Cal 63 & AIR 1945 Nag 255 & AIR 1935 Bom 247 & AIR 1964 Bom 96, Rel. on. (Para 13)

Section 106 does not require that the notice should be addressed to all co-tenants or to every one of them. The only requirement as to service is that it should be given as prescribed in Section 106 to the "party who is intended to be bound by it." The rule of sufficiency of service of notice on one co-tenant in the case of co-tenancy can be in conformity with the requirement of the section only if the co-tenants are taken to constitute one "party" so that service on any one only of them will be service on the party intended to be bound.

(Para 15)

It is an incident of 'tenancy' that it is one and even though more than one person may hold it they hold it together as one. It is well recognized that a landlord cannot terminate the tenancy piecemeal, nor can some out of the several co-tenants terminate it for themselves only. Co-tenants who come to hold a tenancy by inheritance may, for the purposes of succession, have an estate as "tenant in common" and not "joint tenants", but the special incidents attaching to a tenancy will not be changed upon the tenancy passing to more than one person by inheritance. In so far as their relationship with the landlord is concerned they hold the tenancy jointly and for the landlord they constitute one unit. So even if a notice is addressed to one or some of the co-tenants, it must be effective as against all, the only limitation to this being that there is nothing to show that the tenancy is intended to be terminated piecemeal and it is clear that the intention is to terminate the tenancy as a whole. It appears that it is by way of this safeguard that while laying down the rule that service of notice on one co-tenant will be sufficient service of notice for terminating the tenancy that the qualification has been added that the notice should be addressed to all the co-tenants. There does not appear to be any sanctity otherwise behind this qualification. AIR 1964 Bom 96, Rel. on. (Para 15)

Held on the facts of the case that the notice under Section 106 addressed only to the widow of the monthly tenant who died leaving also sons and daughters and served upon her only was sufficient and valid. AIR 1963 SC 468, Discussed and

Followed; AIR 1918 PC 102, Rel. on; AIR 1968 Ker 229, Dissented from. (Para 17)
Cases Referred: Chronological Paras

- (1969) AIR 1969 All 474 (V 56) = 1968 All WR (HC) 572 (FB), Asa Singh v. B. D. Sanwal 19
(1970) AIR 1970 SC 763 (V 57) = 1968 All WR (HC) 892 = 1968 All LJ 1023, Parshottam Das v. Raj Mani Devi 7
(1968) AIR 1968 Ker 229 (V 55) = 1967 Ker LT 583, Valiyaveetil Konnappan v. Kunniyil Manikam 12, 13
(1967) AIR 1967 SC 997 (V 54) = 1967 Cri LJ 950, Supdt. and Remembrancer of Legal Affairs West Bengal v. Corporation of Calcutta 13
(1966) AIR 1966 Cal 63 (V 53), Bhusan Chandra Paul v. Bengal Coal Co., Ltd. 13
(1966) AIR 1966 Cal 447 (V 53), Mannalal Serowjle v. Ishwari Prasad 10
(1965) AIR 1965 All 287 (V 52) = 1965 All LJ 880, Roshan v. Purshottam Lal 13
(1965) AIR 1965 All 498 (V 52) = 1965 All LJ 58 (FB), Bashi Ram v. Mantri Lal 7
(1964) AIR 1964 All 52 (V 51), Shri Nath v. Smt. Sarawati Devi 13
(1964) AIR 1964 Bom 96 (V 51) = 65 Bom LR 647, Mt. Ramubai v. Jai Ram Sharma 13, 15
(1963) AIR 1963 SC 468 (V 50) = (1983) 2 SCJ 134, Kanji Manji v. Trustees of the Port of Bombay 7, 10, 11, 12, 17
(1959) AIR 1959 All 33 (V 46) = 1958 All LJ 573, Janardan Swarup v. Debi Prasad 7
(1956) 1956 All LJ 650 = 1956 All WR (HC) 543, Pt. Lila Dhar Pandey v. Ramji Dass 13
(1945) AIR 1945 Nag 255 (V 32) = ILR (1945) Nag 629, Mohanlal v. Governor General in Council 13
(1940) AIR 1940 Cal 89 (V 27) = ILR (1939) 2 Cal 254, Anwarali Bepari v. Jamini Lal 10
(1937) AIR 1937 Nag 321 (V 24) = ILR (1937) Nag 406, Rajib Husain v. Nawab Yanus Khan 10
(1935) AIR 1935 Bom 247 (V 22) = 37 Bom LR 376, Vaman Vithal v. Khanderao Ram Rao 13
(1929) AIR 1929 Cal 651 (V 16) = ILR 57 Cal 10, Bodardoja v. Ajiluddin Sircar 13
(1925) AIR 1925 Cal 752 (V 12) = 29 Cal WN 620, Bejoy Chand v. Kali Prasanna Seal 12, 13
(1918) AIR 1918 PC 102 (V 5) = ILR 46 Cal 458, Harihar Banerji v. Ramshashi Ray 12, 15

- (1856) 6 Ir CLR 367 = 1 Ir Jur (NS) 360, Pollok v. Kelley 12
(1806) 7 East 551 = 8 RR 670 = 3 Smith K. B. 517, Doe d. Bradford v. Watkins 12, 13
(1805) 5 Esp 196 = 8 RR 848, Doe d. Macartney v. Crick 12, 13
Umesh Chandra, for Appellant; All Zahere, J. B. Srivastava and S. P. Singh, for Respondent.

JUDGMENT:— This second Civil Appeal arises out of a suit for ejectment from a house and recovery of arrears of rent. The suit was decreed by the trial Court and an appeal from the judgment and decree of the trial Court was dismissed.

2. The suit was instituted by Bhagwat Vithu Chowdhry (respondent in this appeal) against Smt. Vishnawati (appellant in this appeal) claiming that he had terminated the tenancy by notice to quit and had obtained the permission of the District Magistrate under Section 3 of the U. P. (Temporary) Control of Rent and Eviction Act, 1947 to get over the bar to the institution of the suit created under that section. Admittedly the appellant's husband Gaya Prasad Shukla was originally the tenant of the house on a monthly rent of Rs. 35 from its former owner Lala Mangli Prasad. The house was sold by Lala Mangli Prasad to one Smt. Vidyawati. The latter in turn sold it to the respondent. After the purchase of the house, which professedly was for the purpose of his own residence, the respondent obtained the District Magistrate's permission dated 8-8-1986 to sue the tenant for eviction. He had already given a notice dated 24-3-1966 to the appellant terminating the tenancy and asking for vacation of the premises. The plaintiff filed a revision before the Commissioner but the same was dismissed on 20-1-1967. The suit was instituted the same day.

3. The suit was contested by the defendant-appellant on various grounds. The notice was said to be invalid since it was not given after grant of permission, and the permission to be invalid as the purchase was with full knowledge of the tenancy. Gaya Prasad Shukla, who had died about 10 years before suit, had left, besides his widow (appellant), three sons and daughters from her as also two sons from an earlier wife. Since permission had been obtained to file a suit against the widow and not the sons and daughters of Gaya Prasad Shukla and the notice terminating the tenancy had also been addressed to, and served upon, the widow alone, it was pleaded that the notice was bad for that reason and the permission was also illegal and without jurisdiction. The suit was also said to be not maintainable on the ground of the State Government having passed a stay order

on the filing of a revision application by the defendant under Section 7-F of the aforesaid Act.

4. As to the plea of the notice being invalid on the ground that it was not given after the grant of permission by the District Magistrate, not again after the confirmation of the District Magistrate's order by the Commissioner, the learned Additional Munsif who tried the suit held that it was not necessary to give the notice after the grant of permission and that it could be given before that. The plea has not been pressed again at least in this Court, and for obvious reasons, as it has been held in several decisions of this Court that it is not necessary that the notice under Section 106 of the Transfer of Property Act be given only after the permission to evict has been obtained. About the additional ground (raised by an amendment of the written statement) that the notice was bad because it had been both addressed to and served upon the appellant alone though Gaya Prasad Shukla had left other heirs and the tenancy devolved upon those other heirs also, the learned Munsif held that the appellant alone had been acting as, and asserting herself to be, the tenant and had for all practical purposes been recognised as the tenant and she was thus the sole tenant. He was further of the opinion that even if the sons and daughters had inherited the tenancy rights they had impliedly surrendered those rights in favour of their mother. For these reasons he held the notice to have been rightly given to the appellant alone.

5. Regarding the plea of invalidity of the permission, it was conceded before the learned Munsif on the defendant's side that permission granted against one co-tenant held good against all the co-tenants. He held that the defendant had failed to show in what respect otherwise the permission was illegal and without jurisdiction. On the plea that the State Government had stayed the operation of the order of the lower authorities granting permission and the suit was therefore, not maintainable, the learned Munsif found that no order of stay of the State Government was on the record and so he rejected the plea.

6. After deciding also the minor controversies which related to the arrears of rent and damages, the trial Court decreed the suit for ejectment and for recovery of a lesser amount as arrears of rent besides damages for use and occupation.

7. In the appeal filed by the defendant Smt. Vishnawati the second Additional Civil Judge who disposed the same held that it being undisputed that a tenancy is heritable in the absence of a contract to the contrary and that Gaya

Prasad Shukla had left surviving him not only the appellant but also sons and daughters, those sons and daughters also became co-tenants of the house with the widow. However, relying on the decision of the Supreme Court in *Kanji Manji v. The Trustees of the Port of Bombay*, AIR 1963 SC 468 he held that the notice to the widow alone to determine the tenancy was sufficient and the suit for ejectment filed against her alone was also good at law. In regard to the permission, he too held that nothing had been shown as to how the permission was illegal or without jurisdiction and that so far as the ground that it was obtained against one of the co-tenants only was concerned, the decision in the case *Janardan Swarup v. Debi Prasad*, 1958 All LJ 573 = (AIR 1959 All 33) showed that the permission obtained against one co-tenant was good against the entire body of the class designated as 'the tenant'. The plea based on an alleged stay order by the State Government was not seriously pressed in the appeal. Relying upon the Full Bench case *Bashi Ram v. Mantri Lal*, 1965 All LJ 58 = (AIR 1965 All 498) (FB) the learned Judge held that the proceedings under Section 7-F aforesaid could have no effect on the suit already instituted. It may be stated that this position has since been confirmed by the decision of the Supreme Court in *Parshottam Das v. Smt. Raj Mani Devi*, AIR 1970 SC 763 = 1968 All WR (HC) 892. The appeal was accordingly dismissed.

8. In the second appeal the same legal pleas have been reiterated and argued. Learned counsel for both the sides have been heard at length. It may be noted here that another second civil appeal No. 152 of 1967 with a similar plea about invalidity of notice given to one co-tenant only was also tacked with this appeal under decision after it had been heard in part and this appeal is being decided after hearing also learned counsel for both the sides in that other second appeal.

9. On the side of the appellant it has been urged that the decisions of the High Courts in India have no doubt been that a notice served on one of the co-tenants is a good notice to the other co-tenants but that is only where the notice is addressed to all. It is said that the notice in the instant case was addressed only to the appellant and was served only on her. For that reason the notice is said to be not in accordance with law and therefore, invalid for the purpose of terminating the tenancy. In regard to the Supreme Court decision aforesaid, the argument is that the same is distinguishable because it relates to a case of "joint tenants" as distinct from "tenants-in-common" which is the position of the appellant and the other heirs of Gaya Prasad Shukla who succeeded to the tenancy by inheritance.

Now the expression "joint tenants" has very often been used in those earlier cases too which have been cited on the appellant's side and on which reliance is placed for the argument that in order to be effective under Section 106 of the Transfer of Property Act, the notice must be addressed to all the co-tenants but it has not been urged that in those decisions also the expression "joint tenants" was intended to refer to co-tenants holding as "joint tenants" as distinguished from "tenants-in-common". It has also not been disputed that the expression "joint tenants" was used in those cases as a substitute for "co-tenants" and not with a view to indicate the nature of the estate held by the co-tenants. It therefore, needs to be examined whether the Supreme Court decision referred to above was peculiar to any "joint tenancy" estate held by the co-tenants in the tenancy and whether the same is not applicable to co-tenants who got the rights of a tenant in the tenancy on his death by inheritance.

10. At the outset it may be stated that there is no controversy on the proposition that even in the case of a monthly tenancy, the tenancy is inherited by the heirs of the tenant on his death. It was so held in *Anwarall Bepari v. Jamini Lal*, AIR 1940 Cal 89; *Mannalal Serowje v. Ishwari Prasad*, AIR 1966 Cal 447 and *Rajib Husain v. Nawab Yanus Khan*, AIR 1937 Nag 321. It is also not in controversy that except in the case of coparceners in a joint Hindu family under the Hindu Law, property under various inheritance laws in this country is taken by inheritance from a deceased owner by his heirs as "tenants in common" and not as "joint tenants" as between themselves. So it cannot be doubted that as between themselves the interest which the heirs of a deceased tenant inherit will itself be heritable and will not pass by survivorship and in that sense they cannot be said to hold it as "joint tenants." That is why the expression "joint tenants" used in dealing with a case of more than one person holding together the tenancy either by original lease in their favour or by inheritance from a deceased tenant is meant to convey nothing more than the idea that such persons hold the tenancy as one entity and not that they hold that kind of estate which is governed by the rule of passing by survivorship. If the Supreme Court decision in AIR 1963 SC 468 can be said to be in relation to a case of joint tenants in such ordinary sense of the expression, then it would be directly relevant to the instant case, but if it laid down law of sufficiency of notice to determine lease by being given to one of the co-tenants to a case where the co-tenants were holding the tenancy by way of an estate of "joint tenancy", then the decision would be distinguishable, though

the point would still require decision whether in other cases of joint tenancy also notice to one of the joint tenants will not be good and effective in law for the purpose of terminating the tenancy. This calls for an examination of the facts of *Kanji Manji's case*, AIR 1963 SC 468.

11. *Kanji Manji's case*, AIR 1963 SC 468 decided by the Supreme Court arose out of a suit filed by the Trustees of the Port of Bombay for ejectment of *Kanji Manji* and one *Rupji Jeraji* from a piece of land. The land had been leased by the Trustees of the Port of Bombay on a monthly tenancy to two persons. Those two persons later assigned their rights in the lease to *Kanji Manji* and *Rupji Jeraji* and the assignment appeared to have been accepted by the lessors. Some years later, the Trustees of the Port of Bombay sent a notice to *Kanji Manji* and *Rupji Jeraji* requiring them to vacate the premises and deliver vacant and peaceful possession on a certain date. On non-compliance with the notice the suit was instituted against both the persons. It however, turned out that *Rupji Jeraji* had died much earlier to the institution of the suit and the plaintiff therefore, amended the plaint by deleting the name of *Rupji Jeraji*. The suit was contested, inter alia, on the ground that the notice of termination of tenancy was invalid inasmuch as it had been served only upon one of the lessees (that is, *Kanji Manji*) and not upon the heirs and legal representatives of *Rupji Jeraji*, who were also said to be necessary parties to the suit. The suit was decreed by the Bombay City Civil Court by holding that the tenancy was a joint tenancy and notice to one of the joint tenants was sufficient and that the suit was also not bad for non-joinder of the legal representatives of *Rupji Jeraji*. An appeal to the Bombay High Court was dismissed summarily. The dispute was taken to the Supreme Court by *Kanji Manji* upon having obtained from that Court special leave to appeal. In paragraph 7 of the judgment of the Supreme Court it was observed:—

"The argument about notice need not detain us long. By the deed of assignment dated February 23, 1947, the tenants took the premises as joint tenants. The exact words of the assignment were that '.....the assignors do and each of them doth hereby assign and assure that the assignee as joint tenants.....'. The deed of assignment was approved and accepted by the Trustees of the Port of Bombay, and *Rupji Jeraji* and the appellant must be regarded as joint tenants. The trial Judge, therefore, rightly held them to be so. Once it is held that the tenancy was joint, a notice to one of the joint tenants was sufficient and the suit for the same reason was also good. Mr. B. Sen, in arguing the case of the appel-

lant, did not seek to urge the opposite. In our opinion, the notice and the frame of the suit were, therefore, proper, and this argument has no merit."

12. It can very well be argued that the expression "joint tenants" used in the deed of assignment and used in the above paragraph by their Lordships of the Supreme Court was meant to convey no other sense than that Kanji Manji and Rupji Jeraji did not take separate and exclusive interests under the assignment and that they were joint tenants in the sense that they were to hold the lease jointly and not with separate interests therein. In the Kerala High Court case *Valiyaveetil Konnappan v. Kunnivil Manikkam*, AIR 1968 Ker 229 a single Judge of that Court interpreted Kanji Manji's case, AIR 1963 SC 468 to be one relating to a tenancy held by two persons as "joint tenants" in the other sense. It was observed at page 229, column 2 of the report:—

"That is clear from the emphasis placed by their Lordships on the circumstance that the tenants took the premises as joint tenants, the deed of assignment by which they acquired the lease expressly providing that they were taking as joint tenants. Where joint owners are joint tenants there is unity of title, unity of interest and the right of survivorship in addition to unity of possession so that it might be said that any one of the joint tenants represents the entire estate—indeed in the Supreme Court case already referred to it would appear that one of the two joint tenants had died and the lease had vested solely in the other by survivorship before notice to quit was served on the other so that there was no question of the legal representatives of the deceased joint tenant having any interest whatsoever in the lease so as to require that notice should go to them." The learned Judge proceeded further to observe at page 230 column 1:—

"Where, however, the joint owners are only tenants in common there is only unity of possession, not of title or interest, and to determine a tenancy so held in accordance with Section 106 of the Transfer of Property Act notice must be addressed to all the tenants though proof of service on one will be prima facie proof of service on all. See *Harihar Banerji v. Ramshashi Ray*, AIR 1918 PC 102 and *Bejoy Chand v. Kali Prasanna*, AIR 1925 Cal 752. In the words of the section, notice must go to every party intended to be bound by it, and if it is not issued to any of the joint owners of the lease there is no determination of the lease so far as he is concerned. A lease cannot be determined piecemeal and hence it follows that there is no determination even so far as the others are concerned."

The argument in the second quotation will be discussed later on, but the observation in the latter part of the first quotation itself would indicate that their Lordships of the Supreme Court had not in their mind the consideration that Kanji Manji and Roopji Jeraji were owners of the tenancy as "joint tenants" in the special sense, with the right of survivorship as an incident thereof, for in that case it would have been enough for their Lordships to dispose of the controversy by merely saying that upon the death of Roopji Jeraji his interest passed to Kanji Manji and he became the sole lessee, with no necessity in consequence of any notice going to the heirs of Roopji Jeraji or of their impleadment as defendants in the suit. On the other hand, their Lordships proceeded to lay down that a notice to one of the joint tenants was sufficient and the suit against one joint tenant was for the same reason also good. However, reference to an old well-known Privy Council case relied upon on the respondent's side may also be made. That case is AIR 1918 PC 102 in which it was laid down that in the case of joint tenants each is intended to be bound and service of a notice to quit upon one joint tenant is prima facie evidence that it has reached the other joint tenants. There was a suit by the landlords of a piece of land against the tenants and sub-tenants who were actually in possession. The set of defendants who were the tenants consisted of seven persons some of whom were members of a joint Hindu family of which the others were once such members but had ceased to be so. This fact is significant in so far as it shows that all the seven tenants were not, as between themselves, bound by any rule of passing of their interest by survivorship. It may also be stated that they had come to possess what was formerly the tenancy holding of one Nidhi Ram and that they were being treated as tenants in place of Nidhi Ram who was treated as dead. In that case notice was sent to all the seven persons separately but a contest was entered into as to whether some of them who had not been personally served with notice could be regarded as duly served. It was in the context of this contest that their Lordships of the Privy Council observed at page 110, column 2 of the report at the very commencement of their discussion on this controversy:—

"Next and lastly as to the service of the notice to quit. The 106th section of the Transfer of Property Act, 1882, only requires that such a notice should be tendered or delivered to the party intended to be bound by it either personally or to one of his family or servants at his residence, or if such tender or delivery be not practicable, affixed to a con-

spicuous part of the property. The personal tender or delivery may take place anywhere; the vicarious tender or delivery must take place at the residence of the person intended to be bound by the notice. Well in the case of joint tenants, each is intended to be bound, and it has long ago been decided that service of a notice to quit upon one joint tenant is prima facie evidence that it has reached the other joint tenants. *Doe d. Macartney v. Crick*, (1805) 5 Esp 196 = 8 RR 848, *Doe d. Bradford v. Watkins*, (1806) 7 East 551 = 8 RR 670 = 3 Smith KB 517, *Pollok v. Kelley*, (1856) 6 Ir CLR 367".

13. About this case it has been argued on the appellant's side that as a matter of fact notice was issued to all the seven co-tenants and the notice was also held to have been sufficiently served on each one of them and in the circumstances the observation that in the case of joint tenants each is intended to be bound and service of a notice to quit upon one joint co-tenant (is evidence that it has reached the other joint tenants?) is prima facie an obiter dicta. In this connection reliance was placed on the Supreme Court case, *Superintendent and Remembrancer of Legal Affairs West Bengal v. Corporation of Calcutta*, AIR 1967 SC 997 in which it was observed that a decision made on a concession made by parties, even though principle conceded was accepted by the Privy Council without discussion, cannot be given the same value as a decision given upon a careful consideration of pros and cons of the question raised. The judgment in the case no doubt did not discuss the grounds for the rule enunciated, but that appears to be because the rule was taken to be well recognised. There were three English cases cited in that connection. At any rate, the service of a notice addressed to all the co-tenants upon one of them only has been held to be sufficient service for terminating the tenancy in a number of decisions of various High Courts following this Privy Council case. Some of these cases are *Pt. Lila Dhar Pandey v. L. Ramji Dass*, 1956 All LJ 650; *Shri Nath v. Smt. Saraswati Devi*, AIR 1964 All 52; *Roshan v. Purshottam Lal*, AIR 1965 All 287; *Bodardoja v. Ajjuddin Sircar*, AIR 1929 Cal 651; *Bhusan Chandra Paul v. Bengal Coal Co. Ltd.*, AIR 1966 Cal 63; *Mohan Lal v. Governor General in Council*, AIR 1945 Nag 255; *Vaman Vithal Kulkarni v. Khanderao Ram Rao*, AIR 1935 Bom 247 and *Mst. Hanubai v. Jalram Sharma*, AIR 1964 Bom 96.

In none of these cases, however, the question arose whether a notice addressed to one or some only of the joint tenants and served upon him or some was sufficient to terminate the tenancy, since the notice was addressed to all. It was in

the case, AIR 1925 Cal 752 that it was specifically decided that the notice must be addressed to all and the same view has been taken in the Kerala High Court case, AIR 1968 Kerala 229. In the Calcutta case the Privy Council case cited above was distinguished on the ground that the notices were addressed to all the joint tenants by being sent to all of them. The cases (1805) 5 Esp 196=8 RR 848 and (1806) 7 East 551=8 RR 670=3 Smith KB 517 referred to in the Privy Council case were also considered. The first case was said to have no value because in India the matter is governed by the provisions of the Transfer of Property Act. About the other case it was said that the matter was left to the Jury. It cannot be supposed that their Lordships of the Privy Council had not in mind the statutory provision in Section 106 of the Transfer of Property Act when they laid down the rule that "in the case of joint tenants each is intended to be bound, and it has long ago been decided that service of a notice to quit upon one joint tenant is prima facie evidence that it has reached the other joint tenants". Indeed they were specifically considering Section 108 of the Transfer of Property Act and the use of the words "each is intended to be bound" was with reference to the language of the section. The relevant part of Section 106 is in the following words:—

"Every notice under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party or to one of his family or servants, at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

14. One requirement under the above quoted provision is about the form of the notice, namely, that it should be in writing and signed by or on behalf of the person giving it. The other is about service of the notice.

15. It has not been laid down in the section that the notice should be addressed to all co-tenants or to every one of them. In regard to service of notice, it is required that it be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party or to one of his family or servants at his residence, or, if such tender or delivery is not practicable affixed to a conspicuous part of the property. If the words "party who is intended to be bound by it" are interpreted to mean each one of the co-tenants where the tenancy is held by more than one person jointly, then notice must be served on each one of the co-tenants and that would be in direct conflict with the rule

about which there is no controversy that service of a notice on one of the co-tenants would be sufficient service in respect of all (provided it is addressed to all). The fact of its being addressed to all will be immaterial if the notice must be served on each co-tenant individually in order that all of them may be bound. The rule of sufficiency of service of notice on one co-tenant in the case of co-tenancy can be in conformity with the requirement of the section only if the co-tenants are taken to constitute one "party" so that service on any one only of them will be service on the party intended to be bound. It must be in this background that it was laid down by the Privy Council in Harihar Banerjee's case, AIR 1918 PC 102 that "well in the case of joint tenants, each is intended to be bound"; in other words, if a notice is given to one of the joint tenants, it means that the joint tenants as a whole are intended to be bound by the notice. It is an incident of 'tenancy' that it is one and even though more than one person may hold it they hold it together as one. It is well recognized that a landlord cannot terminate the tenancy piecemeal, nor can some out of the several co-tenants terminate it for themselves only. Co-tenants who come to hold a tenancy by inheritance may, for the purposes of succession have an estate as "tenants in common" and not "joint tenants", but the special incidents attaching to a tenancy will not be changed upon the tenancy passing to more than one person by inheritance. In so far as their relationship with the landlord is concerned, they hold the tenancy jointly and for the landlord they constitute one unit. So even if a notice is addressed to one or some of the co-tenants, it must be effective as against all, the only limitation to this being that there is nothing to show that the tenancy is intended to be terminated piecemeal and it is clear that the intention is to terminate the tenancy as a whole. It appears that it is by way of this safeguard that while laying down the rule in the several decisions mentioned above that service of notice on one co-tenant will be sufficient service of notice for terminating the tenancy that the qualification has been added that the notice should be addressed to all the co-tenants. There does not appear to be any sanctity otherwise behind this qualification. In this connection the following passages from the report of AIR 1964 Bom 96 which, if I may say so with respect, contain also my line of thinking, may be usefully reproduced:—

"(11) In this connection it is contended by the learned counsel for the appellants that the provisions of Section 11 of Hindu Succession Act in terms lay down that property acquired by heirs who inherit by intestate succession is acquired

by them as tenants-in-common and not as joint tenants. In this context reference is also invited to paragraph 31 of Mulla's Hindu Law, page 99, 12th edition. In my judgment, the phrase "tenants-in-common" or "joint tenants" used in Section 19 of the Hindu Succession Act or in other texts, when considering the rights of owners of property inter se cannot be confused with the right to hold land as joint tenant in the sense as joint lessees or co-lessees or co-tenants of property such as the subject-matter of the suit. The word "tenant" in Section 19 is not used in the sense of lessees. That word is used in the sense of owners of property whether they are joint owners of property or holding in defined shares. It is an incident of ownership that has been referred to in Section 19 and that incident in the case of persons holding as tenants-in-common is that the devolution in the case of each of these tenants-in-common would be according to the personal law while in the case of persons holding as joint tenants it will be by survivorship. The expression is not germane in deciding whether the leasehold is held as joint tenants. That expression may have led to some confusion and it is preferable to refer to rights of more than one person holding under the leasehold vis-a-vis the landlord as co-tenants or co-lessees. If understood in that sense, there will be no difficulty in holding that all the co-lessees or co-tenants held as joint tenants in the sense that they have a single tenancy relationship with the landlord and they are not different tenants vis-a-vis the landlord.

(12) If this is the correct interpretation of the position of persons even succeeding under Section 19 to a leasehold interest of the deceased Hindu, there would be no difficulty in holding that notice to one of the joint tenants in this case should be held to be a valid and good notice provided notice is intended to be notice to all these joint tenants. It is in that sense that the decision of the Privy Council in ILR 46 Cal 458=(AIR 1918 PC 102) has been applied in several Courts."

16. In contrast, the view taken in the Kerala case, on the one hand, that the expression "party intended to be bound by it" means in the case of co-tenants, each co-tenant individually and, on the other hand, that notice can be served on one of them to bind all, would appear to be self-contradictory and also in conflict with the provisions of Section 106 about service of notice with the said interpretation of that expression.

17. I accordingly hold that both on the authority of Kanji Manji's case, AIR 1963 SC 468 aforesaid and otherwise (i.e., if it applies only to joint tenants with right of survivorship) the notice served on the appellant was sufficient to

terminate the tenancy since on the facts of this case, it must be inferred that by the notice it was intended to terminate the tenancy as a whole and not in part.

18. It may be noted that the appellant was for all practical purposes acting as the tenant. She admitted the averment in the plaint that the house was in her tenancy. It was for the first time in her written statement that she referred to the existence of her sons and daughters. The plea of those sons and daughters being also tenants was raised by an amendment of the written statement. She has deposited rent under Sec. 7-C of the U.P. (Temporary) Control of Rent and Eviction Act describing herself as the tenant. The notice required the vacation of the house which meant house as a whole and not in part. In the permission proceedings also personal necessity for the house as a whole and not in part was disclosed.

19. As has already been stated, It was conceded in the first appellate Court that the permission was not invalid on the ground of having been obtained against the appellant alone. Though no grounds were put forward in the courts below for the permission being invalid otherwise or without jurisdiction. It has been argued in this Court that the permission is invalid and without jurisdiction for want of considering the needs of the tenant as well as required according to the Full Bench case of this Court, Prem Singh v. B. D. Sanwal, 1968 All WR (HC) 572—(AIR 1969 All 474) (FB). It is however incorrect to suggest that in the case under consideration the District Magistrate did not consider whatever case was put up by the appellant. On her behalf it was only said that she was a poor lady and had no source of income to make her both ends meet during these hard days. That did not mean that she required the house in dispute in particular for her residence. She was only interested in refuting the case of personal needs advanced by the respondent before the District Magistrate. Accordingly the plea of invalidity on the new ground taken in this Court has also no substance.

20. In the result the appeal must fail. It is dismissed with costs and the order of stay against execution is vacated.

Appeal dismissed.

AIR 1970 ALLAHABAD 396 (V 57 C 62)

SATISH CHANDRA, J.

M/s. Babu Ram Jagannath, Petitioner v. The District Magistrate, Meerut and others, Respondents.

Civil Misc. Writ No. 647 of 1968, D/- 9-4-1969.

IM/LM/E238/69/NNH/M

Constitution of India, Art. 14 — Essential Commodities Act (1955), Ss. 6-A and 6-B — Provisions not unconstitutional on ground of discrimination — Scheme of the Act does not contemplate any discrimination between dealers contravening order under S. 3.

In support of the challenge to the constitutional validity of Ss. 6-A and 6-B, Essential Commodities Act, under Art. 14 of the Constitution it was urged that it was open to the prosecuting agency to proceed against a dealer under S. 6-A and obtain an order of confiscation of goods and then to quietly sleep over the matter and refrain from prosecuting him with a view to get him punished under S. 7. It was urged that this device could be adopted by the authorities in case they did not wish to run the risk of the order of confiscation passed under S. 6-A being set at naught by the Court under S. 7. The leaving of this discretion with the executive authorities, according to the contention, imported the vice of discrimination into the provisions of the Act, because it enabled the executive to pick and choose dealers who might or might not be prosecuted under Section 7. The Act did not lay down any principles or standards to guide the executive in deciding when to prosecute the defaulting dealers and when not to do so.

Held that it could not be said that the scheme of the Act contemplated any discrimination between various dealers who might have contravened an order under Section 3. Ss. 6-A and 6-B were, therefore, not unconstitutional. (Para 8)

S. 7 cannot be read as conferring any discretion on the authorities to prosecute or not to prosecute any defaulting dealer. The obvious intention of the legislature was that each and every person contravening an order under Section 3 was liable to be prosecuted and punished. (Para 6)

The Legislature clearly contemplated that every dealer who contravened an order under Section 3 would be similarly treated, and prosecuted and punished.

(Para 7)

S. 6-A has not been enacted with a view to provide an alternative to Sec. 7. This provision is not in substitution of S. 7. It is provisional. It provides a measure of an interim relief to the commodities in respect of which a contravention has taken place. AIR 1969 All 159. Ref. (Para 6)

Cases Referred: Chronological Paras

(1969) AIR 1969 All 159 (V 56) —

1968 All LJ 179, Kishori Lal Bihari v. Addl. Collector, Kanpur & S. C. Khare, for Petitioner; Standing Counsel, for Opposite Party.

ORDER:— The petitioner is a partnership firm. It carries on the business of

purchase and sale of foodgrains under licences granted to it under the U. P. Foodgrains Dealers Licensing Order, 1964. In the evening of 12th August, 1967, the Senior Marketing Inspector, Hapur, raided the petitioner's business premises and seized a truck-load of Matar Dal (100 bags), on the belief that this commodity was being transferred to M/s. Prayag Das Ved Prakash of Ghaziabad. On 25th August, 1967, the Collector, Meerut, issued a notice requiring the petitioner to show cause why the seized goods be not confiscated under S. 6-A, Essential Commodities Act, for contravention of conditions 9 and 9-A of the aforesaid Licensing Order. The petitioner filed a representation, and contended that the goods were not being transferred as a result of any sale to any other wholesaler. So, there was no contravention of the provisions of conditions 9 or 9-A. The District Magistrate did not accept the petitioner's contention, and, by an order dated 16th October, 1967, directed that 98 quintals 40 kgs. and 700 grams of matar dal which was seized as aforesaid, be confiscated to the State. He came to the finding that the petitioner had entered into a transaction of transfer with a firm at Ghaziabad, and the said quantity of the matar dal was being transported in pursuance thereof. Aggrieved, the petitioner filed an appeal under Section 6-C of the Essential Commodities Act. The Commissioner affirmed the findings and dismissed the appeal on 28-12-1967.

2. The order of confiscation is challenged in the present writ petition on two grounds. It was submitted that the petitioner did not contravene condition 9 of the aforesaid Licensing Order. Under that condition, a licensee is prohibited from selling foodgrains to a wholesaler in another Mandi or town either directly or through a licensee in form 'F'. It was urged that there was no evidence of any such sale. The finding was, therefore, without any evidence. I am not impressed by this submission. The Collector as well as the Commissioner have relied upon admitted facts and circumstances of the case. They have held that it was admitted that the truck, which was loaded with the seized commodity was going to Ghaziabad. There was a false number plate beneath the driver's seat. Certain papers were found at the time of seizure which indicated that the consignment was required to be delivered to a firm at Ghaziabad. That firm was a wholesale dealer. The petitioner did not offer any adequate explanation. From all these facts, the authorities could legitimately feel satisfied that the goods were being transported in pursuance of a transaction of transfer. On that finding, the order of confiscation was within the purview of

Section 6-A of the Essential Commodities Act.

3. The learned counsel for the petitioner then challenged the constitutional validity of Sections 6-A and 6-B of the Essential Commodities Act. Sections 6-A and 6-B were added to the Essential Commodities Act by the Essential Commodities (Amendment) Act No. XXV of 1966. Section 6-A provides that where any foodgrains etc., are seized in pursuance of an order made under Section 3 in relation thereto, they may be produced, without any reasonable delay, before the Collector of the District. The Collector, on being satisfied that there has been a contravention of an order under Section 3, may order confiscation of the foodgrains etc. Section 6-B requires that a notice to show cause must be given to the owner of the seized article and he must be given a reasonable opportunity of being heard, before the order of confiscation is passed. Then under Section 6-C, an appeal lies against the order passed under Sec. 6-A. Section 6-D provides that the award of confiscation under this Act by the Collector shall not prevent the infliction of any punishment to which the person affected is liable under this Act.

4. Under Section 7 of the Act, a person, who contravenes any order made under Section 3, is punishable with the penalties mentioned in its various clauses. Under Clause (b), the Court has been empowered to forfeit any property like foodgrains etc., in respect of which an order under Section 3 has been contravened. The proviso confers a discretion on the Court, for reasons to be recorded, to refrain from passing an order of forfeiture. It is thus clear that a person, who has contravened any order under Section 3, is liable to punishment under Section 7. He is liable under Section 6-A to the confiscation of the involved goods. An order of confiscation can be passed under Section 6-A provided the Collector is satisfied that there has been a contravention of an order under Section 3. The question of mens rea is equally relevant to the satisfaction of the Collector under Section 6-A. In *Kishori Lal Bihari v. Addl. Collector*, 1968 All LJ 175=(AIR 1969 All 159), I held that for satisfying himself that the provisions of an order under Section 3 have been contravened, the Collector will have to take into consideration the question whether there was an intentional contravention of the order. It was emphasised in that case that an order of confiscation under Section 6-A was provisional and subject to the orders that may be passed by the Court under Section 7. If in a given case, the Collector orders confiscation of goods, it will be open to the Court to pass an order to the contrary, if, for reasons to be recorded, it thinks it fit to do so.

5. The learned counsel for the petitioner urged that it was open to the prosecuting agency to proceed against a dealer under Section 6-A and obtain an order of confiscation of goods and then to quietly sleep over the matter and refrain from prosecuting him with a view to get him punished under Section 7. It was urged that this device can be adopted by the authorities in case they do not wish to run the risk of the order of confiscation passed under Section 6-A being set at naught by the Court under Section 7. The leaving of this discretion with the executive authorities imports the vice of discrimination into the provisions of the Act, because it enables the executive to pick and choose dealers who may or may not be prosecuted under Section 7. The Act does not lay down any principles or standards to guide the executive in deciding when to prosecute the defaulting dealers and when not to do so.

6. In my opinion, the question of law does not arise because the construction placed by the learned counsel for the petitioner on the various provisions of the Act does not appeal to me. Section 7 says that if a person contravenes any order made under Section 3, he shall be punishable according to its various clauses. It does not, however, say that if any person contravenes any order made under Section 3, he will invariably be prosecuted; but that is implicit in it. It provides for punishment of any person who contravenes an order under Sec. 3. I am unable to read this provision as conferring any discretion on the authorities to prosecute or not to prosecute any defaulting dealer. The obvious intention of the legislature was that each and every person contravening an order under Section 3 was liable to be prosecuted and punished.

7. It is true that the Act does not provide for any penalty upon the executive authorities for failure to prosecute a dealer for a contravention of an order under Section 3. Lack of such a provision by itself would not suggest that the Legislature conferred a discretion on the authorities not to initiate a prosecution if the facts justify it. The Legislature, in my opinion, clearly contemplated that every dealer who contravenes an order under Section 3 will be similarly treated, and prosecuted and punished.

8. Section 6-A has not been enacted with a view to provide an alternative to Sec. 7. The obvious intention behind Section 6-A appears to be to make a provision for the speedy and effective control and disposal of the seized commodities like foodgrains, edible oil-seeds, or edible oils, etc., which are perishable in nature. The Legislature well thought that an order of confiscation or forfeiture

may be passed initially, and may not wait till the final disposal of the prosecution. To that end, power has been conferred on the Collector to pass suitable orders under Section 6-A. This provision is not in substitution of Section 7. It is provisional. It provides a measure of an interim relief to the commodities in respect of which a contravention has taken place. It cannot, therefore, be said that the scheme of the Act contemplates any discrimination between various dealers who may have contravened an order under Section 3. These provisions are, therefore, not unconstitutional.

9. The petition fails, and is accordingly dismissed with costs.

Petition dismissed.

AIR 1970 ALLAHABAD 398 (V 57 C 63)
W. BROOME AND G. C. MATHUR, JJ.

Lala Ram and another, Applicants v. Bhajani, Opposite Party.

Civil Revn. No. 799 of 1965, D/- 9-5-1969, from order and judgment of Dist. J., Mathura, D/- 20-2-1965.

Civil P. C. (1908), O. 21, R. 84 — Execution — Date of sale — Date of actual sale by officer conducting sale and date of acceptance of bid by Court itself when relevant. AIR 1931 Cal 583 & AIR 1940 Oudh 261 & AIR 1935 Oudh 131, Dissented.

In three cases, the date of the sale will be the date of acceptance or approval of the bid by the Court, namely,

(i) When there is a practice or a rule to this effect;

(ii) When the Court has reserved to itself the power to accept the bid and to declare the purchaser; and

(iii) When the officer conducting the sale does not, in fact, conclude the sale by accepting the highest bid but refers the matter to the Court.

In other cases, the date of sale will be the date on which the officer conducting the sale accepts the highest bid, declares the purchaser and the purchaser deposits 25 per cent of the purchase price. In either case, application under O. 21, R. 84 filed beyond 30 days of the "date of sale" would be barred. AIR 1931 Cal 583 & AIR 1940 Oudh 261 & AIR 1935 Oudh 131, Dissented; AIR 1932 Rang 17, Full; AIR 1923 Pat 525 & AIR 1925 Mad 318 & AIR 1956 Madh Bha 30, Disting.

(Para 15)
Cases Referred: Chronological Paras
(1963) AIR 1963 Mys 210 (V 50) =
(1963) 1 Mys LJ 61, Tippih Man-
jappa v. Huvinakuli Ramiah 14
(1956) AIR 1956 Madh Bha 30 (V 43)
= Madh Bha LJ 1955 (HCR) 293,
Ram Krishna v. Dulichand 5

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- (1953) AIR 1953 Mad 762 (V 40)=
1952-2 Mad LJ 46, Poongavana
Naicker v. Muthurama Naidu 5
(1950) AIR 1950 All 450 (V 37)=
1950 All LJ 653, Ebadullah Khan
v. Municipal Board, Allahabad 14
(1940) AIR 1940 Oudh 261 (V 27)=
1940 OWN 381, Hadi Husain v.
Zainul Ibad 6
(1936) AIR 1936 Lah 555 (V 23)=
166 Ind Cas 603, Hoshnak Ram
v. Punjab National Bank, Ltd. 12
(1935) AIR 1935 Oudh 131 (V 22)=
ILR 10 Luck 557, Hari Shankar v.
Amina Bibi 6
(1932) AIR 1932 Rang 17 (V 19)=
ILR 9 Rang 608, Mahomed Yacooob
v. P. L. R. M. Firm 13
(1931) AIR 1931 Cal 583 (V 18)=
ILR 58 Cal 788, Surendra Mohan
v. Manmathanath Banerji 4
(1931) AIR 1931 Lah 78 (V 18)=
131 Ind Cas 227, Nur Din v.
Bulaqi Mal 12
(1925) AIR 1925 Mad 318 (V 12)=
82 Ind Cas 793, Ratnasami Pillai
v. Sabapathy Pillai 4
(1923) AIR 1923 Pat 525 (V 10)=
ILR 2 Pat 548, Jaibhadar Jha v.
Matukdari Jha 3, 4
(1913) ILR 35 All 65=10 All LJ 475,
Munshi Lal v. Ram Narain 11

B. L. Jaiswal, for Applicants; Radha
Krishna Rakhal Das, for Opposite Party.

G. C. MATHUR, J.:— Lala Ram applicant No. 1 obtained a simple money decree against Bhajani, opposite party. In execution of the decree, some Bhumidhari land of the judgment-debtor was attached. On May 25, 1963, the Munsif (executing Court) ordered the issue of the sale proclamation, fixing September 14, 1963, for the sale. On May 27, 1963, the warrant of sale was issued, directing the Amin to sell the attached property by auction. The Amin was directed to return the warrant by September 16, 1963, with an endorsement certifying the manner in which it had been executed. The Amin held the auction on September 14, 1963. The highest bid of Girraj applicant No. 2 of Rs. 1,200/- was accepted by the Amin and, on the same date, Girraj deposited with the Amin a sum of Rs. 300/-, being 25 per cent of the purchase money. The Amin then returned the warrant together with his report to the Munsif and on September 16, 1963, the Munsif passed an order "bid is approved". On October 15, 1963, the judgment-debtor filed an application under Order XXI, Rule 90 of the Code of Civil Procedure to set aside the sale. On November 6, 1963, the Munsif dismissed the application as time-barred, holding that it had been filed beyond the period of limitation of 30 days from September 14, 1963, the date of the sale. Two days

later, on November 8, 1963, the Munsif passed the following order:—

"Sale dated 14-9-1963 is confirmed. Execution is struck off in full satisfaction."

Against the order dismissing the application for setting aside the sale, the judgment-debtor filed an appeal. The District Judge, who heard the appeal, was of the view that the date of the sale was September 16, 1963, the date on which the Munsif approved the bid and that the application for setting aside the sale was filed within 30 days of that date. He accordingly allowed the appeal and directed the Munsif to entertain the objection and to decide it on merits. Against this order, the decree-holders and the auction purchaser have come to this Court in revision.

2. The real question, which arises for consideration in this case, is whether the date of the sale is September 14, 1963, when the Amin auctioned the attached property, or September 16, 1963, when the Munsif approved the bid. Under Article 166 of the Limitation Act of 1908, limitation for making an application under O. XXI, Rule 90 is 30 days from "the date of the sale". Admittedly, the application filed by the judgment-debtor is beyond 30 days from September 14, 1963, but within 30 days from September 16, 1963. In allowing the appeal, the District Judge has observed:—

"The Amin has not accepted the bid but he has mentioned in the bid list that a certain bid was the highest bid and then submitted the papers to the learned Munsif who formally accepted the bid on 16th Sept. It cannot, therefore, be said that the Amin had accepted the bid and the order of the learned Munsif is redundant."

This is incorrect and is not borne out by the record. The record clearly shows that the Amin had accepted the highest bid of Girraj. The warrant of sale issued to the Amin directed him to sell the attached property by auction and to report compliance by September 16, 1963. The sale proclamation also states that the attached property will be sold by the Amin. On the Fard Neelam, the Amin has noted down all bids received by him, including the last bid of Rs. 1,200/- by Girraj. After the bids, the Amin has stated that no higher bid than that of Girraj was forthcoming and, therefore, the auction was concluded in favour of Girraj for Rs. 1,200/-. On the back of the warrant of sale, the Amin has written out his compliance report. In this report also, he has stated that no higher bid than that of Girraj for Rs. 1,200/- was forthcoming, that the price offered appeared to be adequate and, therefore, the sale was concluded in favour of Girraj for

Rs. 1,200/-. He has further stated that Girraj had deposited Rs. 300/- in cash towards one-fourth of the sale price and that he had been ordered to deposit the remaining three-fourths of the price, i.e., Rs. 900/- on or before September 29, 1963. From these facts it is abundantly clear that the Amin had accepted the highest bid of Girraj and had taken the deposit of Rs. 300/- on account of 25 per cent of the sale price. These reports do not bear out the observation of the District Judge that the Amin had not accepted the bid of Girraj and had merely forwarded the bids for acceptance to the Munsif.

3. Learned counsel for the judgment-debtor has contended that, as a matter of law, the sale was completed only when the Munsif approved the bid and, therefore, it is the date of the approval of the bid by the Munsif which is the date of the sale. In support of his contention, he has placed reliance upon several reported decisions. In all these cases, Order XXI, Rule 84 C.P.C. came up for consideration. This rule reads:

"84(1) — On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold."

In *Jaibhadar Jha v. Matukdari Jha*, AIR 1923 Pat 525, it was held that it is only when the presiding officer closes the bidding and formally accepts the bid and declares the purchaser that the sale is complete and that mere closing of the bid does not complete the sale. It appears from the judgment of this case that the sale was conducted by the Nazir and, after recording the bids, he sent the bid-sheet, in accordance with the practice, to the Munsif who wrote "close" against the last offer and signed the order. Thereafter the auction purchaser deposited one-fourth of the sale price. It is thus clear that the Nazir had not accepted the highest bid and had merely forwarded the bid list for acceptance to the Munsif. In these circumstances, the sale was complete only when the Munsif accepted the bid and declared the purchaser.

4. In *Ratnasami Pillai v. Sabapathy Pillai*, AIR 1925 Mad 318, it was held that, when a court sale takes place, the sale in favour of a particular individual is not complete unless and until it receives the confirmation of the Court and that it is the acceptance of the Court that constitutes the contract. In this case, the auction was held by the Receiver and Ratnasami Pillai was the highest bidder. When the bids were taken before the Court for confirmation, it refused to accept Ratna-

sami Pillai's bid and directed a re-sale. It appears that, in this case, the Receiver had not accepted the highest bid of Ratnasami Pillai. The contention before the High Court was that Ratnasami Pillai having made the highest bid, there was a concluded contract between him and the receiver. It is this contention which was repelled. Therefore this case also does not lay down any general proposition of law which can be applied to the present case.

In *Surendra Mohan v. Manmathanath Banerji*, AIR 1931 Cal 583, the Calcutta High Court, following the decision of the Patna High Court in AIR 1923 Pat 525 (supra), observed:

"Though the sale may be made by an Officer of the Court or by any person appointed in this behalf, the sale is a sale by the Court; the officer of the Court, for instance the nazir or any person empowered by the Court, is simply a ministerial officer appointed to carry out certain duties imposed upon him by the Court. After the sale is held and completed, so far as the bidding is concerned, the matter must be placed before the Court and, under O. 21, R. 84, on every sale the person declared to be the purchaser shall pay, after such declaration, a deposit of 25 per cent on the amount of his purchase money to the officer conducting the sale. Accordingly, before such declaration is made, the sale does not become complete and effective and the bidder does not acquire any interest in the property."

With great respect, we are unable to agree with the observation that, after the bidding is completed, the sale officer must in every case place the matter before the Court and that it is for the Court to accept the bid and to declare the purchaser. The relevant provisions of Order XXI do not support this conclusion. In this case also, it appears that the highest bid had not been accepted by the Nazir and that he had merely forwarded the bids to the Court. It does not appear from the judgment, but this may have been the prevailing practice in Calcutta or it may have been provided for in some rules made by the High Court.

5. In *Poongavana Naicker v. Muthurama Naidu*, AIR 1953 Mad 762, a learned Single Judge of the Madras High Court has followed the above mentioned three decisions and held that the sale becomes complete only when the Court accepts the final bid. This case does not carry us any further. It, however, appears from the judgment that, under the civil rules of practice in force in Madras, the Nazir, who conducts the sale, is required to put up the matter before the Court and it is then left to the Court to accept the auction of the Nazir or to reject it.

residence within regions of the State tending to disharmony and disunity within the State appear to have been far from the contemplation of the Constitution-makers. Even the concession enabling Parliament to make a law prescribing a requirement as to residence within a State for employment under the Government of the State is not made in any narrow spirit of parochialism, but in the larger interests of efficiency of Public Service, to prevent "people who are flying from one province to another from one State to another, as mere birds of passage without any roots, without any connection with that particular province, just to come, apply for posts and, so to say, take the plums and walk away". A reference to the proceedings of the Constituent Assembly makes the position very clear. As pointed out by their Lordships of the Supreme Court in *A. K. Gopalan v. State*, 1950 SCR 88 at p. 110 = (AIR 1950 SC 27 at p. 38) and other subsequent cases it is permissible to refer to the proceedings of the Constituent Assembly to resolve latent ambiguities.

In the draft Constitution which was presented to the Constituent Assembly Article 10 dealt with 'equality of opportunity in matters of public employment. Clauses (1) and (2) were as follows:—

"10. Equality of opportunity in matters of public employment:—

(1) There shall be equality of opportunity for all citizens in matters of employment under the State.

(2) No citizen shall, on grounds only of religion race, caste, sex, descent, place of birth, or any of them, be ineligible for any office under the State".

13. Clause (2) it may be noticed, did not refer to residence at all and while Article 10 contained clauses corresponding to Clauses 4 and 5 of Article 16, there was no clause corresponding to the present clause (3) of Article 16. Sri Jaspal Roy Kapoor and Sri K. M. Munshi moved an amendment that the word "residence" may be inserted after the word 'birth' in Clause (2) of the article. Sri Jaspal Roy Kapoor stated in his speech moving the amendment.

"Sir, there being only one citizenship for the whole country, it should carry with it the unfettered right and privilege of employment in any part and in every nook and corner of the country Every citizen of the country, Sir, I think, must be made to feel that he is a citizen of the country as a whole and not of any particular province where he resides. He must feel that wheresoever he goes in the country, he shall have the same rights and privileges in the matter of employment as he has in the particular part of the country where he resides. Unfortunately, Sir for some time past, we

have been observing that provincialism has been growing in this country. Every now and then we hear the cry. "Bengal for Bengalis", "Madras for Madrasis" and so on and so forth. This cry, Sir, is not in the interests of the unity of the country, or in the interests of the solidarity of the country. We find that some provincial governments have laid it down as a rule that for employment in the province the person concerned should have been living in the province for many years I submit, Sir, that this is a tendency which must be checked with a strong hand. I, therefore, submit that in the matter of employment there should be absolutely no restriction whatsoever unless it is necessary in the interests of the efficiency of services. The unity of the country must be preserved at all costs; the solidarity of the country must be preserved at all costs. We must do every thing in our power to preserve the unity of the country, and the amendment that I have moved aims at this and is a step in this direction."

14. The amendment moved by Sri Jaspal Roy Kapoor was accepted by Dr. B. R. Ambedkar and passed by the Constituent Assembly.

15. I stated earlier that in the Draft Constitution there was no clause corresponding to the clause (3) of Art. 16. Sri Alladi Krishnaswami Ayyar moved an amendment introducing a new clause in Art. 10 of the Draft Constitution and this became Clause (3) of Article 16. In the course of his speech introducing the amendment Sri Krishnaswami Ayyar stated:

"The object of the amendment is clear from the terms and the wording of it. In the first, part of the article, the general rule is laid down that there shall be equal opportunity for all citizens in matters of employment under the State and thereby the universality of Indian citizenship is postulated. In paragraph 2 of article 10, it is expressed in the negative, namely that no citizen shall be ineligible for any office under the State by reason of race, caste, sex, descent, place of birth and so on. The next two clauses are in the nature of exceptions to the fundamental and the general rule that is laid down in the first part of the article. Now what the present amendment provides for is this that in case of appointment under the State for particular reasons, it may be necessary to provide that residence within the State is a necessary qualification for appointment by and within the State. That is the object of this amendment and instead of leaving it to individual States to make any rule they like in regard to residence, it was felt that it would be much better if the Parliament

lays down a general rule applicable to all states alike, especially having regard to the fact that in any matter concerning fundamental rights it must be the Parliament alone that has the power to legislate and not the different Units in India." Dr. B. R. Ambedkar accepting the amendment moved by Sri Krishnaswami Ayyar stated:

"I shall explain the purpose of this amendment. (It is the feeling of many persons in this House that, since we have established a common citizenship throughout India, irrespective of the local jurisdiction of the provinces and the Indian States, it is only a concomitant thing that residence should not be required for holding a particular post in a particular State because, in so far as you make residence a qualification, you are really subtracting from the value of a common citizenship which we have established by this Constitution, or which we propose to establish by this Constitution. Therefore in my judgment, the argument that residence should not be a qualification to hold appointments under the State is a perfectly valid and a perfectly sound argument.) At the same time, it must be realised that you cannot allow people who are flying from one province to another from one State to another as mere birds of passage without any roots without any connection with that particular province, just to come, apply for the posts and so to say, take the plums and walk away. Therefore, some limitation is necessary. It was found, when this matter was investigated, that already today, in very many provinces rules have been framed by the provincial Governments prescribing a certain period of residence as a qualification for a post in that particular province. Therefore the proposal in the amendment that, although as a general rule residence should not be a qualification, yet some exception might be made, is not quite out of the ordinary. We are merely following the practice which has been already established in the various provinces. However, what we found was that while different provinces were laying down a certain period as a qualifying period for posts the periods varied considerably. Some provinces said that a person must be actually domiciled. What that means, one does not know. Others have fixed ten years, some seven years and so on. It was therefore felt that, while it might be desirable to fix a period as a qualifying test, that qualifying test should be uniform throughout India. Consequently, if that object is to be achieved, viz. that the qualifying residential period should be uniform, that object can be achieved only by giving the power to Parliament and not giving to the Local units, whether provinces or States. That is the underlying purpose of

this amendment putting down residence as a qualification."

16. Thus it is clear from the debates of the Constituent Assembly that Art. 16 (3) was not introduced to promote any spirit of narrow provincialism; far from that it was introduced to promote efficiency of service without sacrificing the principle of equality of opportunity in the matter of public employment. It was introduced to secure uniformity. The law to be made by Parliament providing for requirement as to residence was to be uniform and was not to be designed to prevent persons of one State seeking employment under the Government of other States. The law was only to provide for some qualification regarding residence in regard to some classes of employment so as to promote efficiency of service in connection with that class of employment. If I may say so the law to be made was to attract rather than to prevent, it was to invite officials to develop attachment to the places where they worked rather than to force them to go away. The law was certainly not meant to prescribe requirements as to residence within parts of a State, so as to prohibit residents of other areas of the State from seeking employment.

17. Article 16 (3) refers to employment under the Government of a State. 'State' of course in the context of the Article can only refer to the States i.e., the territories mentioned as comprising the States in the First Schedule to the Constitution. The law to be made by Parliament in pursuance of Article 16 (3) must, therefore, be in regard to employment under Government of the State. The class or classes of employment or appointment to an office under the Government of a State must necessarily refer to class or classes of employment or appointments to offices under the Government of the State anywhere within the territory of a State. The law cannot confine itself to posts within a particular area of a State. Similarly the requirement as to residence within the State can only mean a requirement as to residence anywhere within the State and not in a particular region of the State. If, classes of posts throughout the State are to be preserved for persons possessing certain residential qualification it would be unreasonable to think that the Constitution makers contemplated preservation of such State-wide posts for residents of regions within the State.

18. It is urged that State must include an area or a region of the State even as a whole must include a part. Sri Jeevan Reddy invites my attention to the definition of 'State' in Article 12 of the Constitution and to the power of Parliament under Article 245 to make laws for the

whole or any part of the territory of India. Art. 12 states:

"In this part, unless the context otherwise requires, 'the State' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

The Article itself contemplates that the word 'State' may have different meanings in different contexts and it is clear in the context of Article 16 that there can only be one meaning that can be given to the word 'State' occurring in that Article. The power of Parliament under Art. 245 to make laws for the whole or part of the territory of India has nothing to do with the power under Article 16 (3).

19. It is also urged that Article 16 (3) is intended to protect the residents of a backward State or a backward region within a State. I have already referred to the debates of the Constituent Assembly which clearly show that it was not meant to be such. A comparison of clause (3) of Art. 16 with clause (4) of Art. 16 clearly shows that the 3rd clause of Art. 16 was never meant to safeguard alleged interests of residents of backward States or regions. If that was the object nothing would have been easier than to model clause (3) on the same lines as clause 4. The concept of a backward State or backward region and the idea that an exception should be made in regard to such areas in the matter of enforcement of fundamental rights is wholly absent in the Constitution. Even if it was designed to protect interests of the residents of a backward State I am of the view that a further dissection of the State into regions is wholly unjustified by Article 16 (3).

20. The learned Government Pleader urges that a geographical classification of a State into regions on the basis of historical considerations has been upheld by the Supreme Court in some cases. He therefore contends that the division of the State of Andhra Pradesh into the Telangana and non-Telangana areas is an eminently reasonable classification in the context of the historical developments which led to the disintegration of the erstwhile Hyderabad State and the formation of the State of Andhra Pradesh in 1956. But no question of any reasonable classification arises at all. Considerations of reasonable classification which may be relevant in deciding questions arising under Article 14 are entirely irrelevant in deciding questions arising under Article 16 (3).

21. At this juncture, I may point out that at the time of reorganisation of

States in 1956, suitable textual amendments had to be made to various articles of the Constitution including Article 16 (3) but it was not thought fit to amend the Constitution to provide any safeguards in the matter of Public employment to persons belonging to transferred territories. The State Reorganisation Act also contains no such provisions. I am, therefore convinced that Article 16 (3) does not permit the division, by parliamentary legislation, of a State into regions for the purpose of employment under the Government of a State and the consequent mutilation of the unity of the State and the unity of the Nation, solemnly desired in the preamble to the Constitution. In my view, Section 3 of the Public Employment (Requirement as to Residence) Act is ultra vires the power given to Parliament under Article 16 (3) of the Constitution and is opposed to the fundamental rights guaranteed by Article 16 (1) and (2) of the Constitution because Sec. 3 prescribes as a condition of employment residence within a region of the State, namely the Telangana Region. The rules made under Section 3 follow suit. I have taken into consideration the fact that the Act has remained unchallengeable for ten years, but I am afraid weight of years does no weight to the validity of an enactment encroaching upon fundamental rights.

22. Sri Chowdary goes further and urges that any law made by Parliament in pursuance of Article 16 (3) must be a law applicable to all the States of the Union uniformly. He says that Parliament cannot make a law under Art. 16 (3) for one State and not make a law for other States or make different laws for different States prescribing different requirements as to residence prior to employment. According to him, under the Constitution there is but one common citizenship for all persons entitled to be citizens, carrying with it the same privileges and immunities. The extent and contents of the rights flowing from citizenship and residing in a citizen are the same. Any subtraction from the value of the common citizenship must be common to all citizens. Therefore, all disabilities, like privileges and immunities, must be common to all citizens. Otherwise the value of the citizenship will vary from citizen to citizen or from a class of citizens to class of citizens, leading to the establishment of different grades of citizens. This, Mr. Chowdary says was pointed out by Dr. Ambedkar in the speech already extracted by me where it is said:

"It is the feeling of many persons in this House that, since we have established a common citizenship throughout India, irrespective of the local jurisdiction of the provinces and the Indian

States, it is only a concomitant thing that residence should not be required for holding a particular post in a particular State because, in so far as you make residence a qualification, you are really subtracting from the value of a common citizenship which we have established by the Constitution or which we propose to establish by this Constitution."

23. Dr. Alladi Krishnaswami Ayyar, 'a proud parent' of the Constitution as he has been described, in the Srinivasa Sastri Memorial Lectures delivered by him stated:

"The Constitution adopts the principles of single citizenship and not a dual citizenship as in most Federations. It does not countenance degree of citizenship and conceives of equal and uniform rights to all citizens. There is no office or position which a citizen cannot hold. There are critics who take the view that universal citizenship and suffrage based upon a philosophy of equality is not a desirable end in itself. But the Indian Constitution has adopted a different principle believing in the rights, of the common man as the basis of democratic rule and in the dignity of human personality".

24. I must confess that I am greatly attracted by the argument, as indeed all passionate lovers of freedom and equality are bound to be attracted by such arguments. But I must view it as a lawyer and a Judge, and doing so, I cannot say I am altogether convinced that the language of Art. 16 (3) prohibits Parliament from prescribing different requirements as to residence for employment under Governments of different States, though the achievement of uniformity is clearly one of the objects of Article 16 (3). It is however, not necessary for me to express any final opinion in view of what I have already said about the validity of the Act.

25. The next contention of Sri Venkatramanayya and Sri Chowdary is that the delegation made by Section 3 of the Public Employment Act is far beyond the limits of permissible delegation and the provision is, therefore, ultra vires. Sri Chowdary urges that it is not a mere question of excessive delegation, but a question of breach of a constitutional mandate. He says that the prescription of 'any requirements as to residence prior to such employment or appointment' must be by Parliament or not at all. This argument deserves consideration. Articles 14 to 31 (b) deal with various basic rights, the right to equality, the right to freedom, the right against exploitation, the right to freedom of religion, cultural and educational rights and the right to property. All these articles of the Constitution contain various embargoes on action by the State, State be-

ing defined by Article 12 of the Constitution as including Parliament, Legislatures of each of the States, Government of the Union and each of the States, Local authorities etc. Some of these rights also have certain exceptions and these exceptions are mentioned in some of the clauses of the several articles. For example, Clauses (2) and (3) of Article 15, Cls. (3), (4) and (5) of Article 16, Clauses (2) to (6) of Article 19, Clause (7) of Article 22, Clause (2) of Article 23, Clause (2) of Article 24 and Clauses (2) and (3) of Article 28 deal with such exceptions. Except in the case of the exceptions contained in Clause (3) of Article 16 and Clause (7) of Article 22, in the case of all the other exceptions, the law to be made or the action to be taken by the State is defined in Article 12, that is to say, by Parliament, Union Government, Legislature of a State, Government of a State etc. It is only in the case of exceptions contained in Clause (3) of Article 16 and Clause (7) of Article 22 that the Constitution insists that Parliament alone shall make the law dealing with the exceptions contained in those clauses. Surely this is a matter of some significance. It solemnly emphasises the great importance given by the Constitution to the common citizenship concept and effectively prevents State Legislature and State Governments from making laws prescribing requirements as to residence within their States as qualification for appointment in those States. The responsibility for prescribing any requirement as to residence is laid squarely on the shoulders of Parliament. Parliament alone, therefore, can prescribe what is required to be prescribed under Article 16 (3) or not at all. Sri Chowdary invites my attention to the following language occurring in a judgment of Gajendragadkar J., in *M. R. Balaji v. State of Mysore*, AIR 1963 SC 649 at p. 658.

"Then it is urged that even if special provision can be made by the State under article 15 (4), the said provision must be made not by an executive order by legislation. This argument is equally misconceived. Under Article 12, the State includes the Government and the Legislature of each of the States and so, it would be unreasonable to suggest that the State must necessarily mean the Legislature and not the Government. Besides whether the Constitution intended that a certain action should be taken by legislation and not by executive action it has adopted suitable phraseology in that behalf. Article 16 (3) and (5) are illustrations in point. Both the said sub-clauses of Article 16, in terms, refer to the making of the law by the Parliament in respect of the matters covered by them. Similarly, Arts. 341 (2) and 342 (2) expressly refer to a law being made

by Parliament as therein contemplated. Therefore when Article 15 (4) contemplates that the State can make the special provision in question, it is clear that the said provision can be made by an executive order."

26. This passage appears to support the contention of Sri Chowdary. Sri Venkatramanayya urges that the essential legislative functions have been delegated by Section 3 of the Public Employment (Requirement as to Residence) Act. The essential legislative function of Parliament when making a law in pursuance of Art. 16 (3) of the Constitution in regard to a class or classes of employment or appointment to an office and the Government of or any local or other authority within, a State is to 'prescribe' 'any requirement

as to residence within that State prior to such employment or appointment'. By Section 3 of the Public Employment (Requirement as to Residence) Act the Parliament has empowered the Central Government to make rules in regard to appointment to certain services under the Government of Andhra Pradesh to prescribe any requirement as to residence within the Telangana area prior to such appointment. Thus what the Constitution empowers the Parliament to do is precisely—the identity of the language employed may be noted—what Parliament enables the Central Government to do. It appears to my mind to be clear case of delegation of an essential legislative function. If Article 16 (3) and Section 3 of the Act are placed in juxtaposition and read the position becomes very clear.

Article 16 (3)

Section 3

Nothing in this article shall prevent Parliament from making any law;

The Central Government may, by notification in the Official Gazette, make rules;

Prescribing, in regard to a class or, classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union Territory.

Prescribing in regard to appointment to—
(a) any subordinate service post under the State Government of Andhra Pradesh, or (b) any subordinate service or post under the control of the Administrator of Himachal Pradesh, Manipur or Tripura or (c) any service or post under local authority (other than a cantonment board) within the Telangana area of Andhra Pradesh or within the Union Territory of Himachal Pradesh, Manipur or Tripura.

any requirement as to residence.

any requirement as to residence.

Within that State or Union territory.

Within the Telangana area or the said Union Territory as the case may be.

Prior to such employment or appointment.

Prior to such appointment.

27. Reading Section 3 of the Public Employment Act in juxtaposition with Article 16 (3) of the Constitution it is clear that the legislative function of prescribing any requirement as to residence prior to employment has been delegated by Parliament to Central Government. It is Parliament and Parliament alone that can say that a person should be a resident within a certain State for a period of one, two, five or ten years as the case may be prior to his seeking employment under the Government of that State in regard to particular posts. That function cannot be delegated to any other authority since that would amount to an abdication of legislative power. I have no hesitation to hold that S. 3 of the Public Employment (Requirement as to Residence) Act is void, on this ground also.

ing validity of the Act and the Rules, as also an argument urged by Sri Chowdary that his clients are in any case protected by the doctrine of equitable estoppel. I hold that Section 3 of the Public Employment (Requirement as to Residence) Act and the rules made in pursuance of Section 3 are void and cannot be enforced. W. P. No. 2235 of 1968 is dismissed without costs and W. P. No. 3907 of 1968 and 3962 of 1968 are allowed with costs. In W. P. Nos. 3907 and 3962 of 1968 there will be a declaration that Section 3 of the Public Employment (Requirement as to Residence) Act, 1957 as amended by the Act of 1964 and the Andhra Pradesh (Requirement as to Residence) rules are void and inoperative, and directions will issue to the respondents not to give effect to the orders complained of. Advocate's fee Rs. 150/-.

28. In the view that I have taken on the two principal questions argued before me I do not think it is necessary to consider other points urged before me regard-

Order accordingly.

AIR 1970 ANDHRA PRADESH 246
(V 57 C 37)

GOPAL RAO EKBOTE, J.

Tadepalli Ram Rathnam, Appellant v. Kantheti Varadarajulu and others, Respondents.

Second Appeal No. 597 of 1967, D/- 29-8-1969, from decree of Dist. J. Krishna at Machilipatnam, D/- 27-3-1967.

(A) Civil P. C. (1908), Pre. — Interpretation of Statutes — Proviso — Effect of, on enactment.

The office of a proviso is, either to except something from the enacting clause, or to qualify or restrain its generality or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the Legislature to be brought within its purview.

Statutory Construction (Mc Caffrey (1953) para 56 page 115, para 91 page 121). (Craies on Statute Law (6th Ed.) page 217; 1947 Ch. 565 Rel. on.

(Paras 11, 12, 13)

(B) Evidence Act (1872) Ss. 107, 108 — Presumptions about continuance of life and of death — Both presumptions are rebuttable — S. 108 is by way of proviso to S. 107 — Both sections cannot be applied simultaneously to any one case.

Section 107 deals with the presumption of continuance of life and section 108 deals with the presumption of death. Both the presumptions under sections 107 and 108 come into play after a suit is instituted. These sections deal with the procedure to be followed when in such a suit a question is raised before a court as to whether a person is alive or dead.

In either case, the presumption is always rebuttable. The presumption embodied in section 108 is by way of a proviso to section 107. If the two sections are read together it would be evident that it would be erroneous to seek to apply both sections 107 and 108 to one and the same case and at the same time.

(Paras 8, 10, 14)

(C) Evidence Act (1872), S. 108—Presumption under — How can be rebutted — No presumption as to exact time of death. AIR 1965 Mad. 440 & AIR 1967 Orissa 70 & AIR 1968 Raj. 48 & AIR 1963 Mys. 115 Held no longer good law : 1956 Andh WR 137, Doubtful.

Section 108 relates to burden of proof. The presumption of life under section 107 can get rebutted because of the counter presumption available under section 108. Before a presumption under section 108 is raised, it has to be found out by making an appropriate enquiry that the person has not been heard of for seven years by those who ought to have been heard of him. In that enquiry it is permissible

to show that the allegation that the person has not been heard of for over seven years is not true and that there is evidence to show that he is alive or has been heard of within that period. If it is proved that the person has been heard of within seven years, it is obvious then that the presumption of death under section 108 cannot be raised.

The exact time of death is however not a matter of presumption but is a matter of evidence and the onus of proving that fact is not cast under section 108 but is cast under the general principles of burden of proof. That death took place at any particular time whether prior to seven years before the suit was laid or within seven years prior to the said suit lies upon the person who claims a right to the establishment of which the exact date of death of the said person is essential. There is no presumption that death took place at the close of seven years or earliest on the date of the institution of the suit. No provision of law warrants any such presumption. (1870) 5 Ch. A 139; & AIR 1926 P. C. 9 Explained; (1833-37) 5 B & Ad 86 Rel. on; 1956 Andh WR 137 Doubtful, AIR 1965 Mad 440 & AIR 1967 Orissa 70 & AIR 1968 Raj. 48 & AIR 1963 Mys. 115. Held not correctly understood (1870) 5 Ch. A. 139. AIR 1957 Andh. Pra. 380 & AIR 1963 Mad. 385 & AIR 1960 Mad 430. Rel. on; Head note in (1870) 5 Ch. A. 139; Criticised.

(Paras 18, 19, 38, 43, 44)

(D) Civil P. C. (1908), Pre. — Precedents — Conflicting decisions of Benches in one High Court — Subsequent Bench can choose between them to support the view it takes. (1958) 3 All ER 389 (393) Rel. on. 1956 Andh WR 137 & AIR 1957 Andh. Pra. 380 & AIR 1964 Andh Pra 326, Rel.

(Para 42)

(E) Evidence Act (1872), S. 8 — Presumption of death — 'K' not heard of since 1955 — Plaintiff claiming share in 'K's estate as his daughter—Claim based on under Hindu Succession Act (1956)—Plaintiff must prove that K died after the Hindu Succession Act came into force.

(Para 45)

Cases Referred: Chronological Paras

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 N. Rajeswara Rao, for Appellant; G. V. Sastri, for Respondent No. 2.

JUDGMENT: This appeal raises a short but important question and is directed against the judgment of the District Judge, Machilipatnam given on 27th March, 1967.

2. The short facts relevant for the purpose of this appeal are that the plaintiff and defendants 4 to 7 are the daughters of one K. Venkatakrishnaiah, a resident of Vijayawada. Defendants 1 to 3 are his sons and the 8th defendant is his wife. Venkatakrishnaiah was the owner of the immovable property described in the plaint schedule which was his self-

acquired property. Venkatakrishnaiah was seen for the last time in the last week of December, 1955. From then he was not heard of by those who ought to know about him. The plaintiff claimed 1/9th share in the plaint schedule property on the ground that Venkatakrishnaiah would be presumed to have died either at the end of seven years from the date when he was last seen as he was not heard of for over seven years since then or in any case on the date of the suit, and consequently she is entitled to that share under the Hindu Succession Act (XXX of 1956).

3. The suit was resisted by the defendants on the ground that no such presumption can be made and that the plaintiff is not entitled to any share in the property.

4. Both the Courts below have found that the plaintiff has not proved that Venkatakrishnaiah died after the commencement of the Act and as a result dismissed the suit. It is against this concurrent opinion of the two Courts below that the appeal is preferred.

5. The principal contention of Sri N. Rajeswara Rao the learned Advocate for the appellant, is that when it is admitted that K. Venkata Krishnaiah was alive till the end of December 1955, he must be presumed to be living at least for a reasonable period and the burden of proving that he died within seven years after he was last heard of lies on the party who alleges that he so died within the period of the said seven years. He contended that under Sections 107 and 108 of the Indian Evidence Act, it must be presumed that K. Venkata Krishnaiah was alive till the question of his life or death was raised after the expiry of seven years from the date on which he was last heard of. Since the burden was not discharged by the respondents to prove as to on what date within 7 years the deceased died it must be presumed that either K. Venkata Krishnaiah died at the end of seven years from the date when he was last heard of i.e. December 1952 or in any case on the date when the present suit was laid in 1966. In either case it is argued that the plaintiff, who is one of the daughters of Venkata Krishnaiah is entitled to a share in his self-acquired property under the Hindu Succession Act. Reliance is placed in support of this contention on the following decisions: Ramanna v. Appayya, 1956 Andh WR 137, H. J. Bhagat v. L. I. Corporation, AIR 1965 Mad 440, Parikhit Muduli v. Champa Dei, AIR 1967 Orissa 70, and Lal Chand v. Rampur Gir, AIR 1926 PC 9.

6. In order to appreciate the implications of this argument it is necessary to refer to sections 107 and 108 of the Indian Evidence Act.

"Section 107:

When the question is whether a man is alive or dead and it is shown that he was alive within thirty years the burden of proving that he is dead is on the person who affirms it.

Section 108:

Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive the burden of proving that he is alive is shifted to the person who affirms it."

7. These two sections and section 109 are founded on the presumption that things once proved to have existed in a particular state are to be understood as continuing in that state until the contrary is established by evidence, either direct or circumstantial.

8. Section 107 deals with the presumption of continuance of life and S. 108 deals with the presumption of death. Both the presumptions under sections 107 and 108 come into play after a suit is instituted. These sections deal with the procedure to be followed when in such a suit a question is raised before a court as to whether a person is alive or dead. Section 107 enjoins that when a person's existence is in question, and if he is shown to have been living at a given time within thirty years and there is nothing to suggest the probability of his death, the continuance of life will be presumed and the person who asserts the contrary has the burden to prove it.

9. In view of the presumption of continuance of life embodied in Section 107 it was thought necessary to provide for a counter presumption where a person's death would seem more likely from the nature and circumstances of the case than the continuance of life. Section 108 therefore provides that where a person is continually absent from home for a period of seven years unheard of by persons, if any, who would have naturally received intelligence from him, he is presumed to be dead and the burden of proving that he is alive is shifted to the person who affirms that he is not dead.

10. In either case, it would be evident that the presumption is always rebuttable. It is not an absolute presumption. The presumption embodied in S. 108 is by way of a proviso to section 107.

11. And the office of a proviso is well known. To quote from Statutory Construction by Francis J. McCaffrey (1953) para 56, page 115, the office of a proviso is "either to except something from the enacting clause, or to qualify or restrain its generality or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."

12. In para 91 (page 121) of the same book, it is stated:

"A proviso is a clause added to an enactment for the purpose of acting as a restraint upon or as a qualification of the generality of the language which it follows."

Crales on Statute Law (6th Edition), observes at page 217 as follows:

"The effect of an excepting or qualifying proviso according to the ordinary rules of construction, is to except out of the preceding portion of the enactment or to qualify something enacted therein which but for the proviso would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect."

13. And it is well established that a proviso should not be interpreted so as to have greater effect than strict construction of the proviso renders necessary, See *Re. Tabrisky*, 1947 Ch. 565 (C. A.)

14. If the two sections are read together it would be evident that it would be erroneous to seek to apply both sections 107 and 108 to one and the same case and at the same time because a person cannot at the same time both be alive and dead. The court therefore should not attempt to apply to a given case both the presumptions relating to the continuance of life and the counter presumption relating to death. It must always be borne in mind that section 108 although separately enacted comes only as a proviso to section 107.

15. To a case where the proviso i.e., section 108 is attracted the enacting section viz., section 107 can have no application. The function of the proviso is obviously ignored while advancing the argument as stated above by the learned Advocate for the appellant. The fallacy in the method of such interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. The argument treats it as if it were an independent enacting clause instead of being dependent on the main enactment. It would therefore not be proper to read into these two sections any idea which is not to be found therein and which would alter its operative effect, because of provisions found in section 108. If that provision is applicable, then it is obvious that section 107 will have no application.

16. It is true that section 107 presumes that a person shown to be alive at a given time which is within 30 years is presumed to be alive until the contrary be shown, for which reason the onus of showing the death of K. Venkatakrish-

naiah under section 107 originally lay in this case on the defendants. It is however, a common ground and the defendants have also shown the death of K. Venkatakrishnaiah by proving his absence for over seven years and his not having been heard of for seven years by those who naturally would have heard of him; whence arises at the end of those seven years another presumption of law under section 108 replacing the earlier presumption under section 107 viz., that Venkatakrishnaiah is not then alive. Therefore, the argument that K. Venkatakrishnaiah should be presumed to be alive under Section 107 for any length of time in the presence of the counter presumption of his death cannot be correct and ought to be rejected. When the question of life or death of K. Venkatakrishnaiah has arisen in this suit and it is a common case that he has not been heard of by those who ought to have heard of him for over seven years from December 1955 K. Venkatakrishnaiah must be presumed to be dead.

17. A close reading of section 108 can leave no one in doubt that death is to be presumed after a certain interval, that is seven years, but there is no presumption as to the time of the person's death. The actual time of death on the basis of which any right is claimed by the plaintiff has to be proved by him like any other fact by admissible evidence, direct or circumstantial.

18. Now the question is whether there is any warrant either on the language of section 108 or on the authority of the decided cases thereunder for the view that if the exact date of death is not proved the earliest date on which the death could be presumed is the date on which the suit was filed. A plain reading of section 108 in my view does not warrant any such contention. Section 108 relates to burden of proof. It must be remembered that the presumption of life under section 107 can get rebutted because of the counter presumption available under section 108, and if the counter presumption holds the field, there is no place for the presumption of life under section 107 because that stands replaced.

19. It is true that before a presumption under section 108 is raised, it has to be found out by making an appropriate enquiry that the person has not been heard of for seven years by those who ought to have been heard of him. In that enquiry it is permissible to show that the allegation that the person has not been heard of for over seven years is not true and that there is evidence to show that he is alive or has been heard of within that period. If it is proved that the person has been heard of within seven years, it is obvious then that the presumption

of death under section 108 cannot be raised. And in such a situation the presumption of life under section 107, since he has been shown to be alive within 30 years will continue to hold the field. There is however, no warrant for any contention that under section 108 not only a person who has not been heard of for seven years shall be presumed to have died but further that he shall be presumed to have died on the date of the suit in which the question of his life or death has arisen. Any such contention would mean that the proviso is being interpreted so as to give it a greater effect than strict construction of the proviso i.e., section 108 renders necessary. This is not permissible. The exact time of death is not a matter of presumption but is a matter of evidence and the onus of proving that fact is not cast under section 108 but is cast under the general principles of burden of proof. That death took place at any particular time whether prior to seven years before the suit was laid or within seven years prior to the said suit lies upon the person who claims a right to the establishment of which the exact date of death of the said person is essential. There is no presumption that death took place at the close of seven years or earliest on the date of the institution of the suit. No provision of law warrants any such presumption.

20. The view that the death in such a case should be presumed to have occurred on the date of the suit is, if I may say so with respect, based on a total misunderstanding of *In re Phene's Trusts*, (1870) 5 Ch. A. 139 and AIR 1926 P.C. 9.

21. In *re Phene's Trusts* (1870) 5 Ch. A. 139 the facts were that one Nicholas Phene Mill was not heard of since June 1860. Francis Phene, his uncle, executed a will and subsequently died on 5th January, 1861. Under the will the testator bequeathed his residuary estate to his nephews and nieces in equal shares.

22. The share to which Nicholas Phene Mill would, if living at the testator's death, have been entitled was deposited in the Court because of uncertainty as to whether Nicholas Phene Mill had survived the testator. His brothers, after obtaining letters of administration to the estate of Nicholas Phene Mill on 24th April, 1869 presented a petition for payment of the fund deposited in the Court to him.

23. The points which were established in the case were that Nicholas Phene Mill was born in 1829, that he left his parents' home on the 19th August, 1853 and went to America, that he frequently wrote thence to his family, that he wrote to his mother a letter dated 15th August 1858, but he never wrote again nor did any of his family afterwards hear any-

thing of him except a communication from the American Officials that he had deserted on the 16th June, 1860 while on leave from New York to join the Philadelphia station and had not since been heard of.

24. Vice Chancellor James, before whom the application for payment of the fund in deposit was made ordered payment to the petitioner. The nephews and nieces, who had survived the testator, presented the appeal.

25. Sri G. M. Giffard, L. J. observed that the Vice-Chancellor ordered the petition in deference to the authority of three cases which were decided by Vice-Chancellor Kindersley and a fourth by the Vice-Chancellor Malins although Vice-Chancellor James was not inclined to agree with the opinion expressed in those cases. But he thought that they were binding upon him. Next, the learned Lord considered the aforesaid four cases. While noting the fact that in *In Re Benham's Trusts* (1867) 4 Eq. 418 at p. 419 the decision of the Vice-Chancellor Malins was discharged by the appellate Court said that the three cases decided by Vice-Chancellor Kindersley laid down the three propositions which the learned Lord referred to at page 144 of the Judgment. The learned Lord then observed that Vice-Chancellor Malins went a step ahead of the said propositions in holding that "If you cannot presume death at any particular period during the seven years, then at the end or expiration of the seven years you must presume for the first time that the person was dead, and you must also presume that within that time he is alive."

26. Considering then some more authorities of the Equity Courts, the learned Lord referred to the leading case of *Doe v. Nephew*, (1833-37) 5 B. & Ad. 86. The Exchequer Chamber adopted the doctrine of the Court of the Queen's Bench in these terms viz.

"We adopt the doctrine of the Court of Queen's Bench, that the presumption of law relates only to the fact of death, and that the time of death whenever it is material must be a subject of distinct proof." (1837) 2 M. & W. 894 (914).

27. The learned Lord on the consideration of these cases reached the conclusion that the view expressed by the Vice-Chancellor Malins went beyond what was laid down by the Vice-Chancellor Kindersley. After examining the two judgments referred to therein and considering the argument at the Bar the learned Lord approved of the doctrine laid down by Vice-Chancellor Kindersley which was as follows.

"... Where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person

is dead, but not that he died at the beginning or the end of any particular period during those seven years; that if it be important to any one to establish the precise time of such person's death he must do so by evidence of some sort to be laid before the jury for that purpose beyond the mere lapse of seven years since such person was last heard of."

28. The learned Lord observed:

"After fully considering the argument at the Bar, we are all of opinion that the doctrine so laid down is correct."

29. The learned Lord concluded from the examination of Vice-Chancellor Kindersley's decisions as well as the decision of Vice-Chancellor Malins that these judgments go to prove that there is no and ought not to be any presumption of law that the person must be presumed to have died at the end of seven years. In conclusion the learned Lord observed at page 151:

"It is a general well-founded rule that a person seeking to recover property must establish his title by affirmative proof. This was one of the grounds of decision in (1833-37) 5 B. & Ad. 86 and to assert as an exception to the rule that the onus of proving death at any particular period either within the seven years or otherwise should be with the party alleging death at such particular period and not with the person to whose title that fact is essential is not consistent with the judgment of the present Lord Chancellor, when Vice-Chancellor in *In Re Green's Settlement*, (1865) 1 Eq. 288 or with the dictum of Lord Justice Rolfe when he said in *In Re Benham's Trusts*, (1867) 4 Eq. 416 that the question was one not of presumption, but of proof; or with the real substance of the actual decisions or the sound parts of the reasoning, in (1833-37) 5 B. & Ad. 86 or with the judgments in *Re v. Inhabitants of Harborne*, (1835) 2 A. & E. 540 and *Reg v. Lumley*, (1869) 1 C. C. 196 or with the principles to be deduced from the judgment in *Underwood v. Wing*, (1854) 4 D. M. & G. 633; (1860) 8 H. L. C. 183. The true proposition is that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence; the evidence will necessarily differ in different cases, but sufficient evidence there must be of the person asserting title will fail."

30. Applying the principles laid down in that case to the facts of that case the learned Lord held at page 152:

"This case happens to be one of an alleged member of a class of legatees. Survivorship of a testator is requisite to clothe a person with the character of a member of that class. This is a tacit condition annexed by law to the gift, and it follows that the representatives of a person alleged to be a member of the class

must prove as against the other members of the class who prove their survivorship, that he survived the testator, otherwise he was not a legatee at all. For these reasons, and upon a review of the authorities, and the judgments on which they rest, I am of opinion that there is no presumption of law as to the particular period at which Nicholas Phene Mill died, that it is a matter of fact to be proved by evidence and that the onus of proof rests on his representative".

31. As the burden of proof was found to have been resting on the representative and as it was not properly discharged it was held:

"It is enough, however, for me to state that in my opinion the burden of proof is on the representative of Nicholas Phene Mill and that Nicholas Phene Mill's representative has not proved affirmatively that Nicholas Phene Mill survived the testator a proof which I consider essential to his title. The order must be discharged."

32. It is pertinent to note that the head note given by the Editor to this judgment in *In Re Phene's Trusts*, (1870) 5 Ch. A. 139 reads as follows:

"If a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential."

33. It is immediately seen that only a portion of the headnote appears to have been quoted in AIR 1926 PC 9 and although the learned Lord refers to these words as "taken originally from in *Re Phene's Trusts*" I could not find those words in the body of the judgment reported in (1870) 5 Ch. A. 139 and also as reported in 1869-1873 All England Law Reports 514. The learned Advocates appearing for the parties also could not point out to me these words which the Privy Council had quoted from any part of the judgment in *Re Phene's Trusts*. The quotation therefore seems to have been taken from the Editors' note which I have extracted above. The head note in turn seems to have been drafted, if I may say so with due respect to the Editor, without regard to what was really said by the learned Lord in the judgment. The words first "within that period" and second "within the seven years" do not reflect the judgment correctly. The judgment on the other hand categorically lays down that "there is no presumption of law as to the particular period at which Nicholas Phene Mill died."

34. It will thus be seen that the conflict arose in my view because of extract-

ing a portion of the head-note of the judgment in *In Re Phene's Trusts* which head note does not reflect the judgment truly. It is true that it is only an Editor's note relating to the facts of that case. But since the Privy Council referred to it as if it was a part of the original judgment the judgments which followed thereafter and which took the contrary view have been basing their conclusions mostly on the quotation given by the Privy Council without of course keeping in view either the judgment in *In Re Phene's Trusts* (1870) 5 Ch A 139 or even the judgment of the Privy Council itself. It has already been seen very clearly that the judgment in *In Re Phene's Trusts*, (1870) 5 Ch. A. 139 in fact emphatically negatives such a contention.

35. It would be erroneous to say that the Privy Council in AIR 1926 PC 9 took the view that there is a presumption that the person died on the date of the suit apart from the presumption of his death under section 108. Any such contention would almost amount to fly in the face of not only the conclusion of that case but a categorical observation made by the Privy Council. The following is the observation:

"But the law really is that on the facts now assumed there is no presumption as to Bhawan Gir being dead either in 1902 or 1904. There is only one presumption and that is that when these suits were instituted in 1916 Bhawan Gir was no longer alive. There is no presumption at all as to when he died. That, like any other fact, is a matter of proof. And Their Lordships would here observe that it strikes them as not a little remarkable that the theory on this point on which the plaintiff's pleader hazards his whole case is still so widely held, although it has so often been shown to be mistaken."

36. It is pertinent in this connection to note that the mistaken view which is persistently held had been characterised as a "persistent heresy by the Privy Council. In searching for an explanation of this very persistent heresy their Lordships found it in the words which their Lordships quoted from the head note given by the Editor to (1870) 5 Ch A 139 as extracted above. After quoting those words their Lordships have observed:

"Following these words, it is constantly assumed not perhaps unnaturally that where the period of disappearance exceeds seven years, death which may not be presumed at any time during the period of seven years may be presumed to have taken place at its close. This, of course, is not so. The presumption is the same if the period exceeds seven years. The period is one and continuous though it may be divisible into three or even four periods of seven years. Probably the true rule

would be less liable to be missed and would itself be stated more accurately if instead of speaking of a person who had not been heard of for seven years it described the period of disappearance as one of not less than seven years."

37. It is really unfortunate that in spite of this very clear decision of the Privy Council firmly negating this persistent wrong view and clearly holding that there is no presumption at all as to when he died that like any other fact is a matter of proof, there is no justification whatsoever to base any such erroneous view on the said decision of the Privy Council and argue that at the end of seven years during which a person was not heard of a presumption of his death arises and there also arises another presumption that such a person died either at the end of the said period of seven years or latest on the date when the suit was instituted in which suit the question of his life or death had arisen. The presumption in such a case is about the death and no more. A party who wants to found his case on the death of such a person at a particular time which gives him a certain right must prove the exact date on which the person died in order to entitle him to any such right. The mere fact that it is very inconvenient or difficult to prove the exact date on which the person died when he was not heard of for seven years does not alter the position in law. It is for such a person to prove that fact and if he fails to prove that fact he must be prepared to receive the consequences of such failure to prove. It will thus be very clear that the conflicting view which is still being taken by some of the courts has no basis whatsoever found either in the decision in *In re Phene's Trusts*, (1870) 5 Ch A 139 or in the decision of the Privy Council. In fact these two decisions emphatically negative any such view.

38. I am fully fortified in my view by the following two decisions of this court: *Venkateswarlu v. Bapayya*, AIR 1957 Andh Pra 380 and *Venkata Subbarao v. G. Subba Rao*, AIR 1964 Andh Pra 326.

39. It is true that 1956 Andh WR 137 in spite of first laying down the law relating to presumption of death correctly nevertheless held: "If the exact date of death is not proved the earliest date on which death can be presumed under Section 108 of the Evidence Act is the date on which the suit was filed". This observation is made as if it is supported by the above said decision of the Privy Council which I have already pointed out is not correct but on the other hand is patently inconsistent with it and also does not lend any support for such a presumption.

40. 1956 Andh WR 137 is explained in the later decision of AIR 1957 Andh Pra 380 in the following way:

"What the learned Judges apparently meant in 1956 Andh WR 137 is only that the presumption can be that a man is not alive by the date of the suit."

41. This explanation is characterised in the arguments as unsatisfactory and not in accordance with the judgment itself. It would have been of course better to have that decision declared as bad to that extent by referring the case to a Full Bench. Nevertheless the fact remains that the earlier decision has been explained in the later case. There is also a subsequent decision wherein the view taken in the later decision is reiterated. Although no reference is made to the second case but it is clear that in effect it was followed.

42. Even if it is assumed that 1956 Andh WR 137 still stands good as a precedent because of the unsatisfactory way in which it is sought to be explained in the later case, even then the position would be that while 1956 Andh WR 137 takes one view about the presumption of the exact date of death of a person, two subsequent decisions which also are Bench Decisions take a contrary view holding that there is no such presumption available under Section 108. Even then I am at liberty to choose between the said two conflicting views and I am more inclined to follow respectfully the two subsequent decisions which, in my view take the correct view. That I am entitled to so choose between the two conflicting views expressed by two competent Benches of this Court finds sufficient support from what is said in *W. & J. B. Eastwood Ltd. v. Herrod* (1966) 3 All ER 389 at p. 393. Lord Denning, M. R. in a somewhat similar situation said:

"Are we at liberty however, to depart from the test of *Thompson v. Milk Marketing Board*, (1952) 2 All ER 344? I think that we are; and for this reason there are several other cases in this court which are in conflict with it."

"Seeing then that there are conflicting tests laid down in this court we are at liberty to choose between them. That is clearly stated in *Young v. Bristol Aeroplane Co. Ltd.* (1944) 2 All ER 293. It is true that in *Gilmore v. Baker*, (1962) 3 All ER 230 and *Geary v. Lee*, (1968) RA 281 we did not realise that we were laying down anything in conflict with (1952) 2 All ER 344. So we distinguished it. Now we can take the next step and say that the test in *Thompson's case*, (1952) 2 All ER 344 is not merely distinguishable from the other cases but in conflict with them and hence we can depart from it. The cynic can comment on this process if he likes. It is a way round the strict doctrine of precedent; but I prefer it to the endless task of distinguishing the indistinguishable and reconciling the irreconcilable. That is the way we have

had to do it in the past and in so doing we have made confusion worse confounded. It is better to make a clean cut and to depart from prior precedent if we are satisfied that it is wrong. Has it not been said recently by high authority that 'too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.'

43. From the above said discussion it would be clear that the decisions relied upon by the learned Advocate for the appellant such as AIR 1965 Mad 440, AIR 1967 Orissa 70, Narbada v. Ram Dayal, AIR 1968 Raj 48 and Shankareppa v. Shivarudrappa, AIR 1963 Mys 115 cannot be considered as good law.

44. The view which I have taken is not only supported by the two Bench decisions of this court to which reference has already been made but also supported by the following decisions: Suburamu Pillai v. Ramayi Ammal, (1965) 78 Mad LW 624; Narayana Pillai v. Velayuthan Pillai, 1964-1 Mad LJ 246 = (AIR 1963 Mad 385) and Gnanamuthu v. Anthoni, AIR 1960 Mad 430.

45. What must follow from what is stated above is that it was for the plaintiff to prove that Venkatakrishnaiah died after the Act came into force because her right depended upon the provisions of the Hindu Succession Act. It is conceded by the learned Advocate for the Appellant that if no presumption is made in favour of the appellant that Venkatakrishnaiah died on the date of the suit and that the onus to prove as to whether Venkatakrishnaiah died after the Act came into force, is on the plaintiff then since the appellant has not adduced any evidence which can be said to prove that Venkatakrishnaiah died after the Hindu Succession Act came into force, the plaintiff-appellant must fail. I quite agree with the concession which was fairly made. That is the view which the lower Courts took and I do not find any valid reason to take a different view.

46. The Second Appeal therefore must fail and is dismissed with costs. No leave. Appeal dismissed.

AIR 1970 ANDHRA PRADESH 253
(V 57 C 38)

GOPAL RAO EKBOTE, J.

Todupunoori Dubbiah, Appellant v. Todupunoori Laxmiah and others, Respondents.

Second Appeal No. 569 of 1967, D/- 18-7-1969, from decree of Dist. J. Medak at Sangareddy, in Appeal Suit No. 1 of 1964.

(A) Registration Act (1908), S. 17 (2), Cl. (vi) — Compromise comprising pro-

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perties in suit as well as properties outside the suit — It requires registration only to the extent of property which is outside the subject-matter of the suit, AIR 1945 Bom 143 and AIR 1931 All 745, Rel. on. (Para 11)

(B) Tenancy Laws — A. P. (Telangana Area) Tenancy and Agricultural Lands Act (21 of 1950), S. 47 (1) — Settlement of suit by way of compromise — When amounts to 'transfer' under S. 47(1).

When one party has no title whatsoever to the property, and yet the party in whom the title for the time being lawfully vests agrees to the transfer of such title to the other party, such a transaction would operate as a transfer of property within the meaning of S. 47(1) of the Tenancy Act regardless altogether of the fact that the transfer is made during the pendency of the suit or parties have compromised or there was a settlement of the suit. No effect therefore can be given to such a compromise decree, the effect of which is to transfer agricultural lands without obtaining the permission of the concerned authority. AIR 1947 Lah 175, Rel. on. (Paras 17, 19)

Cases Referred: Chronological Paras (1947) AIR 1947 Lah 175 (V 34) =

226 Ind Cas 434, Chanan Singh v.

Waryam Singh 118

(1945) AIR 1945 Bom 143 (V 32) =

46 Bom LR 931, Supdu Laxmanshet

v. Soniram Ragho 11

(1931) AIR 1931 All 745 (V 18) =

1931 All LJ 835, Bishunath Rai v.

Sarju Rai 11

(1919) AIR 1919 PC 79 (V 6) = 46

Ind App 240, Hemanta Kumari v.

Midnapore Zamindari Co. 11

Upendralal Waghray for K. V. Narasinga Rao, for Appellant; A. V. Radhakrishnan for B. V. Subbarayudu, for Respondents.

JUDGMENT: This is an appeal from the judgment of the District Judge, Medak at Sangareddy given on 30th day of June, 1967. The relevant facts are that the respondents-plaintiffs instituted O. S. No. 31 of 1962 in the Court of the District Munsif of Siddipet. It was contended inter alia in the plaint that Rajesham, Lakshminarayana and the defendants were three brothers. The three plaintiffs are the sons of Lakshminarayana. Rajesham died 18 years before the suit leaving his widow Lakshmi Bai. The properties mentioned in the B Schedule are said to be ancestral properties of the three brothers. After the death of Rajesham, his widow Lakshmi Bai filed O. S. 20/60 in the District Munsif's Court, Siddipet for recovery of possession of A Schedule properties and certain other properties. The suit was laid against the plaintiffs and the defendant in this suit. It was alleged that the suit properties therein had fallen

to the share of her deceased husband Rajesham and that after his death she became entitled to those properties. She was deprived of those properties by the defendants in that suit. In a joint written statement the defendants in that suit denied the right of the plaintiff in that suit on the ground that those properties did not fall to the share of her husband nor she could become entitled to them after his death. Their contention was that the family continued to be joint, and after the death of the plaintiff's husband they became entitled to the property under the principle of survivorship. The suit was compromised and a compromise memo was filed in the court on 31-8-1960. It was further contended that in the said memo of compromise the defendants in that suit accepted the contention of the plaintiff. In consideration of Rs. 3150 which was paid to the plaintiff outside the Court, the plaintiff in that case gave up her right in the properties and agreed that the property may be taken by the plaintiffs in the present suit. It was further provided that the 4th defendant in that suit admitted that he had no title to those properties. The compromise was recorded and in pursuance of the said compromise the suit was dismissed.

2. While so the defendants-appellants filed O. S. No. 48 of 1961 for the issue of an injunction and for cancellation of the abovesaid compromise decree. That suit, however, was dismissed for default on 18-6-62. No further steps to restore the same were taken.

3. The present suit therefore was instituted by the plaintiffs on the abovesaid allegations and a partition is demanded of the properties. They also claimed separate possession of the plaint A Schedule properties.

4. The defendant resisted the suit. According to him, the plaint B Schedule properties are ancestral and joint properties of the parties. He contended that Lakshmlal is the widow of Rajesham. Rajesham died as Manager and a member of the joint Hindu family. After his death, the defendant and Lakshmi Narayana, the father of the plaintiffs, became entitled to the properties by virtue of the principle of survivorship. They were in joint possession. Lakshmlal therefore had no right, title or interest in the suit properties. He further contended that the compromise decree passed in O. S. No. 20 of 1960 is invalid and void. It was contended that the compromise required registration; and secondly as no permission under S. 47 of the Andhra Pradesh (Telengana Area) Tenancy and Agricultural Lands Act, 1950 was obtained the transaction was void. He further stated that the properties are part and parcel of the joint ancestral properties of the parties and no suit for separate possession of only one-third share can lie.

5. Upon these pleadings, the trial court framed several issues, and after recording the evidence adduced by the parties, dismissed the plaintiffs' suit. The trial Court agreed with the contention of the defendant in regard to Section 47 of the Tenancy Act, but it did not agree with the other contention in regard to the registration of the compromise deed.

6. Dissatisfied with that judgment, the plaintiffs carried the matter in appeal to the District Court. At the appellate stage, the appellate court allowed certain documents regarding previous litigation to go on record as additional evidence under Order XLf Rule 27 C. P. C. These documents were filed by the plaintiffs-appellants. The appeal was ultimately allowed and the suit was decreed. The appellate Court negated the contention of the defendant that the compromise involved transfer of the property and therefore it required permission under Section 47 of the Tenancy Act. It also took the view that the compromise does not require registration. It found the suit maintainable in the present form. The defendant has therefore come in second appeal.

7. Three contentions were raised by Sri Upendralal Waghray, learned counsel for the appellant. His first contention was that the compromise requires registration and as it is not registered, it is not admissible in evidence nor it conveys any title to the plaintiffs. No suit on the basis of any such compromise decree can therefore lie. In order to appreciate this compromise, The compromise memo reads as follows:

"(1) That the defendant No. 1 Lachiah have compromised with the plaintiff and has given to the plaintiff Rs. 3,150/- I.G. out of the Court. Hence the plaintiff has withdrawn with her rights in favour of the defendant Lachiah and his brothers Bhomiah and Rajesham. By the date of the compromise the defendants Lachiah and his brothers the defendants Nos. 2 and 3 will be in possession of the suit property as owner and in which the plaintiff or the other remaining defendant will have no right. The defendant No. 1 will have a right of making the palta in his name as per the compromise.

(2) That the defendant No. 4 admits with this compromise and has no objection. Hence he will have no right or his share in the suit property.

(3) That as per the compromise the plaintiff has given the house situated at Chikod Kalan as detailed below to the defendant Lachiah. Hence he will in future be in possession of the said house and the plaintiff will have no right or share in the house also."

8. The following is the endorsement appearing on the memo of the compromise:

"The parties admitted the facts of the compromise petition. Sri Mahaboob Ali, Advocate identified the plaintiff and Sri Abdul Kareem, Advocate identified the defendants. I know them. Hence verified."

The District Munsif made the following order in the main suit:

"Advocates for the parties present. The file is put up in advance. Compromise petition has been filed.

The Court Fee Examiner has raised an objection that the plaintiff should furnish the correct market value. And as the value of the lands has increased considerably the court fee paid is not sufficient. In my opinion, the court fee paid is sufficient. The area of the land is 15 Acres and 15 cents and court fee Rupees 143/- has been paid.

ORDER

The suit is dismissed. Parties should bear their own costs. File be struck off and consigned."

9. It is common ground that the house to which a reference is made in paragraph 3 of the compromise was not the subject-matter of the suit in which the compromise memo was filed. Thus the compromise memo relates to the property which was the subject-matter of the suit and also to the house which was not the subject-matter of the suit. The procedure to be followed in such cases under Order XXIII Rule 3 C. P. C. is patent enough. According to that provisions,

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

It is in the light of this provision that the order passed on the compromise by the Court has to be understood. In so far as the recording of the compromise or agreement is concerned, the decree covered the entire terms of the agreement or the compromise which are lawful. But in so far as the question of passing a decree is considered, it has to be confined to the property which was the subject matter of the suit. But the property which, does not relate to the suit may form one of the terms of the compromise, but there will be no decree in regard to such a property because it does not relate to the suit. The term relating to such property should be mentioned in the schedule attached to the decree but will not form part of the decree.

10. It is in this background that I have to consider whether a compromise comprising the terms relating to the suit property as well as relating to some other property which is not the subject-matter

of the suit, requires registration under section 17 of the Indian Registration Act. Sub-section (1) of that section refers to the documents which shall be registered. Sub-section (2) points to the exceptions. Certain documents mentioned therein are exempted from the operation of clauses (b) and (c) of sub-section (1). In cases of those documents those provisions have been made inapplicable. The relevant clause in this case is clause (vi), which reads as follows:

"any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immoveable property other than that which is the subject-matter of the suit or proceeding."

11. A close reading of this clause would indicate that broadly speaking all the decrees or orders of Court have been exempted from the operation of clauses (b) and (c) of sub-section (1). There is, however, an exception to this exception. Those decrees or orders, which are expressed to be made on a compromise other than that which is the subject-matter of the suit or the proceeding would not be exempted from the operation of clauses (b) and (c). If the case of a compromise relates to property, which is not the subject-matter of the suit or proceeding, then obviously the latter part of clause (vi) would take away the exception, and to such a case clause (b) or (c) as the case may be would apply, and such a document would be liable for registration. It will thus be plain that where the compromise deals only with the properties in the suit and the Court passes a decree in accordance therewith, such a case will squarely fall which the exception and such a decree would not require registration.

Similarly, where the compromise deals with the properties which are not the subject-matter of the suit and the Court passes a decree in accordance therewith, such a decree is not exempted from the operation of clause (b) or (c) and it will require to be registered. Where, however, the compromise deals not only with the properties in suit but also properties outside it and the Court embodies the whole compromise in the decree but passes a decree under Order XXIII R. 3 C. P. C. in accordance with the terms so far as it relates to the suit, the question naturally arises as to what extent the compromise decree is required to be registered under the above said clause of section 17 (2).

In so far as a decree or order embodies the compromise in relation to matters outside the suit or proceeding, there was, before the amendment of 1929, a conflict of opinion, one set of cases holding that it did not require registration and another set of cases holding that they do

require registration. This conflict of opinion was set at rest by the decision of their Lordships of the Privy Council in *Hemanta Kumari v. Midnapore Zamin-dari Co.*, AIR 1919 P.C. 79. It was to the effect that a decree, which wholly incorporated a compromise relating not only to the properties in the suit or proceeding, but also properties outside it is not compulsorily registrable as regards any portion thereof. This view was subsequently followed till section 17 was amended in 1929. After clause (vi) was amended in 1929, it seems to be plain that a decree or order based on a compromise comprising properties which are the subject-matter of the suit and properties which are outside the suit, is compulsorily registrable only to the extent of the property which is outside the subject-matter of the suit. But it is not registrable in so far as it relates to the subject-matter of the suit. In other words, a decree or order based on a compromise comprising properties other than the subject-matter of the suit or proceeding, to that extent it would not be exempt from registration. I am fortified in my view by the following decisions: *Supdu Laxmanshet v. Soniram Ragho*, AIR 1945 Bom. 143 at p. 146 and *Bishunath Rai v. Saju Rai*, AIR 1931 All. 745.

12. What must necessarily follow from the abovesaid discussion is that to the extent the compromise decree relates to the house, which was not the subject-matter of the suit, the decree is not exempt from registration, and consequently it will not affect the right, title or interest of the house. But in so far as the other properties of the compromise are concerned, which admittedly relate to the subject-matter of that suit, the decree falls squarely within clause (vi) of section 17 (2) and therefore is exempt from registration.

13. What was, however, argued before me by Mr. Waghray was that what has to be seen under the later part of clause (vi) is whether the decree expressed to be made on a compromise comprises of immoveable property other than that which is the subject matter of a suit, and if the answer is in the affirmative, then the exception embodied in clause (vi) would apply and the entire decree comprising both the properties relating to the suit and outside it is registrable. It is difficult to accept this contention. If it is borne in mind that the governing principle of clause (vi) is to exempt the decree of the court from the registration and operation of clauses (b) and (c), then any exception to this general principle must be construed narrowly. It is only to the extent that a compromise comprises immoveable property other than that which is the subject-matter of the suit which would require, registration and not the

entire thing. Otherwise, the very purpose of clause (vi) would be frustrated. I do not think there is any scope for such an interpretation of clause (vi) as is put upon it by the learned counsel for the appellant. I am therefore satisfied that to the extent of the house, the compromise decree was compulsorily registrable. But in so far as the property relating to that suit was concerned, it did not require any registration. The decree to that extent therefore is admissible in evidence. It purports to transfer the right, title and interest in the subject-matter of the suit in favour of the plaintiffs in this suit.

14. The next contention of Mr. Waghray was that under section 47 of the Tenancy Act, since the compromise effects a transfer from the widow in favour of the present plaintiff, permission under section 47 was necessary, and since no such permission was obtained, the transfer was void.

15. Section 47, in so far as it is relevant, reads as follows:

"(1) Notwithstanding anything contained in any other law for the time being in force or in any decree or order of a Court, no permanent alienation and no other transfer of agricultural land shall be valid unless it has been made with the previous sanction of the Tahsildar." What has to be seen is whether the compromise is a permanent alienation of agricultural land or a transfer of the same. In either case, it will come within the mischief of section 47 (1), and the transaction admittedly will be void.

16. It was contended by the learned counsel for the respondents that the compromise is neither a permanent alienation nor any other transfer of agricultural land within the purview of S. 47 (1). His contention was that it was a case of family arrangement, which recognised a pre-existing right of the plaintiffs and consequently cannot come within the purview of section 47 (1).

17. Now, a family arrangement is a transaction between the members of the same family which is entered into for the benefit of the family generally. It is an agreement which tends to the preservation of the family, to the peace or security of the family and the avoidance of family disputes and litigation or to the saving of the honour of the property. Such an arrangement is based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges what the title is. It is only on this assumption that the arrangement is held not to be a transfer. It is true that the existence of a dispute in praesenti or of a doubtful claim is not essential for the validity of a family arrangement. What is, however, necessary in all such cases is that there must

be an arrangement entered into for one of the abovesaid purposes. It must assume that there was an antecedent title of some kind or the other. When one party has no title whatsoever to the property, and yet the party in whom the title for the time being lawfully vests agrees to the transfer of such title to the other party, such a transaction in my view, would operate as a transfer of property regardless altogether of the fact that the transfer is made during the pendency of the suit or parties have compromised or there was a settlement of the suit. It is in this light that I have to examine whether the plaintiffs had any pre-existing bona fide right.

18. It is true that they claimed that the husband of the widow was a member of the joint and undivided family and after his death, the surviving brothers became entitled to the entire property because of the right of survivorship. They ultimately conceded that there was earlier partition under which Rajesham had become separated and that the property belonged to his widow as was contended by her in the plaint. It is on this basis that the plaintiffs paid Rs. 3150/- to her on consideration of which she withdrew from her suit and transferred the title to the plaintiffs. I fail to see in these circumstances how it can be said that the plaintiffs had any bona fide pre-existing right. They never had any pre-existing right because Rajesham was a member of the undivided family. After his death it is his widow who would get the property whatever may be her extent of the right in the property. The plaintiffs purchased the property from her by paying her some amount. The compromise was therefore a sale and not a family arrangement. There was no question of preservation of any property for the purpose of the family. There was no idea of avoiding any litigation. It is also in this connection pertinent to note that the 4th defendant in that suit was kept out of the property under one of the terms of the compromise. If the contention of the plaintiffs, who were defendants in that case, was right that Rajesham died as a member of the joint family then not only the plaintiffs or their father but also the defendant-appellant would by right of survivorship become entitled to the entire property including the share of Rajesham. In the compromise however, no share was given to the present defendant who was the 4th defendant there. That makes the position very clear, and there can be no difficulty in reaching the conclusion that the parties knew that there was an earlier partition. It is because of that they agreed that the property belonged to the widow, and since the 4th defendant was not in a position

to purchase any share of the property, it is the plaintiffs who paid Rs. 3150/- and purchased the property from the widow. The transfer of the house would form part of such consideration. In these circumstances, I do not think there is any justification for holding that it is a family arrangement entered into between the parties. I am supported in my view by the following decision Chanan Singh v. Waryam Singh, AIR 1947 Lah 175.

19. What must follow is that it is a case of permanent alienation; in other words, a sale which squarely falls within the purview of section 47 (1) of the Tenancy Act. Admittedly, no permission was obtained for the transfer from the Tahsildar. The transfer therefore being opposed to S. 47 (1) is hit by S. 23 of the Contract Act. The contract is illegal and void. No effect therefore can be given to such a compromise decree, the effect of which is to transfer agricultural lands without obtaining the permission of the concerned authority.

20. It is also doubtful as to whether the plaintiffs could file the suit for partition which is partial in its character. The case of the plaintiffs is that in the whole of the suit property there were three shares. One belonged to Rajesham, he had earlier partitioned, which property was not divided by metes and bounds. The plaintiffs have one-third share and the rest belongs to the defendant-appellant. After the plaintiffs purchased under the compromise decree the one-third share of Rajesham from his widow, they became entitled to two-thirds share in the suit property. They filed the suit only for partition and separate possession of one-third share. The question naturally is whether the plaintiffs can get one-third share of Rajesham separated and continue their one-third share joint with the one-third share of the defendant. If the plaintiffs had become entitled to two-thirds share, they should have asked for partition of their two-thirds share from the defendant. The learned Advocate for the respondents could not show me as to why this is not a case of partial partition. It is not material that they got the share of Rajesham transferred in their favour. What is more relevant is that they are entitled to two-thirds share in the suit property. They should have therefore asked for the separation of two thirds share, and not a suit for separation of one-third share only and allowing the other one-third share to remain joint with the one-third share of the defendant. Such a suit for partial partition, in my view, is not maintainable.

21. For the above-said reasons, I would allow the appeal, set aside the judgment of the Court below and dis-

miss the plaintiff's suit with costs. No leave.

Appeal allowed.

AIR 1970 ANDHRA PRADESH 258
(V 57 C 39)

P. JAGANMOHAN REDDY, C. J.
AND KUPPUSWAMI, J.

Katta Subbarao (died) and others, Appellants v Pokuri Sri Ramalu and others, Respondents.

Letters Patent Appeal No. 158 of 1964, D/- 23-3-1968, from decree and judgment of Krishna Rao, J. in Appeal No. 4 of 1961, D/- 6-2-1964.

(A) Civil P. C. (1908), S. 11, O. 41 R. 1 — Plea of res judicata — Not raised in pleadings or in issues — New plea in appeal — Waiver not proper reason for refusing — But res judicata if not raised properly in pleadings or issues, High Court is justified in refusing it.

It is doubtful whether the mere fact that the plea of res judicata was not raised in the written statement amounts to waiver. Therefore, waiver may not be a proper reason for refusing the permission to raise plea of res judicata as an additional and new ground of appeal. But if the plea of res judicata is not raised properly by the pleadings or in the issues the High Court would be justified in declining to allow the appellant to go into the question of res judicata. AIR 1936 PC 258 & AIR 1947 Mad 5 (2) & AIR 1949 PC 302, Rel. on: 1959 Andh LT 156, Expl (Paras 14, 15)

When allowing the plea of res judicata as a new plea in appeal the question in each case is whether the circumstances of that case and the interests of justice require that the appellate court should exercise its discretion to entertain a new point, even though it is a pure question of law. Where the contention was that the plea of res judicata was not raised in the written statement filed in the trial Court because the appeals against the prior cases were still pending in High Court at the time when written statement was filed, but it was found that the subsequent suit was pending for more than two years after the dismissal of those appeals and yet neither the written statement was amended nor any additional written statement was filed raising the plea of res judicata, nor was it raised also when preliminary issues on other law points were decided and even in revision, and further it was found that the defendant by trying to raise the plea of res judicata in appellate Court was making an attempt to defeat the claims of the plaintiff for his share of the profits which were admittedly due to him.

GL/HM/C928/63/HGP/T

Held that it was not a fit case for entertaining the plea of res judicata for the first time in appeal. AIR 1967 SC 465, Rel. on. (Paras 12, 13, 17)

(B) Limitation Act (1908), Art. 89 — Suit for accounts against co-owner — No question of termination of agency or of refusal to account as co-owner or as agent — Suit filed within 3 years from date of notice asking for accounts — Suit held was within time. (Para 20)

Cases Referred: Chronological Paras

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| (1967) AIR 1967 SC 465 (V 54) — | |
| (1967) 1 SCR 489, Raghubans | |
| Narain v. Govt. of Uttar Pra- | |
| desh | 17 |
| (1966) AIR 1966 SC 153 (V 53) — | |
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| (1949) AIR 1949 PC 302 (V 36) — | |
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| (1947) AIR 1947 Mad 5 (2) (V 34) — | |
| 11LR (1947) Mad 190, Raja of Ven- | |
| Katagiri v. Madras Province | 14 |
| (1936) AIR 1936 PC 258 (V 23) — | |
| 1936 All WR 717, Jagadish Chan- | |
| dra Deo v. Gour Hari Mahto | 14, 15 |
| (1892) 1892 AC 473 — 61 LJ PC 50, | |
| Connecticut Fire Insurance Co. | |
| v. Kavanagh | 10 |

N. Bapiraju, for Appellant No. 3 N. Ramachandrarao (for No. 1), E. Manohar (for Nos 2 and 3) and Hanumalah (for Nos. 4 to 6), for Respondents.

KUPPUSWAMI, J.: The first defendant in O. S. 54/55 on the file of the District Judge, Eluru preferred the above appeal against the judgment and decree of Krishna Rao, J., in A. S. 4/1961. During the pendency of this appeal, the appellant died and his legal representatives have been brought on record. The suit was filed by the first respondent on 4-11-1955 for partition and separate possession of 1/8th share in Sri Ramakrishna Oil Mills, Eluru (hereinafter referred as the suit mill) and for rendition of account by the first respondent of the income from the suit mill from 6-1-1946 on the following allegations:

2. The plaintiff and defendants 1 to 3 are co-owners and the plaintiff being entitled to 1/8th share, first defendant to 1/2 share and the second defendant to 1/4th share and the 3rd defendant to 1/8th share respectively. Due to differences between them they agreed to lease out the suit mill by auction among themselves on 6-1-1946 and the first defendant was the highest bidder at Rs. 20,001/- per year. The first defendant accordingly became the lessee of the suit mill. He was also the Managing Co-owner and as

such was liable to render to the co-owners the account of the rents and profits.

3. The defence of the first defendant material to the appeal was that he was not the lessee. He bid at the auction not for himself but on behalf of the 6th defendant-Firm of which he, 4th and 5th defendants were the partners and therefore, the 6th defendant alone was liable for rent. He further contended that he was not the managing co-owner and was not therefore, liable to account. He raised also the plea that the suit was barred by limitation.

4. The trial Court on a consideration of the evidence held that the first defendant was the lessee and was also the managing co-owner and that the suit was not barred by limitation. He therefore, passed a preliminary decree for partition and delivery of possession of plaintiff's 1/8th share in the suit mill and directed the first defendant to render account of the suit mill business from 6-1-1946 until 25-5-1957 the date on which the possession of the suit mill was taken over by the Commissioner appointed by the Court.

5. The first defendant, thereupon preferred A. S. 4/61 to this court. He did not dispute the right of the plaintiff to a decree for 1/8th share and for recovery of possession, but questioned his liability to render account. In addition to the pleas raised in the court below that he was not a co-owner, that the 6th defendant, and not he was the lessee and that the suit was barred by limitation, he attempted to raise a further contention, namely that the finding in two prior suits, O. S. 66/51 and 93/52 on the file of the Court, Eluru that the 6th defendant was the lessee and not the first defendant operated as res judicata and it was, therefore not open to the lower court to find that the first defendant was the lessee. He also urged that certain directions given by the lower court with reference to the rendition of accounts were erroneous and the interest ought to have been awarded at 6%.

6. Our learned brother, Krishna Rao, J., after a consideration of the evidence agreed with the findings of the lower court that the first defendant was the co-owner and was also the lessee and that the suit was not barred by limitation. He gave certain directions regarding account and also held that the interest should have been awarded at 6% per annum, only from the date of suit. He however, refused to permit the appellant to raise the plea of res judicata which had not been raised in the lower court. In the result, subject to the modifications relating to the directions regarding accounting and interest he dismissed the appeal with costs. The present Letters Patent

Appeal is directed against the said judgment and decree.

7. We are not inclined to interfere with the concurrent findings of fact of our learned brother and the trial court on the questions whether the first defendant was the managing co-owner and whether he was lessee. The findings were arrived at by the trial court after elaborate consideration of the evidence. In fact, on the question whether the first defendant was the managing co-owner, there is the admission of the first defendant in the prior proceedings, in which he stated that he was directed to manage the mill by all of them (co-owners) including the plaintiff. On the question, whether the first defendant or the 6th defendant was the lessee, also the court considered the entire documentary and oral evidence and our learned brother, Krishna Rao, J., agreed with that finding. No other fresh material has been placed before us to differ from the conclusions of the trial court and our learned brother on these points and we, therefore, affirm those findings.

8. Sri Bapiraju, however, urged that there is a finding in certain prior proceedings between the same parties that the lessee was not the first defendant but the 6th defendant-firm and that operates as res judicata in these proceedings, and that Krishna Rao, J., erred in refusing to permit the appellant to raise that question in the appeal before him. In order to appreciate the contention based on res judicata, it is necessary to set out briefly the previous proceedings:

9. The second defendant filed two suits, O. S. 66/51 and O. S. 93/52 in the Sub-court, Eluru, for recovery of his 1/4th share of rent due from the first defendant for the period from 6-1-46 to 6-4-1949 and from 6-4-1949 to 6-1-1952 respectively. The present plaintiff was the third defendant in that suit and the present 3rd defendant was the second defendant therein. They supported the second defendant's case and asked for a decree in their favour for their share and offered to pay the necessary court-fee, if the suit was decreed for their share and the rent as well. The suits were tried together and dismissed on 7-3-1953. The Additional Subordinate Judge, found that the plaintiff and defendants 1 to 3 constitute an unregistered firm and therefore, the suit was not maintainable at the instance of one of them only. He also held that the lessee of the mill was not the first defendant but the 6th defendant herein. It may be observed that the 6th defendant was not a party to those proceedings. Against the dismissal of the suit, the second defendant appealed to the High Court in A. S. Nos. 874 and 875/53.

10. While the appeals were pending the second defendant and the first defendant entered into a compromise on 14-7-1958 by which the first defendant agreed to pay on behalf of the 6th defendant a sum of Rs. 16,000/- to the second defendant in full settlement of his claims. In view of the compromise the appeals were withdrawn and were dismissed on 5-9-1958. It is contended that as the appeals were withdrawn and dismissed, the decision of the Subordinate Judge in those suits have become final and operate as *res judicata* in these proceedings.

11. It is contended for the respondents that the plaintiff herein and the 3rd defendant were only pro forma defendants in that suit and as they were co-defendants with the first defendant, any decision therein cannot operate as *res judicata* in these proceedings as the requirements necessary to make the decision between the co-defendants as *res judicata* are not present in this case.

12. Before considering the question whether the findings operate as *res judicata*, it has to be decided first, whether the first defendant should have been allowed to raise this question of *res judicata* in the appeal before our learned brother and should be allowed to raise it again before us. This contention was admittedly not raised in the written statement. It is argued that it could not have been raised as the appeal in the High Court was still pending at the time when the written statement was filed on 6-3-1956. But the appeals were withdrawn and dismissed on 5-9-1958 and the judgment of the trial court in this suit was given on 31-10-1960. Thus the suit was pending for more than two years after the dismissal of the appeals in the High Court. No reason has been given as to why the written statement was not amended or an additional written statement was not filed raising the pleas of *res judicata* during this long period. We find from the judgment that issues 13 to 15 regarding the limitation, mis-joinder of parties, maintainability of suit were decided as preliminary issues on 16-2-59. Even at this stage the defendant could have asked for an issue regarding *res judicata* also to be raised. A revision petition was preferred against the order of the preliminary issues to the High Court and the petition was dismissed on 8-1-1960. During all these stages no attempt was made to raise the plea of *res judicata*. If the plea had been raised and an issue had been framed, this court would have had the benefit of the judgment of the trial court on that aspect. Further it is possible that the plaintiff might not have allowed the appeals in the High Court to be withdrawn and would have taken steps to transpose him-

self as the appellant and continue the appeal on the ground that the second defendant, (the plaintiff therein) had entered into compromise with the first defendant. The defendant by trying to raise this plea of *res judicata* is making an attempt to defeat the claims of the plaintiff for his share of the profits which are admittedly due to him.

13. For all these reasons we do not consider in the interest of justice that it is a fit case for permitting the first defendant to raise the plea of *res judicata* and our learned brother was also equally right in refusing that permission.

14. Mr. Bapiraju, argued that one of the main reasons for Krishnarao, J., to refuse the permission to raise this plea was that he considered that the plea of *res judicata* was not one which affects the jurisdiction of the Court and is a plea in a bar which a party may waive. Mr. Bapi Raju contends that this is not a correct statement of law. He has relied on a decision in *Pandurang v. Maruti*, AIR 1966 SC 153 in support of his contention that the plea of *res judicata* concerns jurisdiction. Our learned brother, Krishnarao, J., relied on a decision of a Bench of this court in *Venkatasubbarao v. Janakiramayya*, 1959 Andh LT 156, at page 165 it was stated as follows:

"In *Jagadish Chandra Deo v. Gour Hari Mahato*, AIR 1936 PC 258 the Privy Council upheld the decision of the Calcutta High Court which had declined to go into the question of *res judicata* on the ground that it had not been properly raised by the pleadings or in the issues, particularly in the issues. The plea of *res judicata* is not one which affects the jurisdiction of the court. It is a plea in a bar which a party may waive." Perhaps, the later portion of this observation, namely, that the plea of *res judicata* is not one which affects the jurisdiction of the Court and is a plea in a bar which a party may waive, is open to question. The decision of the Privy Council relied on in that Judgment, namely, AIR 1936 PC 258 does not support that proposition. On the other hand, a decision of a Bench of the Madras High Court in *Raja of Venkatagiri v. Madras Province*, AIR 1947 Mad 5 (2) consisting of Patanjali Sastri and Bell, JJ., is to the effect that—

"though the doctrine of *res judicata* is often treated as a branch of the law of estoppel it is really founded on the public policy of putting an end to all litigation in regard to the same matter or in other words, of setting to rest rights of litigants, and cannot be waived even by the consent of the parties". Further it is doubtful whether the mere fact that the plea was not raised in the written statement amounts to waiver. In the decision in *Shivraj Gopalji v. Ayyissa*

Bi, AIR 1949 PC 302 their Lordships of the Privy Council held that the High Court was right in allowing the plea of *res judicata* to be raised before them even though it was not pressed in the trial court having been raised there.

15. If a plea which has been raised and not pressed could be permitted again to be raised in the High Court, we do not see any reason why the plea which was not raised at all in the trial court should not be allowed in the High Court on the ground of waiver and therefore, we are inclined to agree with the argument of Mr. Bapiraju, that in this case waiver may not be a proper reason for refusing the permission to raise this plea as an additional and new ground of appeal. But as pointed out by the Privy Council in AIR 1936 PC 258 (*supra*) if the plea of *res judicata* is not raised properly by the pleadings or in the issues, particularly in the issue, the High Court would be justified in declining to allow the appellant to go into the question of *res judicata*.

16. Mr. Bapiraju relied on a number of decisions to the effect that a pure question of law can be raised for the first time in an appeal, if it is based either on facts which are admitted or which have been proved beyond controversy and in this case as there is no dispute about the prior proceedings which form the basis of the plea of *res judicata*, the said question should have been permitted to be raised. He relied upon the oft-quoted decision in *Connecticut Fire Insurance Co. v. Kavanagh*, 1892 AC 473 where Lord Watson observed as follows:

"When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea."

17. These observations have been referred to and followed in a number of decisions of the High Courts and of the Supreme Court, for instance, see decision in *Raghubans Narain v. Govt. of Uttar Pradesh*, AIR 1967 SC 465 of the Supreme Court. But the question in each case is whether the circumstances of that case and the interests of justice require that the appellate court should exercise its discretion to entertain a new point, even though it is a pure question of law. For the reasons stated in the earlier part of our judgment we feel that this is not a fit case for entertaining this plea of *res judicata* for the first time.

18. In this view it is unnecessary to go into the question whether the findings in the prior proceedings operate as *res*

judicata between the plaintiff and the first defendant who were co-defendants in those proceedings.

19. Sri Bapi Raju contends that the suit is barred by limitation under Art. 89 of the Limitation Act of 1908 which deals with a suit by a principal against his agent for movable property received by the latter and not accounted for and period of three years is to commence when the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates. He contended that in the prior suit which was filed by the second defendant it was stated that the first defendant had agreed to pay the lease amount individually to each of the other co-owners and the present plaintiff in his written statement which he filed as a second defendant in that suit also took up the same position. He contends that the agency was terminated by reason of the stand taken up in that suit, and that he also ceased to be a co-owner because the plaintiff chose to treat him as a lessee by filing the written statement as the second defendant to that effect.

20. Mr. Ramachandra Rao contends that these two suits were for recovery of rent upto 1952 and not suits for accounts and there was no question, therefore, of asking for accounts on the footing of agency or the termination of agency. We agree with this contention. We do not construe the written statement of the plaintiff as second defendant in those suits as amounting to termination of the agency of the first defendant or affecting his character as co-owner. The character of those suits is entirely different from the character of the suit in the present case as the previous ones were for rent against the lessee whereas the present suit is one for accounts against co-owner. In the circumstances, it cannot be stated that there is any termination of agency or refusal by the first defendant to account as co-owner or as agent. The account as co-owner was asked for for the first time by notice Ex. A-5 dated 27-10-1953 and the suit was filed on 4-11-1955, within three years thereafter. The suit was, therefore, within time. The plea of limitation also therefore, fails.

21. In the circumstances the appeal is dismissed with costs of respondent 1.
Appeal dismissed.

AIR 1970 ANDHRA PRADESH 262

(V 57 C 40)

FULL BENCH

P. JAGANMOHAN REDDY, C. J.,
KUPPUSWAMI AND CHINNAPPA
REDDY, JJ

The Revenue Divisional Officer Guntur,
Appellant v. Vasireddy Rama Bhanu Bhup-
pal and others, Respondents.

Appeal No 167 of 1962. D/- 27-12-1967,
decided by Full Bench on Order of Refer-
ence made by Narasimham and Vaidya JJ.
D/- 7-8-1967.

(A) Land Acquisition Act (1894), S. 54
— Award of compensation — Adequacy
— No interference by Appellate Court ex-
cept on basis of fundamental or radical
error of principle. AIR 1950 Mad 650 and
AIR 1967 Andh Pra 56, Rel. on.

(Para 10)

(B) Land Acquisition Act (1894), Ss. 28,
31, 16, 17 — Expression 'taking possession
of the land' in S. 28 — Meaning of — Pos-
session even prior to acquisition proceed-
ings and with consent of owner would be
possession of land under the Act—Interest
is payable from date of taking possession,
whether possession is taken under the Act
or by private negotiations or otherwise in
anticipation of valid proceedings under
the Act — On equitable principle also in-
terest would be payable from date of de-
privation of possession—(T. P. Act (1882),
S. 55 (4) (a)).

Section 28 of the Act states that the
Collector shall pay interest from the date
on which he took possession of land. It
does not say that the Collector should pay
interest only from the date on which he
takes possession under the Act. On a
plain reading of the section the interest is
payable from the date when the Collector
takes possession, whether he takes posses-
sion under any of the provisions of the
Act or by private negotiations or other-
wise in anticipation of valid proceedings
under the Act for the acquisition of the
land in question. Even assuming that the
expression 'taking possession of the land'
under Section 28 of the Act, would only
mean taking possession of the land under
or in pursuance of the Act, there is no
reason why the taking of possession of the
land prior to the Land Acquisition pro-
ceedings without any objection by the
owner (in this case by private negotiation
with his consent followed by valid pro-
ceedings under the Act) should not be held
to be taking possession of the land under
the Act. The Act does not prescribe when
the Collector representing the Govern-
ment should take possession of the land.
Under S 16 of the Act he may take posses-
sion after he has made an award, but
there is nothing in that section or in any
other provision of the Act, which prevents
the Collector from taking possession of

the land earlier with the consent of the
owner. On the other hand there are pro-
visions in the Act, for instance Section 17
which authorises the Collector, in case of
urgency to take possession of any waste
or arable land needed for public purposes,
after expiration of fifteen days from the
publication of the notice mentioned in Sec-
tion 9(1) of the Act. (Para 12)

The claimants' land was taken posses-
sion of by the Municipality of Guntur on
30th November 1950, for constructing re-
servoir for water supply scheme. Subse-
quently Government acquired the same
property under the provisions of the Land
Acquisition Act. The Collector passed the
award on 31st March, 1968 granting in-
terest at 6 per cent from 30th November
1950. The compensation was enhanced on
a reference being made to the Civil
Court and interest was awarded from 30th
November 1950.

Held in appeal, preferred by the Land
Acquisition Officer, that even on equitable
principles the claimant would be entitled
to interest from the date when he was
deprived of his possession, even if it was
before the initiation of the proceedings
under the Act i.e. from 30th November
1950. The fact that on 30-11-1950 it was
the Municipality that took possession and
not the Government would not make any
difference as the acquisition of the land by
the Government was at the instance and
for the purpose of the Municipality and
it was also stated in the award that the
cost of acquisition would be met from the
amount deposited by the Municipality
under Works Deposit in the name of the
Revenue Divisional Officer, Guntur.
Therefore, no distinction could be made
between the possession of the Municipali-
ty and the possession of the Government
in the circumstances of this case. AIR 1957
Andh Pra 34 and AIR 1918 PC 129 and
AIR 1928 PC 287 and AIR 1929 PC 163
and AIR 1936 Mad 199 and AIR 1961 SC
908 and AIR 1950 Cal 498 and AIR 1964
Orissa 113, Rel. on. F. A. No. 78/1 of
1956 D/- 23-8-1965 (Andh Pra). Explained,
AIR 1964 Andh Pra 504, Disting.

(Para 12, 13)

(C) Land Acquisition Act (1894), S. 28
— Calculation of interest — Possession
taken on 30-11-1950 without payment of
value of land — Proper course would be
to calculate value at end of each year
and award interest thereon upto date of
payment — Held that result was achieved
in effect by grant of interest no value as
on date of acquisition i.e. 1956 which was
somewhere midway between taking pos-
session and award of compensation, and
calculating interest at 6 per cent thereon.

(Para 21)

Cases Referred: Chronological Paras
(1967) AIR 1967 Andh Pra 56 (V 54) —
(1966) 1 Andh WR 325, Revenue
Divisional Officer v. Appalaswami 10

- (1965) F. A. No. 78/1 of 1956 D/- 23-8-1965 (Andh Pra) 17
 (1964) AIR 1964 Andh Pra 504 (V 51) = 18
 1964-2 Andh WR 120, Hamberger v. R. D. O. Bandar
 (1964) AIR 1964 Orissa 113 (V 51), Smt. Swarnamayi v. Land Acquisition Collector 17
 (1961) AIR 1961 SC 908 (V 48) = 16
 (1961) 3 SCR 676, Satinder Singh v. Umrao Singh
 (1957) AIR 1957 Andh Pra 34 (V 44) = 13
 ILR (1956) Andh 87, State v. Andhra Pradesh Mills Co.
 (1950) AIR 1950 Cal 498 (V 37) = 16
 ILR (1951) 2 Cal 172, Province of Bengal v. Pawn Kissen Law and Co.
 (1950) AIR 1950 Mad 650 (V 37) = 10
 1950-1 Mad LJ 725, Venkamma v. Collector of West Godavari
 (1936) AIR 1936 Mad 199 (V 23) = 13
 ILR 59 Mad 433, Revenue Divisional Officer v. Venkatarama
 (1929) AIR 1929 PC 163 (V 16) = 13, 15, 16
 56 Ind App 259, Vallabhadas v. Development Officer, Bandra
 (1928) AIR 1928 PC 287 (V 15) = 16
 1928 AC 492, Inglewood Pulp Co. v. New Brunswick Electric Power Commission
 (1925) 1925 AC 520 = 94 LJ KB 629, Swift and Co. v. Board of Trade
 (1918) AIR 1918 PC 129 (V 5) = 13
 ILR 43 Bom 181, Ratanlal Chunilal v. Municipal Commr. for the City of Bombay
 (1852) 3 HLC 565 = 10 ER 222, Birch v. Joy

3rd Govt. Pleader and S. Parvatharao, for Appellant; E. Ayyapureddy for G. Narayanarao and Miss K. Padmaja, for Respondents.

KUPPUSWAMI, J.: This appeal arises out of proceedings for the acquisition of 10,900 sq. feet of land in T. S. No. 79 of Guntur town. The said land was required by the Guntur Municipality for the High level Service Reservoir for Guntur Water Supply Scheme. The Commissioner of the Guntur Municipality by his letter D/- 16-9-1953 applied for the acquisition of that land for the above purpose. Even prior to the request by the Commissioner the Municipality seems to have taken possession of the land on 30-11-1950. In response to the Commissioner's request, proceedings for the acquisition of the land were started under the Land Acquisition Act (hereinafter referred to as "the Act") and notification under Section 4(1) of the Act was published on 12-4-1956. The Land Acquisition Officer gave his award on 31-3-1958, whereby he assessed the value of the land at Rs. 8 per sq. yard. He awarded 15 per cent solatium on the said amount and awarded interest on the compensation at 6 per cent from 30-11-1950

when the land was taken possession of by the Municipality till 31-3-1958, the date of award. The total compensation awarded was Rs. 16,044-80. As the respondents herein requested that a reference be made under S. 18 of the Act as they claimed compensation at the rate of Rs. 18 per sq. yard and also disputed the extent of the site acquired the Land Acquisition Officer made a reference to the Court of the Subordinate Judge, Guntur and that reference was numbered as O. P. No. 33/59.

2. The learned Subordinate Judge after considering the evidence oral and documentary, in the case came to the conclusion that the reasonable price payable for the site was Rs. 8 per sq. yard for a small triangular bit of an extent of 208 sq. yards and Rs. 15 per sq. yard for the remaining area.

3. The contention regarding the difference in extent was given up before the learned Subordinate Judge. On the above valuation he held that the enhanced compensation payable was Rs. 7021-78 and solatium on this amount was Rs 1053-25. He awarded interest at 6 per cent per annum on the enhanced compensation from 30-11-1950 till the date of payment. The referring officer, namely the Revenue Divisional Officer Guntur has preferred the above appeal against the judgment of the learned Subordinate Judge. Three contentions are raised in the appeal, namely.

1. that the rate awarded by the court is excessive and it should have adopted the rate of Rs. 8 per sq. yard as given in the award;

2. interest ought to have been granted on the enhanced compensation from the date of award only and not from 30-11-1950; and

3. the rate of interest should have been 4 per cent and not 6 per cent per annum.

4. The appeal first came up before our learned brother Krishna Rao J. It was contended before him by the learned Government Pleader that the Government had not taken possession in pursuance of the acquisition though the award was passed on 31-3-1958 and therefore there is no liability at all on the part of the Government to pay interest. He agreed with that contention but his attention was drawn to an unreported decision of a bench of this Court in F. A. No. 78/1/1958 D/- 23-8-1966 (Andh Pra) dealing with a case under the Hyderabad Land Acquisition Act where it was held that the claimant was entitled to interest at least from the date of notification under Section 4(1) of the Act. As it was contended that this ruling is opposed to the plain language of the Act and requires reconsideration he referred this case for decision by a Division Bench. The appeal, thereupon came up for hearing before a

Division Bench consisting of Mr. Justice Narasimham and Mr. Justice Vaidya.

5. As they felt that the question regarding interest requires consideration by a Full Bench they formulated the following points for decision by the Full Bench:

"Whether the claimants are entitled to interest under the Act from 30-11-1950 when the Municipality is said to have taken possession "not under the Act but by private negotiation" (vide the Reference to Court) or from the date of Notification under Section 4(1) of the Act. Viz. 12-4-1956 or from the date of making the award, viz., 31-3-1958 or from any subsequent date under the Act?"

6. They however added that as the main question is being referred to the Full Bench it was expedient to refer the entire case for decision by the Full Bench. In the above circumstances the entire appeal is before us.

7. The first contention that is urged by the learned Government pleader is that the proper value of the land on the date of acquisition is Rs. 8 per sq. yard as stated in the award and that the granting of Rs. 15 per sq. yard for a major portion of the site is not warranted by the evidence on record. The learned Subordinate Judge made an inspection of the acquired site. He found that the land was attractive as a house site and there was possibility of the property being used as such site and several buildings were likely to be constructed upon it in the near future. He, therefore, held that the land was not to be valued merely by reference to the use to which it was being put to at the time of acquisition but also by reference to the uses to which it was capable of being put in the near future. The site in question abuts two roads running north and south and is very near the ring road which is a very important road running round Guntur. The value of the land has naturally to be ascertained with reference to the sale deeds of sites situate near the locality and executed at or about the time of the acquisition. Ex. A-1 is a sale-deed dated 16-10-1950 in respect of a site about one furlong to the north of the acquired site, the value of which works out at Rs. 13-8-0 per sq. yard. The Court below felt that on this basis, the rate of Rs. 15 per sq. yard on 12-4-1956, the date of acquisition for the site acquired would not be unreasonable. In this connection it has to be noticed that the High Court of Andhra was located in Guntur in July, 1954, and the value of the sites at Guntur began to raise very much by about that time. Even subsequently the town of Guntur has been extending year by year and the value of the sites has been increasing steadily.

8. Another sale-deed relied on by the claimants was Ex. A-3, dated 22-4-1956. The rate according to this sale-deed is

Rs. 30 per sq. yard. Though this sale-deed is nearer in date to the date in question, the court below did not take this as a basis as this is related to shopping locality though only one furlong from the acquired site. The learned Government pleader's main objection to the judgment of the court below on this aspect of the matter is that the court below ignored Exs. B-1 & B-2 dated 30-11-1953 and 15-4-1954 respectively which are much nearer in date to the date of acquisition than Ex. A-1 dated 16-10-1950.

9. We do not agree that these two sale-deeds relied on by the learned Government Pleader were not considered by the Court below. The court below referred to Ex. B-2 and stated that this is a vacant site and low-lying area and that on the site under Ex. B-1 there are small huts. The rate for the site under Ex. B-2 is Rs. 8-6-0 per sq. yard and B-1 is Rs. 8.

10. The Court below pointed out that the locality of the site in question is a neat one unlike the locality of the sites covered by Exs. B-1 and B-2. The learned Judge was, therefore, right in not proceeding on the basis of Exs. B-1 and B-2. In considering the adequacy of the amount that has been awarded by a court or tribunal which has got to assess the exact amount, it is a well settled principle that an appellate court ought not to interfere except on the basis of a fundamental or radical error of principle made by the trial court (Vide decision in Venkamma v. Collector West Godavari, AIR 1950 Mad 650. This decision was followed by this court in Revenue Divisional Officer v. Appalaswami, AIR 1967 Andh Pra 56).

11. We are not satisfied that there has been any error on principle justifying any interference by the appellate Court. On the other hand, we are of the opinion that the compensation awarded by the court below is just and reasonable in the circumstances of the case.

12. The next contention which as has already been observed necessitated the reference to a Full Bench is that interest can be awarded on the enhanced amount of the compensation awarded by the Court only from the date of the award. Though it seems to have been argued before Mr. Justice Krishnarao that as the possession was taken only by the Municipality under private negotiations and that the Government has not taken possession under the Act, no interest at all was payable by the Government for any period. The argument before us is that interest should have been awarded from the date of the award. To appreciate this contention it is necessary to set out the relevant provisions of the Act.

Section 16.
"When the Collector has made an award under Section 11 he may take possession

of the land, which shall thereupon vest absolutely in the Government free from all encumbrances,"
Section 28:

"If the sum which in the opinion of the court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation the award of the court may direct that the Collector shall pay interest on such excess at the rate of four per cent per annum from the date on which he took possession of the land to the date of payment of such excess into court."

It is therefore argued that Section 28 directs the award of interest of the enhanced compensation only from the date when the Collector took possession of the land to the date of payment of such excess into court. It is argued that taking possession of the land under this section could only mean taking possession of the land in pursuance of or under the Act and it is only from the date of taking such possession that interest becomes payable under this section. Even though the Government according to the Government pleader, did not take possession of the land under the Act at any time it was submitted that having regard to Section 16 of the Act it must be deemed that the Government took possession of the land only immediately after the Collector made the award i.e. on 31-3-1958. We do not see any force in this submission. Section 28 of the Act states that the Collector shall pay interest from the date on which he took possession of the land. It does not say that the collector should pay interest only from the date on which he takes possession under the Act. On a plain reading of the section it appears to us that the interest is payable from the date when the Collector takes possession, whether he takes possession under any of the provisions of the Act or by private negotiations or otherwise in anticipation of valid proceedings under the Act for the acquisition of the land in question. That section 28 of the Act has been so understood is also clear from the provisions of Chapter XXVI of the Land Acquisition Manual relating to payment of interest on the compensation awarded. Under paragraph 3 of the said Chapter it is stated as follows:

"Independently of the Land Acquisition Act, it may become necessary to take possession of a land urgently . . . The Officer entering upon the land should record a statement from the owner agreeing to his entry. When he takes possession he should if possible obtain a further statement that the owner will not claim interest from the date of taking possession. In cases in which the owner declines to give such further statement, interest on the amount of compensation should be included in the award."

Even assuming that the expression 'taking possession of the land' under Section 28 of the Act, would only mean taking possession of the land under or in pursuance of the Act we do not see any reason why the taking of possession of the land prior to the Land Acquisition proceedings without any objection by the owner (in this case by private negotiation with his consent) followed by valid proceedings under the Act should not be held to be taking possession of the land under the Act. The Act does not prescribe when the Collector representing the Government should take possession of the land. Under Section 16 of the Act he may take possession after he has made an award, but there is nothing in that section or in any other provision of the Act, which prevents the Collector from taking possession of the land earlier with the consent of the owner. On the other hand there are provisions in the Act, for instance, S. 17 which authorises the Collector, in case of urgency to take possession of any waste or arable land needed for public purposes, after expiration of fifteen days from the publication of the notice mentioned in Section 9(1) of the Act. The fact that on 30-11-1950 it was the Municipality that took possession and not the Government would not make any difference as the acquisition of the land by the Government was at the instance and for the purpose of the Municipality and it is also stated in the award that the cost of acquisition would be met from the amount deposited by the Municipality under Works Deposit in the name of the Revenue Divisional Officer, Guntur. Therefore no distinction can be made between the possession of the Municipality and the possession of the Government in the circumstances of this case.

13. At any rate we are of the opinion that interest is payable on equitable principles on the compensation amount from the date when the owner was deprived of his possession on 30-11-1950. There is abundant authority which will be referred to presently, for the award of interest from the date of taking possession, even though the possession was taken long prior to the date of notification for acquisition or of the award. It is a well established principle that on a contract for sale and purchase of land, the purchaser has to pay interest on the purchase money from the date of taking possession. This principle is recognised by S. 55 (4) of the Transfer of Property Act, which states that where the ownership of the property has passed to the buyer he is bound to pay interest on the purchase money or any part thereof remaining unpaid from the date on which the possession has been delivered. Even in cases to which S. 55 (4) (a) of the Transfer of Property Act is, in terms not applicable

it has been held that interest in payable from the date of taking possession on equitable principles This in *State v. A. P. Mills Co.*, AIR 1957 Andh Pra 34 where in anticipation of the transfer of the property the prospective buyer was put in possession of the property it was held that Section 55 (4) (a) of the T. P. Act has no application as there was no completed transfer. Nevertheless it was held that the situation is governed by the equitable principle which requires the buyer to pay interest on his purchase money from the date of taking possession and which is based on an implied agreement arising out of the fact of taking over possession without paying the consideration amount. The Division Bench consisting of Subbarao, C. J. (as he then was) and Bhimasankaram J., pointed out that this principle is quite independent of the provisions of the Transfer of Property Act. After referring to the English decisions on this subject, they pointed out that this equitable principle was applied in India under similar circumstances. In particular, they referred to the decision of the Privy Council in *Ratanlal Churnilal v. Municipal Commissioner for the City of Bombay*, ILR 43 Bom 181 - (AIR 1918 PC 129) where the Judicial Committee observed as follows:

"The Board is of opinion that the right to interest depends upon the following broad and clear consideration. Unless there be something in the contract of parties which necessarily imports the opposite, the date when one party enters into possession of the property of another is the proper date from which interest on the unpaid price should run. On the one hand the new owner has possession, use and fruits, on the other the former owner, parting with these has interest on the price. This is sound in principle and authority fully warrants it."

The same principle holds good in the case of compulsory purchase also. In *Inglewood Pulp Co. v. New Brunswick Electric Power Commission*, AIR 1928 PC 287 possession was taken on 13-10-1920 in pursuance of the New Brunswick Electric Power Act, 1920. The award was made on the 30th October 1926, and on appeal from the award the Supreme Court of New Brunswick awarded interest from the date of taking possession i.e., from 13-10-1920. The allowance of interest from that date was questioned before the Privy Council. Lord Warrington of Clyffe delivering the judgment of the Board stated as follows:

"It is true that the appropriation under the Act in question is not effected for private gain, but for the good of the public at large, but for all this the owner is deprived of his property in this case as much as in the other, and the rule has

long been accepted in the interpretation of statutes that they are not to be held to deprive individuals of property without compensation unless the intention to do so is made quite clear. The statute in the present case contains nothing which indicates such an intention. The right to receive interest takes the place of the right to retain possession and is within the rule.

The respondents in their case state that they expropriated the land on 13 10 1920, the date from which the appeal division directed the interest to be calculated and that date may be taken as correct."

In *Vallabhadras v. Development Officer, Bandra*, AIR 1929 PC 163 the Government took possession on 27-11-1919 and proceeded to erect certain building without the necessary notification which was not served until 4-11-1920 when the Government notified under S 6 of the Act, a declaration that the land was required for a public purpose. The main question for consideration before their Lordships of the Privy Council was whether the appellant was entitled to have the building erected by the Government included in the valuation. The Assistant Judge held that the appellant was not so entitled but that he was entitled to compensation for the occupation of the lands by the officials in 1919 before notification on 4-11-1920 and awarded such compensation in the form of interest on the value of the land computed from 27-11-1919 when the Government took possession. Their Lordships of the Privy Council held that under the circumstances of this case the Government Officials were in possession 'not as mere trespassers' but under such a colour of title that the buildings erected by them on the land ought not to be included in the valuation as having become the property of the landowner. Regarding interest they observed as follows:

"the justice of the case was met by holding that the appellant was entitled to compensation for the occupation of the land by the officials before the notification of 4-11-1920 which as before stated, was awarded in the form of interest in the value of the land computed from 27-11-1919 when the Government took possession."

14. It is therefore seen that even in the above case the Privy Council considered it just to award interest from the date of taking possession by the Government even though the award was passed much later. It is no doubt true, as submitted by the Government Pleader that there was no argument addressed on the right to award such interest from that date. But it is to be observed that their Lordships of the Privy Council did not consider the award of interest from the

date of taking possession as opposed to the Provisions of the Act.

15. In Revenue Divisional Officer v. Venkatarama, AIR 1936 Mad 199 the Subordinate Judge granted interest at 6% as compensation for the period of occupation by the Public Works Department Officers prior to the award, that is, from 16-1-1925 to 31-12-1927. In that case as urgent possession was required the consent of the owner had been obtained. It was contended before their Lordships that the award of interest was contrary to the provisions of the Act. After referring to the decision of the Privy Council in AIR 1929 PC 163 their Lordships stated—

"That furnishes a precedent for the award of interest by way of compensation in the circumstances which are very similar to the present case."

They observed—

"As pointed out in 1928 A. C. 492 = (AIR 1928 PC 287) the right to receive interest takes the place of the right to retain possession. We think that the principle of those cases can be applied to the present case. Section 34 of the Act says that the amount of compensation if not paid on or before taking possession of the land, shall carry interest at rate of 6% per annum from the time of taking possession until the compensation money is paid."

Their Lordships added:

"No doubt Section 34 contemplates an award having been made. But the foundation of the section is that when compensation is payable and has not been paid, interest for non-payment must be given from the date of taking possession." Though this decision is with respect to interest awarded by the Officer under Section 34 with regard to compensation awarded by him, we do not think that there is any difference in principle between the case of interest payable under section 34 of the Act, on the compensation awarded by the officer and the interest payable on the excess compensation awarded by the court under S. 28 of the Act, as in both cases the language is similar.

16. In Satinder Singh v. Umrao Singh, AIR 1961 SC 908 it was held that—

"Where the lands are acquired under the Land Acquisition Act and the claimants are awarded compensation, the claimants are entitled to interest on the amount of the compensation for the period between the taking of the possession of the land by the State and the payment of compensation by it to the claimants." In that case a notification for the acquisition was made on 23rd March, 1948 but no action was taken in pursuance of the notification. Meanwhile the Punjab Legislature passed the East Punjab Requisition

of Immovable Property (Temporary Powers) Act 48 of 1948. Under the provisions of that Act the Government requisitioned the land in question for the purpose of resettling the persons who were likely to be evicted from their lands as a result of the construction of the new Capital. It was contended that under this Act it was not permissible to award interest on the compensation and this contention was rejected by the High Court. Their Lordships of the Supreme Court, however held that there was nothing in the act which excludes the application of the general rule in the matter of payment of interest. Discussing the general grounds and principles regarding awarding of interest, their Lordships stated as follows:

"What then is the contention raised by the claimants? They contend that their immovable property has been acquired by the State and the State has taken possession of it. Thus they have been deprived of the right to receive the income from the property and there is a time lag between the taking of the possession by the State and the payment of compensation by it to the claimants. During this period they have been deprived of the income of the property and they have not been able to receive interest from the amount of compensation. Stated broadly the act of taking possession of immovable property generally implies an agreement to pay interest on the value of the property and it is on this principle that a claim for interest is made against the State."

Then they proceeded to refer to the decisions of the House of Lords and the Privy Council in *Swift and Co. v. Board of Trade*, 1925 AC 520, *Birch v. Joy*, (1852) 3 HLC 565 and AIR 1928 PC 287 and observed:

"It would thus be noticed that the claim for interest proceeds on the assumption that when the owner of immovable property loses possession of it he is entitled to claim interest in place of right to retain possession."

In *Province of Bengal v. Pawn Kissen Law & Co.*, AIR 1950 Cal 498 where the land was acquired under the Defence of India Act (1939) it was held that the arbitrator can award interest to the person whose land has been acquired, on the price of the land and the interest will run from the date when the land is taken possession of till the date on which the Land Acquisition Collector draws up the award and makes an offer to the person.

17. In *Smt. Swarnamayi v. Land Acquisition Collector*, AIR 1964 Orissa 113 it was held that so far as interest is concerned, it makes no difference whether the possession is taken under the Land Acquisition Act or independently of it. In either case the owner becomes

entitled to interest on the basis of deprivation of his property without immediate payment of compensation. After referring to several of the decisions on this subject, their Lordships said—

"The learned Advocate General argues that the State had taken possession of the acquired land in 1948 not under the Act and as such the claim for interest is not tenable. This argument is not admissible and the matter is no longer *res integra*. Authorities are one sided that even if possession is taken prior to the commencement of the land acquisition proceedings the owner is entitled to interest from the date of taking possession on the theory that it comes within the meaning of compensation which is equivalent of what the owner had been deprived of."

It is therefore clear from the catena of decisions discussed above that the claimant is entitled to interest on equitable principles from the date he is deprived of possession even if it be prior to the land acquisition proceedings. Reliance however is placed by the learned Government Pleader on an unreported decision of a Bench of this court in F. A. 78/1 of 1956 D/, 23-8-1965 Andh Pra. In that case possession was taken in 1937 F. but proceedings under the Act were not however, taken till 1951F. when the file was transferred to the Talukdar's Office for that purpose. A declaration under Section 5 of the Hyderabad Land Acquisition Act (Corresponding to S. 4 of the Act) was made on 7-7-1956 F. The learned District Judge awarded interest at 6% per annum on the total compensation as found by him from the date of notification till the date of final payment. It was argued that the claimant was entitled to interest from the date of taking possession. It was held by this court that under Section 29 of the Hyderabad Act (corresponding to S. 34 of the Act) the claimant would be entitled to interest only from the time of taking possession under the Act, that though the Military authorities were already in possession, they must be deemed to have taken possession under the Act only on the date of notification but not earlier. Hence interest was awarded only from the date of notification. No arguments were addressed in that case that on equitable principles based upon implied agreement the claimant is entitled to interest from the date of taking possession. The various decisions of the Privy Council, the Supreme Court and of number of High Courts referred to above, in which it has been uniformly held that the claimant is entitled to interest from the date when the Government takes possession, even if it has been taken prior to initiation of land acquisition proceedings, were not placed before this court. Therefore

this court had no occasion to consider whether interest should be awarded from the date of taking possession on principles of justice and equity.

18. Another decision relied on by the learned Government Pleader is *Hamberger v. R. D. O., Bandar*, 1964-2 Andh WR 120 = (AIR 1964 Andh Pra 504). In that case the notification under S. 4 of the Act was published on 7-10-1955 in respect of certain lands and buildings. They were already in possession of the Government from 1941 as the Mission Society, which was the owner had leased the buildings on rent to the Government for a favourable rent of Rs. 200/- in that case it was held that the interest on enhanced compensation given by the Subordinate Judge was payable from the date of award inasmuch as the possession as tenant must be deemed to have changed into possession of the Government as owner from that date, till the date of deposit or realisation, as the case may be. The question of interest from the date of compensation to the date of award was not considered or decided by this Court, presumably because throughout that period the owner was getting rent from the Government. There was therefore no question of deprivation of the possession by the land-owner without being compensated for such deprivation. This decision cannot be treated as authority for the proposition that no interest is payable from the date of deprivation of possession, if possession is taken prior to the proceedings under the Act.

19. Having regard to the series of decisions referred to earlier to the effect that the claimant would be entitled to interest from the date when he is deprived of his possession, even if it be before the initiation of the proceedings under the Act we are of the opinion that the claimant in this case will be entitled to interest as and from 30-11-1950.

20. It was next argued that the rate of interest is 4% and not 6%. Under Section 28 of the Central Act, the rate of interest stipulated is 8% but by reason of Madras Amendment (Madras Act 12/53) the interest payable is 4% and the argument that the rate should be 4% only is based on this amendment. There is however a proviso introduced by the same amending Act to the following effect:

"Provided that where such possession is taken before the commencement of the Land Acquisition (Madras Amendment) Act 1953, the foregoing provision shall have effect as if for the rate of four per cent per annum specified therein, the rate of six per cent per annum had been substituted."

As possession was taken in this case on 30-11-1950, that is before the commencement of the amending Act, it follows that

the rate of 6% awarded by the court below is correct. In any event as we have held that the interest is payable under principles of equity from the date of taking possession, the rate of 6% which has always been regarded as just and equitable and has even been taken as the proper rate under the Civil Procedure Code will in our opinion meet the ends of justice.

21. It was then argued that this interest should be calculated on the value of the property as on the date of taking possession, that is 30-11-1950. We have held that interest is payable on equitable principles by way of compensation for deprivation of possession without payment of the value thereof. In order to give effect to that principle completely perhaps the logical and proper course would be to calculate the value at the end of each year and award interest thereon up to the date of payment. That result is achieved in effect by the grant of interest on the value as on the date of acquisition, that is 1956 which is somewhere midway between taking possession and the award of compensation, and calculating interest at 6% on that date.

22. For all the reasons stated above, we are of the opinion that the judgment of the court below is correct in every respect and the appeal is therefore dismissed with costs.

Appeal dismissed.

AIR 1970 ANDHRA PRADESH 269
(V 57 C 41)

GOPALRAO EKBOTE AND
KUPPUSWAMI, JJ.

Mantrala Rajagopalam, Appellant v.
Vemuri Venkata Subba Rao, Respondent.

Letters Patent Appeal No. 54 of 1965.
D/- 11-4-1969, against order of High Court,
Hyderabad, in A. A. A. O. No. 48 of 1963.
D/- 20-10-1964.

Limitation Act (1908), Art. 182 (2) —
Two or more decrees passed on different
dates in a single suit — Appeal against
only one of them — Decrees from which
no appeal is filed are also covered by
Article 182 (2).

Where two distinct decrees are passed
in a suit and an appeal is preferred
against only one of them, then the ap-
peal can be said to be against a portion
of the decree in a suit and the final
decree in such appeal will save limita-
tion for execution of the other decree,
from which no appeal, was filed under
Art. 182 (2) of the Limitation Act. It is
now fairly established that though an
appeal is preferred in respect of only a
part of a decree, limitation is saved as

regards the entire decree. The principles
upon which appeal against a portion of
the decree are held to save limitation in
respect of the portion not appealed, must
necessarily and logically apply to cases
where more than one decrees are passed
in one suit. Two or more decrees pass-
ed on different dates in a single suit are
merely two or more stages where dif-
ferent reliefs are granted by the Court
to the party. They supplement each other
and ultimately culminate into a single
decree disposing of the whole suit. Any
appeal filed against anyone of such
decrees would place the entire suit to-
gether with other decrees not appealed
before the appellate court where the suit
shall be reheard and suitable orders pass-
ed. Such an appeal would directly and
immediately be connected with the
decrees not appealed. Such an appeal
therefore must be considered as having
direct and immediate connection with the
decree under execution. The test whe-
ther the whole decree whether compo-
site or passed separately is imperilled by
appeal or not will be relevant. When no
difficulty can be found in cases of pre-
liminary and final decrees or cases where
two decrees are passed on two different
dates against two different defendants,
in applying clause (2) of Article 182, then
the same principle can be applied to
cases where in a single suit two decrees
are passed on two different dates and
in such cases also, under clause (2) of
Art. 182 limitation will run from the date
of the final decree passed in appeal. Case
law discussed.

(Paras 23, 29)

Cases	Referred:	Chronological	Paras
(1963) AIR 1963 Pat 412 (V 50) =	ILR 42 Pat 192 (FB), Sidheshwar Prasad v. Ram Saroop		23
(1961) AIR 1961 Mad 495 (V 48) =	ILR (1961) Mad 692, Arumugam v. Kalyanasundaram	23	12
(1956) AIR 1956 Nag 200 (V 43) =	ILR (1956) Nag 840, Balkishan v. Dhanraj	23	
(1955) AIR 1955 Him Pra 35 (V 42)	Om Chand v. Lalman	32	
(1953) AIR 1953 Trav-Co. 220 (V 40)	= ILR (1953) Trav-Co. 89 (FB), Narayana Thampi v. Lakshmi Narayana	30	
(1951) AIR 1951 Mad 962 (V 38) =	ILR (1952) Mad 277 (FB), Sivaramachari v. Anjaneya	15	23
(1950) AIR 1950 SC 6 (V 37) =	1950 FCR 25, Bhawanipore Bank- ing Corporation v. Gouri Shan- kar	18	
(1932) AIR 1932 PC 165 (V 19) =	59 Ind App 283, Nagendra Nath v. Suresh	17	27
(1911) ILR 33 All 264 =	38 Ind App 37 (PC), Ashfaq Husain v. Gauri Sahai	23	29, 30

(1903) ILR 26 Mad 91 (FB), Krist-nama Chariar v. Mangammal 25 N. Rajeswara Rao, for Appellant; Y. B. Tata Rao, for Respondent.

GOPAL RAO EKBOTE, J.: The question which has to be answered in this Letters Patent Appeal, is, where two distinct decrees are passed in a suit and an appeal is preferred against only one of them, can it be said that it is an appeal against a portion of the decree in a suit and the final decree in such appeal would save limitation for execution of the other decree from which no appeal was filed under Article 182 (2) of the Indian Limitation Act, 1908.

2. The facts which give rise to this problem may briefly be stated. The appellant filed O. S. No. 479 of 1944 for possession of about 1 acre and 60 cents of land and in the alternative for partition of the same into three equal shares and for separate possession of one such share. The 1st defendant in the suit is the plaintiff's father and the 2nd defendant is his only brother. The 3rd defendant obtained a sale deed D/- 14-6-1944 from the 1st defendant for a consideration of Rupees 1500/-. The plaintiff contended that the sale was not binding on him.

3. On 31-3-1947, a preliminary decree was passed by the trial Court declaring that the plaintiff is entitled to a one-third share in the suit property. It directed the appointment of a Commissioner to partition of the properties into three equal shares and for delivery of possession of one such share to the plaintiff. It further ordered that the plaintiff was entitled to mesne profits calculated at 3 bags on his share from defendants 1 to 3. It also directed that the future mesne profits would be determined on a separate application.

4. The 3rd defendant carried the matter in appeal to the Subordinate Judge's Court, Machilipatnam. The plaintiff filed a memorandum of cross-objections. The learned Subordinate Judge held that the property sold to the 3rd defendant was the self-acquired property of the father of the 1st defendant. He therefore allowed the appeal and dismissed the memorandum of cross-objections. The plaintiff then filed Second Appeal No. 1572 of 1949 in the High Court. The High Court allowed the Appeal on 1-7-1955 and restored the decree of the trial Court. The preliminary decree passed by the trial Court was thus finally upheld.

5. After the second appeal was disposed of, the plaintiff filed two applications in the trial Court I. A. No. 2532 of 1955 was filed to partition the property according to the preliminary decree and to allot two shares to the plaintiff on the ground that he became entitled to the 2nd defendant's share as the 2nd de-

fendant, the plaintiff's mother as well as the 1st defendant, had died during the pendency of the second appeal.

6. The second application was I. A. No. 2320 of 1955 for the ascertainment of mesne profits of the two third share belonging to the plaintiff. Since the 3rd defendant was set ex parte, the decree for mesne profits was passed in favour of the plaintiff on 2-1-1956.

7. The 3rd defendant filed an application to set aside the said ex parte decree passed for mesne profits. It was, however, dismissed. C. R. P. No. 1372 of 1956 filed against that order refusing to set aside the ex parte decree was also dismissed by the High Court on 26-9-1958.

8. In the meanwhile I. A. No. 2532 of 1955 was allowed and a final decree allotting two one-third shares to the plaintiff on 23-2-1956 was passed. The 3rd defendant filed A. S. No. 65 of 1956 in the Subordinate Judge's Court, Machilipatnam challenging this final decree. The appeal was however dismissed on 21-3-1957. Second Appeal No. 992 of 1957 was then filed by the 3rd defendant in the High Court. Manohar Pershad J. dismissed the said second appeal on 15-2-1961.

9. The decree-holder appellant filed E. A. No. 1424 of 1960 asking the Court to transmit the decree for mesne profits to the District Munsif's Court, Avanigadda for execution alleging that the judgment debtor's properties which he intends to sell are situated within the jurisdiction of the Avanigadda Court. On an objection regarding limitation raised by the judgment-debtor, the District Munsif dismissed the application as time barred and refused to transmit the decree. He thought that the case is governed by Article 182 (1) of the Limitation Act. As the decree was passed on 2-1-1956 and the E. A. was filed on 24-9-1960 after more than three years, the District Munsif found the E. A. to be statute-barred.

10. The decree-holder filed A. S. No. 65 of 1961 in the District Court, Krishna. It was subsequently transferred to the Subordinate Judge's Court, Machilipatnam where it was numbered as A. S. No. 12 of 1961.

11. The learned Subordinate Judge held that the case is governed by Article 182 (2) of the Limitation Act. The period of limitation would therefore commence from 15-2-1961 when the second appeal No. 992 of 1957 was dismissed by the High Court. He found therefore the E. A. within limitation and allowed the appeal.

12. C. M. S. A. No. 48 of 1963 was then filed by the 3rd Judgment-debtor, Chandrasekhara Sastry, J. allowed the appeal by his judgment dated 20-11-1964. He held that the case comes under the first clause of column 3 of Article 182. The E. A. therefore is barred by limitation. It

is this judgment, from which the decree-holder has appealed.

13. Article 182 in so far as it is relevant reads as follows:

Description of application.	Period of limitation.	Time from which period begins to run.
182.—For the execution of a decree or order of any Civil Court not provided for by Art. 183 or by S. 48 of the Code of Civil Procedure, 1908.	Three years, or where a certified copy of the decree or order has been registered, six years.	(1) The date of the decree or order, or (2) Where there has been an appeal the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal, or

14. A reading of this Article would indicate that it deals with an application for the execution of a decree not provided for by Article 183 or by Section 48, C. P. C. Column 3 gives different dates from which the period of limitation begins to run for execution petitions. The first clause refers to a date which is the date of the decree, the execution of which is sought. Clauses 2, 3 and 4 provide for cases where there have been proceedings directly connected with the decree referred to in clause 1. The three contingencies provided are: (a) where there has been an appeal (b) where there has been a review of judgment; and (c) where the decree has been amended. The three different proceedings contemplated obviously are proceedings taken after the passing of the decree. While it may be stated that clauses 3 and 4 refer to the decree mentioned in clause 1, there has been some controversy as to whether the appellate decree mentioned in clause (2) refers to the decree for the execution of which the application is filed as mentioned in clause (1).

15. It has, however been held that "When the review and amendment which result in postponing the starting point of limitation have a direct connection with the original decree or order, the appeal mentioned in clause (2) must likewise be directly connected with the original decree or order" Vide Sivaramachari v. Anjaneya, AIR 1951 Mad 962 (FB).

16. Reviewing certain authorities, Rajamannar, C. J. in the above said judgment observed at page 965 as follows:

"The preponderance of authority in the several Courts was therefore that the appeal referred to in Cl. (2) of column 3 of Art. 182 must be confined to an appeal against the decree in the suit and not extended to an appeal from any interlocutory order in the suit or an appeal in any collateral proceeding." The learned Chief Justice at page 967 concluded thus:

"In my opinion that word (appeal) which is no doubt a general word must bear a meaning restricted by its context and the meaning that I would give to it is 'an appeal from a decree or order of the nature mentioned in cls. 1, 3 and 4 that is

to say, an appeal from the original decree or order, an appeal from a decree following a review of judgment, and an appeal from an amended decree.' The true test is that the decree of the appellate Court in the appeal must be the decree which is sought to be executed."

17. In Nagendra Nath v. Suresh, AIR 1932 PC 165. A and B were co-mortgagees under a mortgage. A brought a suit on the mortgage claiming that B had assigned his interest in the mortgage to him. This claim was overruled and a decree for sale was passed in which it was provided that B was entitled to receive a certain amount from the sale proceeds of the mortgage property. A appealed against B in respect of this provision in the decree. The judgment-debtor was not joined as a party to this appeal. The appeal was dismissed. Then B applied for execution of the mortgage decree. It was contended that limitation for the application ran not from the date of the dismissal of the appeal but from the date of the original decree. The contention was based inter alia on the following two grounds: (1) That an appeal in order to save limitation under clause (2) of Article 182 must be one to which the person affected, that is the judgment-debtors were parties; and (2) that it must also be one in which the whole decree was imperilled. Their Lordships of the Privy Council in repelling these contentions observed that the questions raised had been the subject of much difference of opinion in India. After referring to certain decisions to illustrate their statement, their Lordships proceeded as follows:

"Their Lordships think that nothing would be gained by discussing these varying authorities in detail. They think that the question must be decided upon the plain words of the article "where there has been an appeal", time is to run from the date of the decree of the appellate Court. There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it, the words mean just what they say. The fixation of periods of limitation must always be to some extent arbi-

trary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide. It is at least an intelligible rule that so long as there is any question sub judice between any of the parties those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage. Nor in such a case as this is the judgment-debtor prejudiced. He may indeed obtain the boon of delay, which is so dear to debtors, and if he is virtuously inclined there is nothing to prevent his paying what he owes into Court. But whether there be or be not a theoretical justification for the provision in question, their Lordships think that the words of the article are plain, and that there having been in the present case an appeal from the mortgage decree of 24th June 1920, time only ran against the appellants from 24th August 1922, the date of the appellate Court's decree."

18. In Bhawanipore Banking Corporation v. Gouri Shankar, AIR 1950 SC 6 the facts were that on 21-8-1940 a preliminary mortgage decree was passed ex parte. On 19th September 1940 the judgment-debtor made an application under O. IX R. 13, C. P. C. for setting aside the ex parte decree. But this application was rejected on 7th June, 1941. On 11th July, 1941 the judgment-debtor filed an application under Section 36 of the Bengal Money-lenders Act for re-opening the preliminary decree, but this application was dismissed for default on 20-12-1941. Thereafter a final decree was passed on 22-12-1941. The judgment-debtor then made an application under Order IX Rule 9, C. P. C. for the restoration of the proceedings under Section 36, Money-lenders Act. It was dismissed on 1-6-1942. The judgment-debtor then filed an appeal to the High Court which was dismissed in default on 3-7-1944. On 9-4-1945 an application for executing the decree against the original judgment-debtor who had died by then was filed. It was dismissed for default on 11-5-1945. On 2-6-1945, another execution petition was filed which gave rise to the appeal before the Supreme Court.

19. Rejecting the contention that the case was covered by clause (3) of Article 182, their Lordships rejected the contention with regard to clause (2) also. The contention was that the case is covered by clause (2) on the ground that even though no appeal was preferred from the final mortgage decree, the words "Where there has been an appeal" are comprehensive enough to include in that case the appeal from the order dismissing the application under Order IX Rule 9, C. P. C. made in connection with the proceedings

under Section 36 of the Money-lenders Act. Their Lordships said:

"This argument also is a highly far-fetched one, because the expression 'where there has been an appeal' must be read with the words in Col. 1 of Art. 182, viz. for the execution of a decree or order of any Civil Court.....and however broadly we may construe it, it cannot be held to cover an appeal from an order which is passed in a collateral proceeding or which has no direct or immediate connection with the decree under execution."

20. From the above said three decisions which constitute important landmarks in the interpretation of Article 182, clauses (1) and (2), the following conclusions emerge. (1) The word 'appeal' in clause (2), although a general word, must bear a meaning restricted by its context. It means an appeal from a decree of the nature mentioned in clauses (1), (3) and (4). (2) The true test is that the decree of the appellate court in the appeal must be the decree which is sought to be executed. (3) There is no warrant for reading into the words of clause (2) any qualification either as to the character of the appeal or as to the parties to it. The words mean just what they say. (4) However broadly the words of clause (2) are construed, they cannot cover an appeal from a decree or order which is passed in a collateral proceeding or is filed from any interlocutory order made in the suit. (5) If the appeal has a direct or immediate connection with the decree under execution, such an appeal would come within the purview of clause (2).

21. Bearing in mind these conclusions, if we look at the present case, it would be evident that S. A. No. 992 of 1957 had not arisen out of any interlocutory order or out of an order made in a collateral proceeding. It arose out of a final decree for partition passed in the same suit in which suit the decree for mesne profits was also passed which now is sought to be executed. The question which then arises is whether the decree in execution is a decree which is referable to clauses 1, 3 and 4 of Article 182 and whether S. A. 992 of 1957 has a direct or immediate connection with the decree under execution.

22. Before we give any answer to this question it seems to us quite relevant to mention that although appeal did not in several cases arise directly out of the decree sought to be executed, nevertheless because of the combination of conclusions Nos. 1, 2 and 5 mentioned above, it has been repeatedly held that clause (2) of Article 182 would apply even to such cases. We propose to mention a few of such examples.

23. AIR 1951 Mad 962 (FB) Itself provides a prominent instance. In that case it is agreed that in cases where there has

heard in respect of those charges against him and where it is proposed, after inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry."

The 15th Amendment envisages two methods of notice and such notices must, therefore, be required to be served when an inquiry is held. The inquiry can be dispensed with only under provisos (a), (b) and (c). The amended proviso (c) of clause (2) runs as follows:

"Provided that this clause shall not apply—

* * * *

(c) where the President or Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry." The Governor in terms of this proviso may dispense with an inquiry as contemplated by clause (2) if he is satisfied that inquiry should not be embarked upon in the interest of the security of the State. In the instant case we have already shown from the order of the Governor quoted before, that he was satisfied under proviso (c) of clause (2) of Article 311 of the Constitution that in the interest of the security of the State it was not expedient to give to the petitioner Zatia an opportunity to show cause against the action proposed to be taken. It appears to us that the Governor's satisfaction as to proviso (c) after the 15th Amendment was not, on the face of the order, complied with, but it seems that such an order was passed on the basis of proviso (c) of Clause (2), which existed prior to the 15th Amendment. It is provided therein that clause (2) shall not apply

"where the President or Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to give that person such an opportunity".

The latter part of the Governor's order quotes this proviso, although the 15th Amendment was in existence at the time when the impugned order by the Governor was passed.

Accordingly if we may say so, this was done inadvertently by the officer who had drawn up the order. Whether it was done advertently or inadvertently is not a question for us to decide. The order on the face of it purports to show that presumably in the first instance an inquiry was ordered to be made, in which notice as per terms of the amended clause (2) is required to be served and the second show cause notice was dispensed with in the interest of the security of the State. This however cannot be the position in law in view of the clear terms

of the amended clause and the Governor's satisfaction must be the satisfaction to the effect that no inquiry was necessary as contemplated by Article 311 (2). From the order it does not appear that resort to proviso (c) was taken as stated above.

5. Mr. G. Talukdar, appearing for the State has argued that the condition of holding an inquiry as laid down in clause (2) of Article 311 is required to be dispensed with under proviso (c). It is also stated that it was absolutely incorrect to say that the Governor's order only exempts the requirement of giving an opportunity to show cause against the action proposed to be taken and does not exempt the holding of the inquiry. He further contends that when the proviso (c) cl. (2) of Article 311 of the Constitution has been clearly mentioned in the second paragraph of the order, that would impliedly show that the Government dispensed with the inquiry and the expression "an opportunity to show cause against the action proposed to be taken in regard to him as stated above", is a superfluity and does not in any way affect the satisfaction of the Governor that no inquiry was to be made.

6. Upon hearing the learned counsel of both the sides it appears to us that as long as the Governor acted in good faith, his satisfaction cannot be determined by this Court by any objective test and inquired into by it. There is no dispute about this proposition of law. But we are concerned to see whether the true letters of the Constitution have been followed by the Governor in passing the impugned order. We have already stated that this order prima facie purports to show that in the first instance an opportunity was given to the petitioner to show cause, but in the interest of public security the second show cause notice was dispensed with. This is not the spirit of proviso (c) of clause (2) of Article 311 and as such since we find that the constitutional provisions have not been adopted regarding the satisfaction of the Governor under proviso (c) (ibid), we cannot say that by implication it should be deemed to have been passed under this clause.

7. In this connection Mr. J. P. Bhattacharjee appearing for Mr. D. M. Sen has referred us to the decision of the Supreme Court reported in AIR 1966 SC 740, Ram Manohar Lohia v. State of Bihar. The ratio of the decision in the matter of Rule 30 (1) (b) of the Defence of India Rules is that 'law and order' cannot mean the same thing as 'public order' as used in the impugned order stated in that decision and as such the only course open to the court was to hold that the

rules were not strictly observed and the order did not justify detention. As for the purpose of justifying the detention, such compliance with the rule by itself was enough, a non-compliance necessarily had a contrary effect. We may quote the relevant observation as stated at paragraph 11 of the judgment:—

"I am not impressed by the argument that the reference in the detention order to R. 30 (1) (b) shows that by law and order what was meant was public order. That is a most mischievous way of approaching the question. If that were right, a reference to the rule in the order might equally justify all other errors in it. Indeed it might with almost equal justification then be said that a reference to the rule and an order of detention would be enough. That being so, the only course open to us is to hold that the rules have not been strictly observed. If for the purpose of justifying the detention such compliance by itself is enough, a non-compliance must have a contrary effect."

From this decision it is absolutely clear that mere reference to proviso (c) of clause (2) of Article 311 and inappropriate application of the old clause and the proviso, cannot impliedly show that the Governor had his satisfaction regarding dispensing with the inquiry, and unless the provisions of the Constitution in their true letters are complied with in the order itself, we may conclude that the Governor's satisfaction in this regard was not obtained. Therefore, the argument of Mr. Talukdar that mention of the aforesaid proviso is enough, cannot stand and we consider that it is of no substance.

8. In the above premises we are of opinion that since the constitutional provision regarding satisfaction of the Governor under proviso (c) of clause (2) of Article 311 of the Constitution was not recorded, the impugned order and the subsequent orders as passed by the Superintendent of Police dismissing the petitioner cannot have any legal validity. We accordingly quash the order passed by the Governor as per Annexure 'I' of the petition and direct that the petitioner shall be deemed to be continuing in his appointment as a Constable from the date of the order of his dismissal by the Superintendent of Police. We, however, observe that the petitioner may be proceeded against afresh, if so advised, according to law. The rule is made absolute in the above terms with costs, advocate's fee being assessed at Rs. 100 (one hundred).

9. Civil Rule No. 8/69 is disposed of in terms of our order in Civil Rule No. 7/69 above. The petitioner Chalbunga

will get costs, advocate's fee being assessed at Rs. 100 (one hundred).

10. S. K. DUTTA, C. J.: I agree.
Rule made absolute.

AIR 1970 ASSAM & NAGALAND 82
(V 57 C 18)

P. K. GOSWAMI AND
M. C. PATHAK, JJ.

Abdul Gani Sarkar, Petitioner v. Assam Board of Revenue and others, Respondents.

Civil Rule No. 221 of 1968, D/- 20-6-1969.

(A) Tenancy Laws — Assam Land and Revenue Regulation (I of 1886) Ss. 81 and 151 — Application under S. 151 held not barred though filed after expiry of three years from date of sale — Section 151 gives wide power to Board and could be invoked in appropriate case — Question of limitation would not affect jurisdiction of Board. (Para 3)

(B) Tenancy Laws — Assam Land and Revenue Regulation (I of 1886), Ss. 70 and 91 — Applicability — Default of rent in respect of annual patta lands — Sale can neither be under S. 70 nor of non-defaulting estate under S. 91.

The defaulting estate, which is liable to be sold under section 70, must be either a permanently settled estate or an estate in which the settlement-holder has a permanent, heritable and transferable right of use and occupancy. Where the defaulting estate is a land covered by annual patta, there is no permanent, heritable and transferable right of use and occupancy with regard to this land. Sale cannot, therefore, be held under the provision of Section 70. Nor can sale take place of a non-defaulting estate for arrears of rent of an annual patta land under S. 91. Section 91 must relate to three earlier processes in Chapter V. Those are to be found under Sections 69, 69A and 70. Any of the foregoing processes mentioned in S. 91 mean whichever processes are applicable when the Deputy Commissioner wants to use them. In other words, with respect to the defaulting estate the Deputy Commissioner must be in a position to use all the three foregoing processes under Ss. 69, 69A and 70. Since, however, Section 70 cannot be invoked because the land is an annual patta land, it is clear that Section 91 cannot apply to annual patta land where the section cannot be invoked. (Paras 5 & 6)

S. N. Chaudhury, for Petitioner; B. C. Barua, Advocate General, for State; A. R. Kalita, for Respondents Nos. 2 to 9.

GOSWAMI, J.: This Rule was obtained against the order of the Board of Revenue.
JM/LM/E593/69/GMJ/B

nue allowing the application of the respondents under section 81 read with section 151 of the Assam Land and Revenue Regulation, hereinafter called 'the Regulation'.

2. The respondents' case before the Board was that they purchased by registered sale deed some time in 1961 the periodic patta lands of the defaulting pattadar who had defaulted in respect of two annual patta lands covered by annual pattas 144 and 127, respectively. There was default with regard to land revenue of these annual pattas for the years 1366 and 1367-68 B.S., respectively. Attempt to attach and sell the movables of the defaulting pattadar was abortive. It is rather intriguing and curious that a defaulting pattadar, who owned as much as 19 Bighas of periodic patta land and was in a position to sell it in 1961 for Rs. 8000/- and odd, was not found to be owning sufficient movables to meet the demand of land revenue of about Rs. 49/- or so. At any rate, after the attempt to sell the movables failed, the Deputy Commissioner sold the periodic patta land of the defaulting pattadar under section 70 of the Regulation. The purchasers of the periodic patta land, who are the respondents herein, applied to the Board as noted above and secured the impugned order in their favour.

3. Mr. Chaudhury, the learned Counsel for the petitioner, questions this order of the Board on the ground of maintainability of the petition under S. 81 of the Regulation before the Board after the expiry of one year, which is the time limit mentioned in section 81. The petition before the Board was filed on 9-12-66 when at the time of admission the question of limitation was left open by the Member who admitted the same. Since, however, the petition was also purported to be one under Section 151 of the Regulation, finally the Board dealt with it as a petition under Section 151 and passed the impugned order. Mr. Chaudhury submits that no petition under section 151 of the Regulation was maintainable after the expiry of three years from the date of the sale, as in this case. It is sufficient to point out that there is no question of limitation under section 151 of the Regulation, which we may read:

"151. The Board, a Deputy Commissioner, a Settlement Officer and a Survey Officer may call for the proceedings held by any officer subordinate to it or him, and pass such orders thereon as it or he thinks fit."

This is sufficiently a wide power and could be invoked in an appropriate case and the question of limitation would not affect the jurisdiction of the Board. The

objection on this score is, therefore, without foundation.

4. The Board took the view that Section 70 could not be invoked in selling the estate in question as the arrears were in respect of an estate which was not the defaulting estate. According to the learned Board, Section 91 of the Regulation was the appropriate section and since there are two different procedures laid down for sale under the two sections namely, Sections 70 and 91, the one adopted by the Deputy Commissioner was not applicable in the case of an estate which is not the defaulting estate. This matter was heard earlier and we thought that we should hear the State in connection with the applicability of Section 91 of the Regulation since that section has been held by the Board which is the highest revenue authority in the State, to be applicable in a case of this description, and we gave notice to the State and wanted to hear the learned Advocate-General who is now in attendance.

5. The question that arises for consideration is whether this auction sale which was held is permissible under section 70 of the Regulation. The answer would be clear by reading the section itself:

"70. When an arrear has accrued in respect of a permanently-settled estate or of an estate in which the settlement-holder has a permanent, heritable and transferable right of use and occupancy, the Deputy Commissioner may sell the estate by auction:

Provided that—

* * * * *

It is absolutely clear from a mere reading of section 70 that the defaulting estate, which is liable to be sold under section 70, must be either a permanently-settled estate or an estate in which the settlement-holder has a permanent, heritable and transferable right of use and occupancy. The defaulting estate in the instant case being land covered by annual patta, there is no permanent, heritable and transferable right of use and occupancy with regard to these lands. It is, therefore clear that sale could not be held under the provision of section 70 of the Regulation, and, as such, the entire proceedings of sale are void.

6. Next question is whether the Board is correct in further stating that S. 91 of the Regulation was applicable in a case of this description and as the procedure relating to sale of estates for realisation of arrears of land revenue has not been complied with, the order is liable to be set aside. We may read S. 91 (1):

"91. (1) If an arrear cannot be recovered by any of the foregoing pro-

cesses, and the defaulter is in possession of any immoveable property, other than the estate in respect of which the arrear has accrued, the Deputy Commissioner may proceed against any of that other property situated within his district according to the law for the time being in force for the attachment and sale of immoveable property under the decree of a Civil Court."

We have heard the learned Advocate General on the question whether S. 91 can at all be invoked in dealing with cases of default in respect of annual patta land. The learned Advocate General contends that on terms this section would apply to both the annual patta land as well as periodic patta land. We have given our anxious consideration to this submission, but bearing in mind the language of section 91 and particularly the provision that this section would be applicable only after the foregoing processes had failed, we are of the opinion that the defaulting estate, which is contemplated under section 91, cannot refer to an annual patta land. The foregoing processes mentioned in Section 91 must relate to three earlier processes in Chapter V. Those are to be found under Sections 69, 69A and 70. The learned Advocate General concedes that section 70 is not applicable when the arrears are in respect of annual patta land. We have, therefore, to consider whether when any of the three processes are not available, if the Deputy Commissioner intends to use them in respect of a particular defaulting estate, section 91 can at all be invoked. We are clearly of the opinion that any of the foregoing processes mean whichever processes are applicable when the Deputy Commissioner wants to use them. In other words, with respect to the defaulting estate the Deputy Commissioner must be in a position to use all the three foregoing processes under sections 69, 69A and 70. Since, however, it is conceded that Section 70 could not be invoked in this case because the land is an annual patta land, it is clear that Section 91 cannot apply to annual patta land where the section could not be invoked. We are, therefore, clearly of the opinion that the learned Board's view on the point that Section 91 was applicable and that the order was bad only because the procedure laid down under Section 91 was not complied with cannot be held to be correct. The order of the Deputy Commissioner is bad because the entire proceedings are misconceived. There could be no sale in law under Section 70 of the Regulation in this case nor could a sale take place of a non-defaulting estate for arrears of rent of an annual patta land under S. 91 of the Regulation. In any view of the matter, the order of sale passed by the Deputy Commissioner is in-

valid and was correctly set aside by the Board although the aforesaid reasons given by the Board are not correct as we have indicated above.

7. In the result, the application fails and the Rule nisi is discharged, but in the entire circumstances of the case, there will be no order as to costs.

We are grateful to the learned Advocate General for his assistance in the matter.

8. M. C. PATHAK, J.: I agree.

Rule discharged.

AIR 1970 ASSAM & NAGALAND 84 (V 57 C 19)

S. K. DUTTA, C. J. AND K. C. SEN, J.
Rameswar Goenka and others, Petitioners v. Income-tax Officer 'A' Ward, Shillong and others, Opposite Parties.

Civil Rules Nos. 356 to 362 of 1965, D/- 30-5-1969.

(A) Constitution of India, Articles 226 and 227 — Procedure — Joinder of parties — Petition being a "proceeding" provisions of Civil P. C. apply — Hindu undivided family and a partnership firm consisting of members of such family aggrieved by order cancelling registration under Income-tax Act — Both can be joined as petitioners. (Para 6)

(B) Constitution of India, Arts. 226 and 227 — Certiorari — Quasi-judicial orders passed by Income-tax authorities in excess of jurisdiction or orders suffering from error apparent on face of record can be quashed. (Para 7)

(C) Income-tax Rules, 1922, R. 6B — Exercise of power in respect of firm — Notice and opportunity has to be given.

If the power under R. 6B is exercised by the Income Tax Officer against a firm, without giving it a notice in that behalf and without affording it an opportunity to satisfy the Officer that it is a genuine firm, it may be open to the firm to question the validity of the order on that ground. AIR 1959 SC 213, Rel. on.

(D) Income-tax Act (1961), S. 147 (a) — Expression "material facts" refers only to primary facts — Assessee is only required to disclose primary facts — He is not required to indicate factual or legal inferences to be drawn. AIR 1961 SC 372, Rel. on. (Para 10)

Cases Referred: Chronological Paras (1961) AIR 1961 SC 372 (V 48) —

(1961) 2 SCR 241, Calcutta Discount Co. Ltd. v. I. T. Officer, Companies Dist. No. 1 16, 18, 20

(1959) AIR 1959 SC 213 (V 46) —

(1959) Supp (1) SCR 204, Narayan Chetti v. I.T. Officer 10

S. M. Lahiri, S. K. Ghose, J. P. Bhat-tacharjee, S. N. Medhi, for Petitioners;

J. C. Medhi, G. K. Talukdar, Sr. Govt. Advocate, for Opposite Parties.

SEN, J.: These seven writ applications are taken up together as the points involved therein are common. It is prayed that the respondents, namely the Income Tax Officer 'A' Ward, Shillong and others should be called upon to forbear from giving effect to the impugned notices as also the impugned order dated 31-3-62 passed by the Respondent No. 1. It is also prayed that the order dated 4-5-66 passed on appeal by the Respondent No. 1, should not be given effect to. We shall mainly refer to the facts of the case stated in Civil Rule No. 357/65 as they are common to all the rest of the cases. The assessment years involved are 1947-48, 1948-49, 1949-50, 1950-51, 1951-52, 1952-53 and 1953-54.

2. There is a Hindu undivided family under the name of Ganeshdass Sreeram which originally owned all the businesses of the family and carried on the same as such, till the assessment year 1946-47. Thereafter there was partial partition in the year 2003 Ramnavami corresponding to 1946, in respect of the business carried on and some moveable properties owned by the Hindu undivided family. With respect to these divided business, a partnership was formed under the instrument of partnership dated 19-9-47 consisting of the petitioners Nos. 1 to 4 and their late father Jivan Ram Goenka. On the death of Jivan Ram Goenka on 20-2-50, a fresh deed of partnership dated 26-7-50 was executed and the petitioner No. 5, the mother of petitioners Nos. 1 and 2 was taken in as a partner in place of Jivan Ram Goenka. Thereafter, another partnership deed was executed on 18-5-54 on attainment of majority of a minor by the name of Sankaral Goenka.

The partnership firm applied for registration under section 26A of the Income-tax Act, 1922, hereinafter called the old Act, for the assessment year 1947-48 in the form prescribed giving all necessary particulars as required. The Income-tax Officer by his order dated 14-2-52 rejected the application for registration of the firm, but on appeal, his order was set aside and registration was granted to the firm by the Appellate Officer's order dated 14-5-52, in consequence whereof, the assessment for the year 1947-48 was made in the hands of the partnership firm and separate assessment was made with regard to the properties in the hands of the Hindu undivided family so far as other income of this family was concerned. This fact has not been denied by the Department. For all subsequent years, renewal of registration was duly granted and assessments were made in the hands of the partnership firm and taxes so assessed were duly paid. This fact has also not been denied.

3. What happened next was that a notice dated 12-3-62 was issued to the partnership firm asking it to show cause why registration granted for the assessment years 1948-49 should not be cancelled. Similar notices were also issued for the other assessment years namely 1947-48 and 1949-50 to 1953-54. According to the petitioner, it is important to note that such notices were issued 19 days before the coming into force of the new Income-tax Act of 1961, hereinafter called the 'Act'. In such notices, no ground for cancellation was given. It was followed by a letter dated 20-3-62, issued by the Income-tax Officer mentioning the alleged facts which led him to believe that there was no genuine firm in existence. We shall deal with the contents of the letter at the time of discussion of the merits of the case.

On receipt of this notice and the letter as aforesaid, an application dated 23-3-62 was filed on behalf of the firm to the Income-tax Officer stating that the senior partner of the firm Sri Rameswar Goenka would be undergoing an operation in the hospital on that date and as such two months' time was prayed for in order that the grounds made by the Income-tax Officer for cancellation of registration might be explained.

The Income-tax Officer however in reply informed the firm by letter dated 26-3-62 that the prayer for extension of time cannot be granted, as a time barred question was involved and granted him as a special case time till 29-6-62. The partnership firm under such circumstances had to submit a reply on 23-6-62, mentioning inter alia that the time allowed was too short and the difficulties in the matter of submission of reply was due to the illness of the senior partner and for which no other materials could be placed. In spite of it, the cancellation order was passed and against this order an appeal was preferred, but the Appellate Assistant Commissioner of Income-tax dismissed the appeals as they were not maintainable.

4. Thereafter, after the lapses of about three years, notice dated 20-3-65 was issued by the Income-tax Officer under section 148 of the Act for the assessment year 1948-49 to the Hindu undivided family alleging that the Income-tax Officer had reason to believe that the income chargeable to tax of the said Hindu undivided family had escaped assessment within the meaning of section 147 of the Act. Similar notices were issued in respect of other assessment years as well. On receipt of such notice, a letter was written as to how under section 148, such a proceeding had been started and at the same time a return was submitted by the Hindu undivided family under pro-

test showing the same income as was shown in the original return already filed. From para 2 of the affidavit-in-opposition, it appears that it was admitted that for the assessment year 1947-48, two returns were filed—one by the Hindu undivided family showing the income from the property and dividend income and the other by the partnership firm showing the income from the business.

5. Upon these facts, the aforesaid orders of cancellation of registration and issue of notices under section 148 of the Act have been challenged.

6. Before the matters were heard on merits, Dr. Medhi appearing for the Department raised a preliminary objection that the joinder of the firm and the Hindu undivided family as petitioners in all these cases is not maintainable in law. In support of his contention, he has referred us to rule 1 of the Rules governing applications under Article 226 of the Constitution at page 44 of the Rules of High Court of Judicature of Assam at Gauhati. It is provided therein that separate application should be filed for each individual, where interests are not identical even if there is one common impugned order governing several cases and the facts of each case should be separately supported by affidavits. He has referred us to several decisions in which it has been held that each aggrieved person must file petition for relief and joint petition although based on common interest does not lie.

In this connection, it should not be forgotten however that an application under Article 226 is a proceeding in a Court of civil jurisdiction and the provisions of the Civil Procedure Code may be invoked. In these particular cases, it appears that the right to relief had arisen out of the same transaction of cancellation of registration as also the notice under Section 148 of the Act and therefore it should be treated as inseparably mixed up, in the sense that the Hindu undivided family and the firm constituted out of it, are mainly concerned in the matter of burden of taxation, if the cancellation of registration stands. Accordingly, it cannot be said that there has been any misjoinder of parties in these applications. Apart from that it may be said that since objection regarding misjoinder of parties was not taken at the earliest stage, it cannot be entertained at the time of hearing of these petitions. Accordingly the preliminary objection made by Dr. Medhi is overruled.

7. In the first instance, we shall deal with the question whether the cancellation of registration was done without giving any reasonable opportunity to the firm and whether natural justice was denied to it. As to interference by the

High Court under Article 226 of the Constitution on the said grounds, it is now well settled that the High Court may issue a Writ of Certiorari to quash quasi-judicial proceedings taken by the Income-tax authorities in excess of his jurisdiction and to quash an order which is vitiated by an error apparent on the face of the record or it is passed in violation of the principle of natural justice.

8. Before dealing with the question as to propriety of the cancellation order, it is necessary to set out briefly certain facts which weighed in favour of cancellation. The Income-tax Officer cancelled the registration when he came to know that late Jivan Ram Goenka executed two powers of attorney—one in the year 1949 and another in 1950 executed in favour of Rameswar Goenka. The Bank account in the name of Ganeshdass Sreeram, the Hindu undivided family with the State Bank of India, Shillong was converted into the partnership account only on 22-12-51. Thirdly the share income from the firm A. V. Morello & Co., Shillong, in which the Hindu undivided family of M/a Ganeshdass Sreeram was partner was not shown as the income of the partnership firm in the assessment years 1948-49 and 1949-50. Fourthly he relied on other papers and records submitted by late Jivan Ram Goenka after the partition of 1946, stating that the business was the proprietary concern. He concluded that the powers of attorney and other documents were sufficient to show that the Hindu undivided family was not disrupted on the creation of a colourable firm. As regards the fourth matter, serious objection was taken that there was denial of natural justice and no reasonable opportunity was given to explain away other documents on which the Income-tax Officer relied.

9. These proceedings for cancellation were taken up by the Income Tax Officer under Rule 6B of the Rules under the old Act. This provides that in the event of the Income Tax Officer being satisfied that the certificate granted under Rule 4, or under Rule 6A has been obtained without there being a genuine firm in existence he may cancel the certificate so granted. The new Act came into force on 1-4-62 and we have already said that before this date, the cancellation proceedings were taken up and it cannot be questioned that it is deemed to have continued after the new Act came into operation. Under rule 8B of the old Act, the firm was already assessed and the Income Tax Officer could reassess the firm under the old S. 34 in the status of an unregistered firm. We have already stated that a partnership deed was executed on 16-9-46 and the firm was duly registered.

Thereafter two partnership deeds were executed respectively on 20-2-50 and 18-5-54 on account of the death of Jivan Ram Goenka in order to make juxtaposition of shares amongst the surviving partners and Sankarlal Goenka a minor, was made a full-fledged partner. We have already stated as to the grounds why the registration of the firm was cancelled. During the cancellation proceedings, it appears that on the 12th March, 1962, the firm of M/s. Ganeshdass Sreeram was asked to show cause by 23-3-62 as to why the renewal of registration granted to the firm under section 26A of the old Act for the assessment year 1947-48 should not be cancelled. This was followed by letter dated 20-3-63 as per Annexure 'F' of the petition. Therein it was said that the first and second powers of attorney given by Jivan Ram Goenka show that these were executed for the purpose of management of properties and business. Secondly an account in the State Bank of India was converted into a partnership account on the 26-12-51.

We have already dealt with the matter of A. V. Morello & Co. The most important point for consideration is whether the petitioners were given reasonable opportunity to say anything against the contemplated cancellation based on other papers and records on which also conclusion was reached that the partnership deed was a mere paper transaction purported to evade taxation and there never existed a genuine firm.

The partnership firm showed cause in pursuance of this notice, vide Annexure 'G' that the senior partner Sri Rameswar Goenka was going to be operated on 23-3-62 and as such a request was made to grant the firm two months' time for giving necessary reply to the alleged matter under reference. This was refused and the reasons given for granting time as prayed for do not appear to be based on natural justice. The Income Tax Officer replied on 23-3-62 that the prayer for extension of time was rejected as a time bar matter is involved. However, as a special case, time for three days was allowed till 26-3-62. Against this, the firm replied on 29-3-62 that the time for showing cause was too short and the matter being very old and complicated for which at least a fortnight's time should have been allowed. It was clearly stated that the senior partner Sri Rameswar Goenka was in hospital for a major operation which was performed on 23-3-62 and he was lying in hospital. In so far as the first and second documents are concerned, explanations were given which were not accepted by the Income Tax Officer. As regards the Bank's account, an explanation was given that after the creation of the firm of partner-

ship, it was decided by the partners to continue the bank account as before.

So far as the firm of M/s. A. V. Morello was concerned, it was explained that the partner of the firm M/s. Ganeshdass Sreeram was never a partner in this firm and the share income was assessed in their hands individually. The "other documents" to which reliance was placed by the Income Tax Officer were not disclosed to the firm and hence they could offer no explanation therefor.

10. On the above, it has been argued by Mr. Bhattacharjee appearing for the petitioners that the impugned order dated 31-3-62 cancelling the registration of the firm was passed without giving any reasonable opportunity of being heard to the firm. As such the said impugned order passed in violation of the principle of natural justice and denial of reasonable opportunity is liable to be set aside and quashed. Dr. Medhi appearing for the respondents has first urged that R. 6B of the old Act does not in any way contemplate that the petitioners should be heard in person, and that he further argued that the question whether the rules of natural justice have been observed in a particular case must itself be judged in the light of the constitution of the statutory body which has to function in accordance with the rules laid down by the Legislature. As such, his contention is that Rule 6B not having contemplated such a procedure, the question of denial of natural justice does not arise at all.

In so far as his argument that no adjournment was prayed for would by itself give rise to the fact that the contention of the petitioners is not at all genuine, we must say in this connection that the question of prayer for adjournment could never arise in this case, inasmuch as there was a pre-emptory order, as stated before, that if within 29-3-62 nothing was done, the case would be decided ex parte. We are of the opinion that on such order being given, there could not be any scope of any prayer for adjournment and the petitioners were left at the mercy of the Income Tax Officer. In such circumstances, it goes without saying that the Income Tax Officer wanted to proceed with the matter in a break-neck speed which clearly goes against the principle of natural Justice.

It has been observed in the case of Narayan Chetti v. Income Tax Officer AIR 1959 SC 213 that if the power under Rule 6B is exercised by the Income Tax Officer against a firm, without giving it a notice in that behalf and without affording it an opportunity to satisfy the Officer that it is a genuine firm, it may be open to the firm to question the validity of the order on that ground. On reference to explanation given by the firm as per Annexure 'T' of the petition,

it appears that regarding the documents stated before, no opportunity was given to the firm to explain the contents thereof after they were disclosed. In our opinion, although we agree with Dr. Medhi that no hearing is necessary, it is incumbent upon the Income Tax Officer to give the partnership firm a reasonable opportunity to explain. Such a course was not adopted by the Income Tax Officer and in his anxiety to reassess the entire Hindu undivided family for a larger realisation of income tax, he decided to take up the matter *ex parte*. In such circumstances, we are of the view that since reasonable opportunity was not given, it offends against the principles of natural justice and therefore the cancellation orders in respect of the assessment years in question commencing from the assessment year 1948-49 should be quashed. Now the question has arisen as to which of the authorities should be called upon to reconsider the matters after giving reasonable opportunity to the firm to explain.

11. It appears that against the orders of cancellation by the Income Tax Officer, appeals were preferred and the said appeals were dismissed by the order of the Assistant Appellate Income Tax Commissioner on 4-5-64 as incompetent. Dr. Medhi has argued that since the Assistant Appellate Commissioner has equal powers with that of the Income Tax Officer to call for any document and receive other evidence, it is in fitness of things desirable that the matter should be sent back to him for reconsideration. We are of the view that since the appeals were found infructuous on the ground that they were incompetent, it seems that they were not at all entertained although under the appropriate law and the rules, appeals against such orders of the Income Tax Officer lay. As such, we are of considered opinion that since the appeals were not considered by the appellate authority, the matter should go back to the Income Tax Officer concerned for reconsideration of the matters in terms set forth above.

12. Another question which arises for our consideration is whether the cancellation order in respect of the assessment year 1947-48 should be set aside. Against the order of cancellation of registration by the Income Tax Officer an appeal was taken to the Appellate Assistant Commissioner, who set aside the orders of the Income Tax Officer and directed grant of registration to the firm by his order dated 14-5-52. This fact has not been disputed. Dr. Medhi with reference to Rule 6B has argued before us that in spite of the order by the Appellate Authority, it was open to cancel the registration by the Income Tax Officer, as it depended upon his own satisfaction. This

rule is not clear to show, whether he could cancel the registration which has been granted by the Appellate Officer.

In this connection, we may quote here the relevant portion of section 31 (3) (part of (b)) and (c) of the Old Act. It is provided *inter alia* that in case of an order cancelling registration of a firm... or refusing to register a firm... under section 26A... the Appellate Assistant Commissioner may confirm such order or cancel it and direct the Income Tax Officer to register the firm or to make a fresh assessment as the case may be. This clearly shows that by an appellate order a direction was made to the Income Tax Officer to register a firm. In such circumstances, the question of satisfaction for cancellation of an appellate order does not arise as under the ordinary principles of law an inferior authority cannot set at naught an appellate order. In such circumstances, we are of the view that in so far as the order of cancellation regarding 1947-48 is concerned, the order of cancellation of registration must be set aside and further enquiry in respect of the assessment year 1947-48 must not be embarked upon.

13. At the next place, we are required to decide a very important question of law, namely whether a notice under Section 148 of the new Act is sustainable or not.

14. It is an admitted position that notices under section 148 of the Act were issued on 20-3-65 on the allegation that the Income Tax Officer had reason to believe that the income chargeable to tax of the said Hindu undivided family had escaped assessment, within the meaning of section 147 of the Act. The Karta of the HUF submitted a petition to the Income Tax Officer, Shillong requesting him to intimate the reasons for initiation of such proceedings. Although he did so, he, at the same time filed a return under protest. In the affidavit-in-opposition, it is clearly admitted by the Department that for the assessment year 1947-48 two returns were filed, one return by the HUF showing income from property and dividend income and the other by the partnership firm showing income from business. It also appears that the balance sheet of the firm was also incorporated. In so far as the other assessment years are concerned, it does not appear that such a course was not followed. The crux of the whole position therefore is whether the income chargeable has escaped assessment for that particular year.

15. On the basis of these facts, it has been argued on behalf of the petitioners that the conditions precedent for issue of notice under section 148 of the Act are non-existent in the present case and as such the impugned notice is wholly illegal and without jurisdiction. Moreover it has been submitted that the ground

alleged for the issue of the notice under section 148 of the Act not being governed by clause (a) of section 147, the impugned notice is barred by limitation under the provisions of clause (b) of section 147 of the Act.

16. In deciding this point, it is found that the notice under section 148 was issued long after the year of cancellation, namely three years and as such *prima facie* it appears to me that the order of cancellation was the pivot round which the whole factum of notice under section 148 moved. Section 147 runs as follows:

"147. Income escaping assessment.— If—

(a) the Income-Tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereinafter in Sections 148 to 153 referred to as the relevant assessment year)." It has been urged on behalf of the Department that the case falls under Section 147(a) inasmuch as there has been a non-disclosure of the income by the HUF and therefore the case fell clearly within the ambit of this clause (a). In S. 147 (a) the expression "material facts" is very important inasmuch as the criterion for decision is whether they were not fully and truly disclosed. It is undoubtedly true that there is no duty on the part of the Income-tax Officer to hear the assessee before the notice is issued and in such circumstances it is in fitness of things desirable to refer to the points of law as argued from the Bar.

The petitioners rely upon the decision of the Supreme Court reported in AIR 1961 SC 372, Calcutta Discount Co. Ltd. v. Income-tax Officer, Companies District No. 1. Their Lordships *inter alia* observed as follows:

"To confer jurisdiction under this section (section 34(1)(a) of the Income-tax Act, 1922 — Section 147(a) of the Act) to issue notice in respect of assessments beyond the period of four years, but within a period of eight years, from the end

of the relevant year two conditions have therefore to be satisfied. The first is that the Income-tax Officer must have reason to believe that income, profits or gains chargeable to income-tax have been under-assessed. The second is that he must have also reason to believe that such 'under-assessment' has occurred by reason of either (i) omission or failure on the part of an assessee to make a return of his income under Section 22 or (ii) omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year. Both these conditions are conditions precedent to be satisfied before the Income-tax Officer could have jurisdiction to issue a notice for the assessment or reassessment beyond the period of four years, but within the period of eight years, from the end of the year in question."

This decision was made regarding the true import of Section 34 of the old Act, the terms whereof are in all material particulars incorporated in Section 147 of the Act. From this decision, it appears that the expression "material facts" used in clause (a) of Section 147 of the Act refers only to primary facts and the duty of the assessee is only to disclose the primary facts and he is not required to indicate what factual or legal inference should be drawn from the primary facts. In the aforesaid decision, it appears that the assessee had disclosed all primary facts regarding sale of shares and the Supreme Court held that action under clause (a) of Section 34 of the old Act could not be taken on the ground that the assessee had claimed it to be a mere change of investment and had not disclosed the true intention behind the sale.

It is not disputed that the expression "reasons to believe" is the test for issuing a notice under Section 148 and as such the whole question hinges upon the fact whether the primary facts were not disclosed, before the issue of notice was embarked upon. We have already said that the returns for the previous years were submitted by the petitioners partly for the HUF and partly for the firm and therefore the question is whether the petitioners were guilty of non-disclosure. In so far as non-disclosure is concerned, it will appear from the affidavit-in-opposition at page 141 of Civil Rule No. 357 that the Hindu undivided family, the assessee in 1948-49 had a total income of Rs. 100247 and of which it did not disclose Rs. 75168 in its return and this amount is liable to assessment in the hands of the HUF as it escaped assessment. Similar is the case with other assessment years. It will not be out of place to mention here once again that the old partnership firm ceased to exist and new partnership documents

were created on some change of devolution of shares, arising out of the death of Jivan Ram Goenka and it is stated by the petitioners that subsequent to the assessment years in dispute these partnership firms were duly registered and that the assessment of tax was based on such registration. For the purpose of this case, it is unnecessary to refer to it, but it may be said in passing that the original partnership business remained unbroken and it was only the interest of the partners which underwent changes. We have discussed this aspect of the law only to show that the argument on behalf of the Department that the registration of the firm on the basis of new partnership deeds, had no nexus to the original partnership, *does not stand to reason.*

17. Now turning to the matter whether the impugned notices come within the ambit of Section 147 (a) of the Act, it has been argued on behalf of the Department that the non-existence of the firm occasioned by cancellation is the test on which it can be said that the petitioners were guilty of lapses, in not truly and fully disclosing the material facts. So it seems that the order of cancellation is the originating circumstance, on which the notices were issued and as such we shall presently refer to the reasons as recorded by the Income-tax Officer under sub-section (2) of Section 148 of the Act, which enjoins that the Income-tax Officer shall, before issuing any such notice under this section record his reasons for doing so.

18. Dr. Medhi has in support of his argument regarding escapement of assessment referred to us to the observation of the Supreme Court in para 15 of the judgment in Calcutta Discount case, AIR 1961 SC 372 which runs as follows:

"The position therefore is that if there were in fact some reasonable grounds for thinking that there had been any non-disclosure as regards any primary fact, which could have a material bearing on the question of 'under-assessment' that would be sufficient to give jurisdiction to the Income tax Officer to issue the notice under Section 34. Whether these grounds were adequate or not for arriving at the conclusion that there was a non-disclosure of material facts would not be open for the court's investigation. In other words, all that is necessary to give this special jurisdiction is that the Income-tax Officer had when he assumed jurisdiction some *prima facie* grounds for thinking that there had been some non-disclosure of material facts."

This proposition of law can never be disputed and it is also true that it is not for the High Court to decide whether the ground was adequate or inadequate. We have already said that cancellation of

Registration was the originating circumstance to set in motion the provision of Section 147(a) and therefore we shall have to look into the reasons of the Income-tax Officer as to whether there was a *prima facie* case for issuing notice under Section 148.

19. It goes without saying that every case must be decided on its own merits. In the instant cases it appears that there was *prima facie* no non-disclosure, in so far as the firm and the HUF were concerned before the date of cancellation of registration. We have had the advantage of going through the reasons recorded by the Income-tax Officer for approval by the appropriate authority and in all these cases it appears that in course of investigation in respect of another sister concern of this assessee namely the HUF, it was found that the alleged partial partition of the HUF was not correct and in fact the HUF continued to remain as before. Accordingly the registration for the aforesaid assessment years was cancelled. Therefore his conclusion was that some income of the HUF escaped assessment. Such is the case in respect of all the years concerned.

In his notes submitted to the Commissioner of Income-tax, he has stated that the cases come within the ambit of clause (a) of Section 147 of the Act, but in none of the reasons given, any reference to omission or failure on the part of the assessee to make a return or to disclose fully or truly of material facts necessary for its assessment for that year, has been made. The main consideration which weighed with the Income-tax Officer after the lapse of three years from the date of cancellation of registration was that in course of an investigation of another sister concern, the partial partition of the HUF was found not to be correct and therefore the registration was cancelled and this was the sheet anchor for taking action for service of notice under Section 147(a) of the Act.

In our opinion, such a reason does not come within the ambit of Section 147(a) on the face of the unchallenged averment of the petitioners that disclosure of income of the HUF and the firm was fully and truly made. In such circumstances the *factum* of cancellation of registration and the consequential fact that the firm's income is the income of the HUF, do not amount to non-disclosure by the HUF within the meaning of Section 147(a) of the Act.

20. A large number of decisions have been referred to us from the Bar, but we need not enter into the question of their applicability in the instant cases, as it is considered that the Calcutta Discount case, AIR 1961 SC 372 is the true guide for disposal of such matters. Furthermore, we may observe that income cannot

be held to have escaped assessment within the meaning of Section 147(a) merely on the ipse dixit of the Income-tax Officer. It is for him to establish that he had reasons to believe in the first instance that there was non-disclosure of income. Such reasons are absent in his notes and accordingly it is hardly possible to hold that the notices come within the ambit of the said clause.

21. Since we have quashed the cancellation orders, it need be considered whether they will be considered as the principal reasons for issuing a notice under Section 147(a) of the Act. In our opinion the foundation having been snapped, the matters remain at large and the notice under Section 148 of the Act for this reason also cannot be said to be operative.

22. The other question which requires consideration is, if the notices do not come within the ambit of Section 147(a), whether they should be deemed to be notices under clause (b). In cases where there has been no failure on the part of the assessee to make a return of his income and to disclose fully and truly any material facts necessary for his assessment, clause (b) comes into operation. It appears from this clause that the Income-tax Officer should receive the information after the original assessment and the information should lead him to believe that income has escaped assessment. It appears to us on examination of the records of the case that for all intents and purposes, the Income-tax Officer has sought to issue a notice under Section 148 on an information which he had received in connection with a sister concern and which gave rise to the cancellation proceedings.

This in our opinion brings the notices within the ambit of clause (b) and not under clause (a) of Section 147 of the Act. It is very important to note that in the affidavits of the Department and the reasons for issuing notices, it has nowhere been specifically stated as to what was the extent and nature of non-disclosure within the meaning of clause (a), on the face of disclosure of the primary facts by the firm and the HUF. In such circumstances, it appears to us that resort was taken by the Income-tax Officers under clause (a) in order to circumvent the period of limitation as enjoined in Section 149(1)(b) of the Act. It requires that in cases falling under clause (b) of Section 147, at any time after the expiry of four years from the end of the relevant assessment year, proceedings for notices may be embarked upon. It is now the established principle of law that where a period of limitation is prescribed under the statute, it imposes a fetter upon the Income-tax Officer to take action beyond certain dates. In such circumstances, it

is open to the Income-tax Officer whether resort should be had for issuing fresh notices under Section 148 in terms of clause (b) of Section 147.

23. For the reasons given above, our conclusion is that the cancellation of registration for the assessment year 1947-48 must stand quashed and the registration for this assessment year must be allowed to stand. In so far as the assessment years 1948-49, 1949-50, 1950-51, 1951-52, 1952-53 and 1953-54 are concerned, the orders of cancellation of registration passed by the Income-tax Officer must stand set aside on the ground that natural justice was denied and reasonable opportunity was not given. The matter shall go back to the Income-tax Officer for reconsideration after giving reasonable opportunity to the petitioners to explain the circumstances against the contemplated cancellation of registration. In so far as the impugned notices under Section 148 are concerned, they are hereby quashed and we direct that the Income-tax Officer must forbear from giving effect to the same.

24. In the result, the Rules are made absolute in the above terms. A consolidated hearing fee of Rs. 200 is allowed for all these seven cases.

25. S. K. DUTTA C. J.: I agree.

Petition allowed.

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FULL BENCH

S. K. DUTTA, C. J., K. C. SEN AND
M. C. PATHAK JJ.

Sikku alias Sikku Halidar and another, Petitioners v. The State of Assam and others, Opposite Parties.

Civil Rules Nos. 68 and 144 of 1968, D/- 16-12-1968 against orders of Govt. of Assam in Memos Nos. VTFG/18/64/104 and VTFG 4/67/128, D/- 20-2-1968 and 19-2-1968 respectively.

(A) Assam Land and Revenue Regulation (1 of 1886), Ss. 16, 155 — Rules framed under S. 155 — Assam Fishery Rules, R. 12 — Validity — Rule is not ultra vires S. 16 or Art. 14 or 19 (1) (g) — Competency of Government to make direct settlement of Fisheries without sale.

An exception to settlement of fisheries by sale is made by R. 12 under which the State Government is empowered to settle fisheries otherwise than by sale. If special circumstances exist, the Government can make direct settlement under the Rule. The Government is the best judge about the existence of special circumstances. Therefore, if the Government has the subjective satisfaction that

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special circumstances exist for giving direct settlement, the Government can do so and its opinion in this respect is to be final. Rule 12, therefore, is not ultra vires S. 16 of the Assam Land and Revenue Regulation (1 of 1886), or Art. 14 or Art. 19 (1) (g) of the Constitution. AIR 1957 SC 377, Foll. (Paras 6, 9)

►(B) Constitution of India, Art. 226 — Patent or latent jurisdiction — Distinction — Lack of either — Effect on issue of writ — Jurisdiction under R. 12 of Assam Fisheries Rules is latent — Acquiescence to it disentitles writ — Assam Land and Revenue Regulation (1 of 1886), S. 155 — Rules under — Assam Fisheries Rules R. 12.

There is distinction between patent and latent lack of jurisdiction. Where the lack of jurisdiction is patent i. e. apparent on the face of the proceedings, a party aggrieved is entitled to a writ even if he acquiesced to the exercise of the jurisdiction. Where, however, the lack of jurisdiction is latent i. e. it depends on certain factors, acquiescence will disentitle a party to a writ. (Para 8)

While exercising power under R. 12 there will be lack of jurisdiction of the Government only if there is complete absence of material on which an opinion can be formed as to the existence of special circumstances warranting exercise of power under R. 12. Such a jurisdiction is latent and a person acquiescing to it is not entitled to a writ. Where the petitioner did not raise objection before the Government when it wanted to exercise power under R. 12, but on the contrary filed application for direct settlement of fisheries in his favour, he is not entitled to a writ. The fact that he withdrew application before settlement also makes no difference when he did question the right of the Government under R. 12. AIR 1956 Bom 530, Rel. on. (Paras 9, 11)

Cases ■ Referred: Chronological Paras

(1957) AIR 1957 SC 377 (V 44) =
1957 SCR 479, Ganga Ram Das v.
Tezpur Kaibarta Co-op. Fishery
Society Ltd. 5

(1956) AIR 1956 Assam 48 (V 43) =
ILR (1955) 7 Assam 510.
Nuruddin Ahmad v. State of
Assam 5

(1956) AIR 1956 Bom 530 (V 43) =
ILR (1956) Bom 374, S. C. Prashar
v. Vasanten Dwarakadas 8

(1953) AIR 1953 SC 309 (V 40) =
1953 SCR 865, State of Assam v.
Keshab Prasad Singh 3

J. C. Medhi, D. N. Razarika, T. C. Das,
for Petitioners; B. C. Barua, Advocate
General, G. K. Talukdar, Sr. Govt. Advo-
cate, S. M. Lahiri, and U. C. Das, for
O. P. No. 4 in C. R. No. 68/68, for Opp.
Parties; D. Sarma, and P. K. Goswami,

for O. P. No. 4 In C. R. No. 144/68, for
Opp. Parties.

DDTTA, C. J.: Civil Rules Nos. 68 and 144 of 1968 are analogous and they are heard together and a single judgment is delivered. The petitioner's case in Civil Rule No. 68 of 1968 is that he is a citizen of India and a member of the Scheduled Caste community and also an actual fisherman by profession. He is the sitting lessee of Fishery No. 2/88 Dharnad Brahmputra Parts II, III and other group Fishery in the District of Goalpara which was settled with him for three years ending on 31-3-68. But the aforesaid fishery was settled by the Governor of Assam on the 20th February 1968 in exercise of powers under Rule 12 of the Assam Fishery Rules with respondent No. 4 for the period from 1-4-68 to 31-3-71 at an annual revenue of Rs. 18006. This settlement with respondent is being challenged by this writ petition.

2. The main contention of Dr. Medhi, the learned counsel for the petitioner is that the aforesaid R. 12 of the Fishery Rules is violative of Art. 14 of the Constitution of India. He submits that by this Rule an unguided and uncanalised power is given to the executive to pick and choose any fishery for direct settlement and then to settle it with somebody arbitrarily. Section 16 of the Assam Land and Revenue Regulation debars the settlement of proclaimed fisheries except in accordance with rules. Rule 12 is also bad, according to Dr. Medhi, on the ground that two procedures for settlement of fisheries are laid down, viz. tender system and direct settlement by the Government and the Government can choose any of these procedures at its sweet will. The direct settlement prescribed by Rule 12 is a more stringent procedure and it must therefore be struck down as violative of Article 14 of the Constitution. It is further contended that the Rule is violative of Art. 19 (1)(g) of the Constitution as it imposes unreasonable restriction on the right to practise a profession.

3. I may examine the history of Rule 12 of the Fishery Rules. First I may refer to the decision of the Supreme Court in State of Assam v. Keshab Prasad Singh, AIR 1953 SC 309. When that case arose, Rule 12 was not yet made. It was observed by the Supreme Court that fisheries in Assam were such a lucrative source of revenue that the legislature considered it undesirable to leave their settlements to the unfettered discretion either of the Provincial Government or of a single individual however eminent he might be. That is why Section 16 of the Assam Land and Revenue Regulation was enacted. The first paragraph of this section reads as follows:—

"16. The Deputy Commissioner, with the previous sanction of the State Government, may, by proclamation published in the prescribed manner, declare any collection of water, running or still, to be a fishery; and no right in any fishery so declared shall be deemed to have been acquired by the public or any person, either before or after the commencement of this Regulation, except as provided in the rules made under section 155."

The Supreme Court pointed out that once a fishery was so declared no person could acquire fishing right in it except as provided by rules drawn up under S. 155.

4. There was at that time Rule 190A which read as follows:—

"No fishery shall be settled otherwise than by sale as provided in the preceding instructions except with the previous sanction of the Provincial Government." The Supreme Court held that this rule did not allow the Government to lift the sale of a fishery out of the rules whenever Government found it convenient and then to dispose it of by executive action. It only authorised the Government to ask the Deputy Commissioner to proceed in a manner which was not quite in accordance with the instructions contained in the Rules. If rule 190A was construed to mean that it permitted the Government to lift a fishery out of the Rules, the rule would have been repugnant to Section 16 of the Regulation. After the above judgment, rule 12 came to be made in place of rule 190A and it runs as follows:—

"12. No fishery shall be settled otherwise than by sale except by the State Government. The order of settlement passed by the State Government shall be final:

Provided that the State Government may introduce the tender system of settlement of fisheries in place of sale by auction system whenever it is considered necessary."

5. In the case of Nuruddin Ahmed v. State of Assam, AIR 1956 Assam 48, the validity of this rule came to be considered by a Division Bench of this Court. It was held in that case that rule 12 was antagonistic to the spirit of Section 16 of the Regulation. Rule 12 was interpreted as giving arbitrary powers to the Government to make settlements of fisheries. It was pointed out that it was a colourable exercise of the rule-making power to make a rule like rule 12 and thereby make Section 16 of the Regulation infructuous. But in Ganga Ram Das v. Tezpur Kaibarta Co-operative Fishery Society Ltd., AIR 1957 SC 377, the validity of the rule 12 came up for consideration before the Supreme Court. It was held that an exception to settlement of fisheries by sale was made by this rule

under which the State Government was empowered to settle fisheries otherwise than by sale. Rule 12 was construed by the Supreme Court to mean that the State Government had the unfettered discretion to settle fisheries directly if the circumstances of the case so warranted. It was further pointed out that the Government was the best judge to decide as to whether the circumstances so warranted or not. In view of this construction, it was held that Rule 12 was not repugnant to Section 16 of the Regulation.

6. Dr. Medhi submits that the question whether the rule gives unfettered and uncanalised power to the Government to settle fisheries directly was not considered by the Supreme Court. It is contended that under Rule 12 the Government can pick and choose any fishery for direct settlement and then arbitrarily settle it with anybody they like even at a loss of Government revenue. If this construction is given to the rule, undoubtedly it will be violative of Art. 14 of the Constitution. But the construction given by the Supreme Court saves the rule. The rule means, according to this construction, that if special circumstances exist, the Government can make direct settlement. Secondly the Government is the best judge about the existence of special circumstances. Therefore, if the Government has the subjective satisfaction that special circumstances exist for giving direct settlement, the Government can do so. Whether a particular circumstance is a special circumstance or not warranting a direct settlement of a fishery is to be decided by the Government and Government's opinion will be final. But it should be remembered that the exercise of discretion, even on subjective satisfaction, is no exercise of discretion if there is complete absence of material to arrive at a satisfaction.

7. In the petition it is contended that no occasion arose for the Government in this case to exercise power given in Rule 12 and to take out the fishery from the ordinary procedure of settlement. According to the petitioner, he learnt that respondent No. 4 was making secret attempts to get a direct settlement of the fishery in question from the Government. Thereupon the petitioner also filed an application for such a settlement. But the settlement was made with respondent No. 4. From the above it is quite clear that the petitioner acquiesced in the exercise of jurisdiction by the Government without raising any objection. It is not the petitioner's case that at that time he thought that the Government had jurisdiction and that it was only subsequently he found out that it had no jurisdiction.

8. Dr. Medhi submits that there can be no waiver of a Fundamental Right. But in the present case there is no question of any such waiver. The point is that a writ being a discretionary remedy, it will not be granted if the petitioner invited or acquiesced to the jurisdiction of the authority. Dr. Medhi, however, contends that as there was total absence of jurisdiction on the part of the Government to settle the fishery under Rule 12 no question of acquiescence can arise. But a distinction must be made between patent and latent lack of jurisdiction. Where the lack of jurisdiction is patent i.e. apparent on the face of the proceedings, a party aggrieved is entitled to a writ even if he acquiesced to the exercise of the jurisdiction. Where, however, the lack of jurisdiction is latent i.e. it depends on certain factors, acquiescence will disentitle a party to a writ. In *S. C. Prashar v. Vasantsen Dwarkadas*, AIR 1956 Bom 530, Chagla, C. J. delivering the judgment of a Division Bench of the Bombay High Court, observed that where the want of jurisdiction was patent, it became a matter of right for a party to challenge the jurisdiction. He emphasised that the want of jurisdiction must be patent for such a right. I respectfully agree with the above view.

9. In the present case there will be lack of jurisdiction of the Government only if there is complete absence of material on which an opinion can be formed as to the existence of special circumstances warranting exercise of power under rule 12. Such a jurisdiction is latent and a person acquiescing to it will not be entitled to a writ. The failure of the petitioner to raise objection before the Government when it wanted to exercise power under Rule 12, disentitles him to a writ. Dr. Medhi's contention that there are two methods of settling fisheries and that the Government can choose any of the methods at its sweet will, has no force. As I have said already, the procedure of direct settlement can be adopted only if in the opinion of the Government, special circumstances warrant it. The regulation of settlement of fisheries by Rules is a reasonable restriction on the right to fish and therefore Rule 12 does not offend Article 19 (1) (g) either. Civil Rule No. 144 of 1968.

10. The petitioner in Civil Rule No. 144 is a Co-operative Fishery Society registered under the Assam Co-operative Societies Act 1949. The petitioner's case is that one Co-operative Society by name and style of Fishing Multipurpose Co-operative Society applied to the Government for direct settlement of Fishery No. 2 Chela Charkaria Fishery of North Lakhimpur of which the petitioner was the sitting lessee till 31-3-68. The peti-

tioner getting information about the move of the above society also made an application to the Government for settlement of the fishery with it under R. 12 of the Fishery Rules. But the Government settled the fishery with opposite party No. 4. Hence the writ petition.

11. The points of law raised in this petition are similar to those raised in Civil Rule No. 68 of 1968 and hence the said points are covered by what is stated above. It is, however, pointed out that the petitioner in this case withdrew his application before the settlement was made by the Government. But I do not think that it makes any difference. When the petitioner withdrew the application, he did not question the right of the Government to settle the fishery under Rule 12. Nor in his petition before us does he make any direct averment that no special circumstance existed for the Government to make settlement under Rule 12. In the circumstances, both the petitions are dismissed and the rules are discharged. There will be no order as to costs.

12. K. C. SEN, J. — I agree.

13. AL. C. PATHAK, J. — I agree.

Petitions dismissed.

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(V 57 C 21)

P. K. GOSWAMI AND
M. C. PATHAK, JJ.

'Abdul Majid, Petitioner v. Adai and others, Opposite Parties.

Criminal Revn. No. '56 of 1966, D/- 17-1-1969, against order of Magistrate First Class (Judicial) Karimganj, D/- 31-3-1966.

Criminal P. C. (1898), Ss. 417 (3), (1) and (5) and 439 (5) — Right of appeal under S. 417 — Nature of — Right of Government and of private complainant — Acquittal in complaint case — Complainant not filing appeal under S. 417 (3) — Revision is barred under S. 439 (5) — High Court's power under S. 439 to otherwise pass suitable orders, however, not affected.

Reading sub-ss. (1) and (5) of S. 417 it is clear that the Section envisages two equal rights of appeal, one to the State Government or the Central Government under sub-s. (2) and the other to the private complainant and although a screening is envisaged under Section 417 (1) to do away with the frivolous appeals against acquittals, the right of appeal as such has not been affected. The right to obtain special leave which is a step in the process of the appeal is intimately integrated with the right of appeal itself and one cannot be divorced from the other. It

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therefore, cannot be argued that the right of appeal under the section is no right at all. An appeal against a judgment of acquittal in a complaint case therefore does lie to the High Court under Section 417 (3) and the provisions of section 439 (5) will be attracted in case the complainant does not choose to take recourse to this remedy and proceeds to move the High Court in revision. Case law Rel. on.

(Paras 5 & 6)

But the fact that the revision application does not lie would not, however, affect the High Court's powers under S. 439 to pass suitable orders in an appropriate case when its attention is otherwise drawn to grave injustice or when it suo motu calls for certain records of the subordinate courts. (Para 6)

Cases Referred: Chronological Paras

- (1966) AIR 1966 Orissa 45 (V 53)=
1966 Cri LJ 152, Dukhishyam Sahu v. Bidyadhar Sahu 5
(1960) AIR 1960 All 296 (V 47)=
1960 Cri LJ 552, Ram Narain v. Mool Chand 5
(1960) Criminal Ref. No. 54 of 1959 D/- 17-5-1960 (Assam), Kartic Teli v. Bachahon Mahto 5
(1959) AIR 1959 All 413 (V 46)=
1959 Cri LJ 800, City Board Mussorie v. Sri Kishan Lal 5
(1959) AIR 1959 Bom 94 (V 46)=
1959 Cri LJ 170, State of Bombay v. N. G. Tayawada 5
(1958) AIR 1958 Punj 228 (V 45)=
1958 Cri LJ 936, Shiv Prasad v. Bhagwan Das 5
(1956) AIR 1956 Mys 62 (V 43)=
1956 Cri LJ 1417, Nagathihalli v. N. Thimmasetty 5

A. M. Mazumdar, for Petitioner; J. P. Bhattacharjee and S. N. Medhi, for Opposite Parties.

GOSWAMI, J.: This application under section 439 of the Code of Criminal Procedure is directed against the judgment of acquittal passed by the learned Magistrate, First Class (Judicial), Karimganj, in a case instituted on a complaint.

2. The prosecution case was that on 11th November, 1962, accused persons cut away paddy from the land in possession of the complainant and on his protest, they assaulted him and his sons, when they later intervened. 19 accused persons were charged under section 147 of the Indian Penal Code and two of them were separately charged under Section 324, Indian Penal Code.

3. The learned Magistrate at the end of the trial held that the complainant could not prove by any reliable evidence that he was in exclusive possession of the disputed land. On the other hand, he found that the defence established that the land was in possession of accused

Lalu and Sonua and that they had been enjoying it peacefully until the date of occurrence. He further held that the accused had a right to protect their property in exercise of their right of self defence. In this view of the matter, after appreciation of the evidence, the learned Magistrate acquitted all the accused persons.

4. The complainant obtained this Rule on 6th of May, 1966. A preliminary objection has been raised by Mr. Bhattacharjee, the learned Counsel for the opposite parties, regarding maintainability of this revision application at the instance of the complainant. He submits that section 439 (5) of the Code of Criminal Procedure is a bar to this application since the complainant in this case instituted on a complaint had a right of appeal under section 417 (3) of the Code of Criminal Procedure. We may read section 439 (5) of the Code of Criminal Procedure:

"439 (5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."

We may also read section 417 (3) of the Code of Criminal Procedure:

"417 (3) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court."

It is contended on behalf of the opposite parties that the case was instituted on a complaint, and, as such, an appeal lay to the High Court against the judgment of acquittal under section 417 (3) of the Code of Criminal Procedure and hence section 439 (5) of the Criminal Procedure Code is attracted, and the revision application does not lie. It is submitted by Mr. Mazumdar on behalf of the petitioner that section 417 (3) gives the complainant a very restricted right of appeal, if any. The complainant cannot straightway submit an appeal to the High Court. He has to obtain special leave from the High Court before he can present an appeal. That being the position, the learned Counsel contends that no appeal lay to the High Court as such within the meaning of section 439 (5) of the Code of Criminal Procedure.

5. In order to appreciate the rival contentions, it is necessary also to read sections 417 (1) and 417 (5) of the Code of Criminal Procedure in this context:

"417 (1) Subject to the provisions of sub-section (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order

of acquittal passed by any Court other than a High Court."

(5) If, in any case, the application under sub-section (3) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1)."

Reading sections 417 (1) and 417 (5) together, it is clear that the scheme under section 417 envisages two equal rights of appeal, one to the State Government or the Central Government under S. 417 (2), as the case may be, and the other to a private complainant. These two rights are at par and although a screening is envisaged under section 417 (1) to do away with the frivolous appeals against acquittals, the right of appeal as such has not been affected. The right to obtain special leave which is a step in the process of the appeal is intimately integrated with the right of appeal itself and one cannot be divorced from the other. It is clearly provided under section 417 (5) that once a special leave for appeal is refused, the Government's right of appeal is barred under this section. It, therefore, cannot be argued that the right of appeal under section 417 (1) is no right at all and it is absolutely clear that an appeal against a judgment of acquittal in a complaint case does lie to the High Court alone under this section and the provisions of S. 439 (5) will be attracted in case the complainant does not choose to take recourse to this remedy and proceed to move the High Court in revision. The view we have taken in this case receives support in some decisions of the several High Courts, namely AIR 1956 Mys 62, Nagathihalli v. N. Thimmasetty Gowda; AIR 1956 Punj 223, Shiv Prasad v. Bhagwan Das, AIR 1959 Bom 94, State of Bombay v. N. G. Tayawada, AIR 1959 All 413, City Board Musorie v. Sri Kishan Lal; AIR 1960 All 296, Ram Narain v. Mool Chand and AIR 1966 Orissa 45, Dukhishyam Sahu v. Bidyadhar Sahu. After we had closed the bearing of the case Mr. Bhattacharjee drew our attention to an unreported Special Bench decision of this Court in Criminal Reference No. 54 of 1959 D/- 17-5-1960 (Assam), Kartik Teli v. Bachahon Mahto, wherein the same view was taken of the provisions of sections 417 (3) and 439 (5) of the Code of Criminal Procedure. The Court held as follows:

"In this case the order of acquittal would have been challenged by way of appeal by the complainant under the provisions of Section 417 (3), and, therefore, under the provisions of Section 439 (5), no revision can be entertained.

If there is a right of appeal and that right is not availed of, then the party

aggrieved cannot come to this court by way of revision and this matter is now well settled."

6. The fact that a revision application does not lie at the instance of the complainant would not, however, affect the High Court's powers under section 439 of the Code of Criminal Procedure to pass suitable orders in an appropriate case when its attention is otherwise drawn to grave injustice or when it suo motu calls for certain records of the subordinate courts. This is, however, not a case where we may be induced to take action in exercise of those powers.

7. The application is dismissed and the Rule is discharged.

8. M. C. PATHAK, J.: I agree.

Application dismissed.

'AIR 1970 ASSAM & NAGALAND 96
(V 57 C 22)

M. C. PATHAK, J.

Abdul Gafur Darbhuyan, Petitioner v. Mustakim Ali and others, Respondents.

Civil Revn. No. 60 of 1969, D/- 2-7-1969, against order of Asst. Dist. J. Nowgong D/- 30-4-1969.

Civil P. C. (1908), O. 39 R. 1 and S. 9—Interim Injunction — On facts, held, that injury likely to arise from refusing injunction would be greater than that likely to arise from granting it — Hence, injunction order was proper — (Co-operative Societies — Assam Co-operative Societies Act, 1949 (1 of 1950), Ss. 79 (2) and 34).

The plaintiff filed a suit for declaration that the election of defendant as a chairman of the Society was void and illegal and that the defendant was not entitled to hold the office as the Chairman of the said Society. An interim injunction restraining the defendant from taking over charge and functioning as Chairman was granted by the trial Court. The defendant challenged the injunction order *inter alia* on the ground that the suit itself was barred under S. 79 (2) of the Assam Co-operative Societies Act.

Held, as the plaintiff had challenged the very constitution of the managing committee which elected the defendant as the Chairman, the plaintiff had a *prima facie* case to go to trial. Under S. 79 (2) of the Act Civil Court's jurisdiction was not barred where the question of jurisdiction was involved regarding the subject matter of the suit. Hence it could not be said that the suit was *prima facie* barred under that section.

(Paras 9 & 10)
Held, further, that since the relevant by-law of the Society provided for continuance of the managing Committee till

JM/AN/E594/69/JHS/W

the Polling Officers who were on duty could not, therefore, continue their work. The Presiding Officer, therefore, reported the matter to the Police Officers there and in consequence thereof, both the accused were arrested and charge-sheeted. Both the accused admitted their presence in the Town Hall but denied having conducted themselves in a disorderly manner. The learned Magistrate who tried both the accused convicted both of them under Section 26 (2) of the Maharashtra Municipalities Act, 1965, and sentenced each of them to pay a fine of Rs. 25 in default, to undergo simple imprisonment for a week. Aggrieved by this decision, the original accused No. 1 filed a revision application in the Court of the Sessions Judge, Wardha. The learned Sessions Judge is of the view that the offences under S. 26 of the Maharashtra Municipalities Act are not cognizable offences at all and that because the offence which is alleged to have been committed by the accused is not a cognizable offence and because there was no complaint by the Chief Officer, therefore, the order of conviction by the trial Court is illegal and improper. It is on the basis of this ground that the learned Sessions Judge has referred the matter here.

2. The learned Government Pleader has opposed this reference contending that the offences under Section 26 are cognizable offences and, according to him, therefore, the cognizance taken by the learned Magistrate was quite legal and proper. It is in this view, therefore, the order of conviction passed by him is quite legal. On the other hand, the learned advocate for the accused argues here that the offences under Section 26 are not cognizable at all and, therefore, according to him, the order of conviction passed by the learned Magistrate is illegal. We will, therefore, have to examine Section 26 of the Maharashtra Municipalities Act to see what kind of offences it provides.

3. Section 26 of the Maharashtra Municipalities Act is as follows:

"26. (1) No person shall, on the date or dates on which a poll is taken at any polling station,—

(a) use or operate within or at the entrance of the polling station, or in any public or private place in the neighbourhood thereof, any apparatus for amplifying or reproducing the human voice, such as a megaphone or a loud-speaker; or

(b) shout, or otherwise act in a disorderly manner, within or at the entrance of the polling station or in any public or private place in the neighbourhood thereof,

so as to cause annoyance to any person visiting the polling station for the poll or so as to interfere with the work of the officer and other persons on duty at the polling station.

(2) Any person who contravenes or wilfully aids or abets the contravention of, any provision of sub-section (1) shall, on conviction, be punished with imprisonment for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both.

(3) If the presiding officer of a polling station has reason to believe that any person is committing or has committed an offence punishable under this section, he may direct any police officer to arrest such person, and thereupon the police officer shall arrest him.

(4) Any police officer may take such steps, and use such force, as may be reasonably necessary for preventing any contravention of the provisions of sub-section (1), and may seize any apparatus used for such contravention."

4. It is, therefore, plain from Section 26(3) that if any person is committing an offence or has committed an offence as mentioned in Section 26, the presiding officer of a polling station could direct a police officer to arrest such a person. The police officer has also a duty under this statute to arrest him on the direction of the presiding officer. In the circumstances such person would, therefore, be arrested by the police officer, without warrant. Now, therefore, if a police officer arrests a person who was committing an offence or who has already committed an offence without warrant, what type of offence could it be said to be?

5. Under Section 4(1)(f) of the Code of Criminal Procedure, "cognizable offence" means an offence for, and 'cognizable case' means a case in, which a police officer within or without the Presidency-towns, may, in accordance with the second schedule or under any law for the time being in force, arrest without warrant. Therefore, if a police officer arrests a person without warrant under any law for the time being in force, then such offence could be said to be a cognizable offence. In so far as the impugned offence with which we are concerned, we have seen that the law laid down in Section 26 (3) of the Maharashtra Municipalities Act is that a police officer can arrest a person committing an offence under Section 26 without warrant at the instance of the presiding officer. The learned Government Pleader, therefore, says that under Section 4(1)(f) of the Criminal Procedure Code, this offence under Section 26 of the Maharashtra Municipalities Act, is a cognizable offence. But the learned advocate for the accused contends here that this is not a case where the police officer arrests the person on his own. Here the police officer does so at the instance of the presiding officer of the polling station. According to him, this difference has to

be taken into consideration and because of this difference, he argues, this offence cannot be said to be a cognizable offence. But the statute permits the police officer to arrest the accused without warrant and if the offence is not cognizable, then what has he to do after arresting the person. According to the learned Advocate for the accused, it is very necessary under Section 296 of Maharashtra Municipalities Act that the Chief Officer should start the proceedings against such person. Section 296 is a provision as respects institution, compounding etc of criminal actions. Subject to the general control of the Council, the Chief Officer may take proceedings against any person who is charged with any offence against the provisions of the Maharashtra Municipalities Act or any rules or by laws made thereunder. It is, therefore, argued that the Chief Officer has to file a complaint and unless there is a complaint by the Chief Officer, the Court cannot take cognizance of the same. It is, however, difficult for me to accept this contention, for the obvious reason that offences as provided under Section 27 of the Act like offences under Section 26 are also made cognizable. If a police arrests a person who has committed an offence or who is committing an offence or who has committed an offence at the instance of the Presiding Officer what is he to do further? Has he to wait for the complaint of the Chief Officer? I do not think the Legislature has intended that the person should be arrested by the police without warrant and the police officer thereafter has to wait for a complaint to be lodged by the Chief Officer.

6. Once the police officer arrests a person without warrant, under Section 60 of the Criminal Procedure Code, without unnecessary delay and subject to the provisions of the Code of Criminal Procedure he should send the person arrested before a Magistrate having jurisdiction in the case or before the officer-in-charge of the police station. Such a person who is arrested cannot also be detained for more than 24 hours under Section 61 of the Criminal Procedure Code. Such a person who is apprehended cannot also be discharged under Section 63 of the Code. Surely, therefore, the Legislature could not have intended that the police officer after arresting the person committing an offence under Section 26 of the Maharashtra Municipalities Act should wait in contravention of the provisions of the Criminal Procedure Code for the complaint of the Chief Officer. It appears to me therefore that once the police officer arrests the person committing the offence under Section 26 of the Maharashtra Municipalities Act without warrant, even though at the instance of the presiding officer of a polling station, that arrest being an arrest without warrant as provided

in Section 4(1)(f) of the Criminal Procedure Code, should be for the offence which can properly be defined as a cognizable offence.

7. But the learned advocate for the accused argues that under Section 26(4) of the Maharashtra Municipalities Act, any police officer may take such steps, and use such force, as may be reasonably necessary for preventing any contravention of the provisions of sub-section (1) and may seize any apparatus used for such contravention. According to him, this sub-section shows that a police officer has limited duties. But this sub-section deals only with the prevention of offences and not with the actions against persons who have committed or who are committing such offences. Under Section 305 of the Maharashtra Municipalities Act the powers of the police officers are given: *Any police officer may arrest any person committing in his view any offence against any of the provisions of this Act or of any rule or of any by-law made thereunder, and if such person does not give his name and address, then he should be detained at the station-house until his name and address are correctly ascertained.* Therefore, under other circumstances, also, the police officer could arrest a person under the Maharashtra Municipalities Act. It is, therefore, very difficult for me to accept the recommendation of the learned Sessions Judge. The Sessions Judge therefore was in error when he found that the offences alleged to have been committed under Section 26(1)(a) and (b) are not cognizable. He seems to have relied upon Notes of cases in 1949 Nag LJ (Note) 45. This was a case, however, under Section 218 of the C. P. Municipalities Act. The facts of our case are governed by the Maharashtra Municipalities Act, 1965. I do not, therefore, think that any decision based on the language of Section 218 of the C. P. Municipalities Act could be good to the facts and circumstances of our case.

8. For the aforesaid reasons, therefore, I do not accept the reference. The order of conviction and sentence passed by the trial Court therefore is confirmed. Record and papers be sent back to the trial Court for further action.

Order accordingly.

AIR 1970 BOMBAY 242 (V 57 C 42)

BAL, J.

Vazirboo W/o Kurbanhussain Rehmatal and others, Petitioners v. M/s. Keshavlal Narshidas and another, Opponents.

Special Civil Appns. Nos. 256 and 257 of 1967, D/- 25-2-1969 to set aside order of Sm. C. C., Bombay, D/- 11-1-1967.

HM/IM/D733/69/DVT/D

(A) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 11 (4) (as introduced by Maharashtra Act 14 of 1963) — Enactment of sub-section (4) during pendency of proceeding — Court can order tenant to deposit certain amount — Section 11 (4) is retrospective by necessary intendment.

Though there is nothing in Section 11 (4) as introduced by Act 14 of 1963, to make it expressly retrospective, the Legislature had made its provisions retrospective by necessary intendment. (Paras 12, 17, 24)

No presumption about retrospective operation can be drawn from the mere fact that Section 11 (4) is a remedial one. This does not, however, mean that the fact that a provision is a remedial one has no significance at all. It certainly is an important factor to be taken into account while arriving at a conclusion as to whether the particular provision is intended to be retrospective. The problem always is to find out the real intention of the Legislature in enacting the particular provision and the answer can generally be found by considering the legislative history of the enactment, the nature of the particular provision, the context in which it occurs and the object which the Legislature in all probability wanted to achieve by enacting it. (Para 18)

It is well known that the Rent Act is enacted for the benefit mainly of the tenants and in order to protect them against eviction and against being made subject to payment of exorbitant rents. However, it is the duty of tenant to pay rent regularly. The provisions of sub-section (4) of Section 11 are intended to protect the landlords against the mischief which might result by the tenants unreasonably withholding the rent. It would therefore, be reasonable to suppose that the Legislature intended to extend that protection to all landlords including those whose proceedings were already pending in the Court at the time when the amendment was made. The provision which is made for the benefit of the landlords will have to be interpreted in such a way that the maximum number of that clause gets the benefit of it. In that view of the matter, it must be held that the provisions of sub-section (4) of Section 11 are retrospective and apply to proceedings pending at the time when the amending Act came into force. The power to make the orders contemplated by Section 11 (4) of the Rent Act in cases other than those where the tenant is withholding the rent on the ground that it is excessive, is discretionary and there is no reason to suppose that in arriving at the conclusion that it is "just and proper" to make such an order the Court will not take into consideration all the circumstances of the case. (Case law discussed). (Paras 22, 24)

(B) Civil P. C. (1908), Preamble, S. 96 — Interpretation of Statutes — Right to appear and defend suit is substantive — Can be taken away by Legislature retrospectively.

A statute altering procedure is ordinarily retrospective. However, a statute cannot affect retrospectively the substantive right vested in a party at the time of institution of suit unless the Legislature has made it retrospective either expressly or by necessary intendment. It is a fundamental principle that no person should be condemned unheard, no decision affecting him should be reached behind his back, no proceeding which is likely to affect his life and/or property should go on in his absence and no person should be precluded from participating in such proceedings. That principle is a principle of natural justice. The right to appear in and defend the suit cannot, therefore, be said to be merely a procedural right. It is a substantive right which vests in the defendant at the institution of the suit against him. The right thus conferred on the defendant can no doubt be restricted or controlled by legislation but in order to have that effect the legislation must say so expressly or by necessary intendment. Even the right of appeal which is a creature of law is not a matter of procedure but is a substantive right vesting in a litigant at the institution of the proceedings. (Para 12)

Cases Referred:	Chronological	Paras
(1968) AIR 1968 Guj 223 (V 55) =		
(1968) 9 Guj LR 177, Keshavlal Parbhudas Choksi v. Manubhai		15
(1964) AIR 1964 SC 1511 (V 51) =		
(1964) 6 SCR 876, Mst. Rafiquennessa v. Lal Bahadur		21
(1960) AIR 1960 SC 12 (V 47) =		
(1960) 1 SCR 200, Central Bank of India v. Their Workmen		18
(1957) AIR 1957 SC 540 (V 44) =		
1957 SCR 488, Garikapati Vceraya v. Subbiah Choudhry		18
(1957) AIR 1957 Raj 118 (V 44) =		
ILR (1957) 7 Raj 262, Seth Rajmal v. Dr. Krishan Swaroop		18
(1954) 56 Bom LR 619, Karamsey Kanji v. Valji Virji		22
(1953) AIR 1953 SC 221 (V 40) =		
1953 SCR 987, Hoosein Kasam Dada (India) Ltd. v. State of Madhya Pradesh		13
(1953) AIR 1953 Bom 183 (V 40) =		
55 Bom LR 1, Syedna Taher Saifuddin v. Tychbhai Moosaji Koicha		24
(1943) AIR 1943 Bom 169 (V 30) =		
44 Cri LJ 616 (FB), Shreekant Pandurang v. Emperor		20
(1940) AIR 1940 Bom 90 (V 27) =		
ILR (1940) Bom 50, Rustomji v. Bai Moti		19

In Spl. Civil Appeal No. 257 of 1967
H. C. Tunara, for Petitioner; Y. S. Chitale,

(for No. 1 (a)) and J. S. Mukadam (for No. 2 (b), for Opponents.

In Spl. Civil Appeal No. 256 of 1967:

H. C. Tunara, for Petitioner.

ORDER: These two petitions arise out of the same order of the Court of first instance and raise an interesting question of law for decision.

2. One Kurban Hussein Rahamatalli owned a building called 'Tayeb Building' at Nagdevi Cross Lane, Bombay. Shop premises in that building were let out by him to a firm doing business under the name and style of Messrs. Keshavlal Narsidas. The agreed rent of the premises was Rs. 245.54 per month. As the firm fell in arrears of rent, Kurban Hussein gave notice to it on 16-11-1961 demanding the arrears of rent from 1-11-1959 and purporting to terminate the tenancy on the ground of non-payment of rent. To that notice Kurban Hussein received a reply dated 15-1-1962 wherein the firm asked for time to pay the arrears. No payment was, however, made even thereafter and on 15-2-1962 Kurban Hussein filed the suit for eviction and recovery of arrears of rent, leading to the present petitions.

3. In answer to the summons of the suit one Ramanlal Shah claiming to be the sole proprietor of the concern, put in appearance on behalf of the firm and filed his written statement on 26-7-1962. He did not raise any contention regarding standard rent or regarding the amount of arrears claimed in the suit but stated that the rent had remained in arrears on account of some dispute with the landlord about repairs to the premises and that he was ready and willing to pay the same. He contended that the firm had been dissolved and all the former partners were therefore, necessary parties to the suit.

4. In November, 1962 Kurban Hussein moved the Court for expediting the suit but was unsuccessful in his attempt. He died on 25-12-1963 while the suit was still pending and the seven petitioners who are his legal representatives were brought on record in his place.

5. On 1-6-1960 two persons named Parmanand M. Shah and Priyakant M. Shah made an application in the suit alleging that they were also partners of the firm along with Ramanlal and praying that they should be joined as defendants to the suit as Ramanlal was not likely to safeguard their interest. That application came to be granted and Parmanand and Priyakant were joined as defendants Nos. 2 and 3 on 22-7-1966. They filed separate written statements on 3-8-1966 but the contentions raised by them were common. One of the contentions was that the agreed rent was excessive and hence the standard rent should be fixed.

6. In the meantime on 26-7-1966 the petitioners had made an application to the trial Court under Section 11 (4) of the Bom-

bay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as 'the Rent Act'), praying for an order directing the defendants to deposit the arrears of rent. The application was opposed by all the defendants and after considering the contentions urged on behalf of the parties, the trial Court passed an order on 7-10-1966 in the following terms:

"9 (a) Defendants Nos. 1 to 3 do deposit in the Court Rs. 8225.08 on or before December 8, 1966, and further regularly deposit in Court Rs. 245.54 every month first of such payment being on January 8, 1967.

(b) If the defendants fail to comply with any part of the above order, they shall not be entitled to appear in or defend the suit except with leave of the Court."

7. Against the said order of the trial Court, Ramanlal filed a revision application on behalf of the firm before the Appellate Bench of the Court of Small Causes, while Parmanand and Priyakant filed a similar but separate application before the same Bench. The two applications were heard separately and decided on different dates. The application of Ramanlal was decided on 11-1-1967 while that of Parmanand and Priyakant was decided on 27-1-1967. The Appellate Bench of the Court of Small Causes came to the conclusion that Section 11 (4) of the Rent Act which was introduced in the Act by an amendment of 28th March, 1963 was not retrospective in operation. It had no application to a suit filed before that date and the defendants to such a suit cannot be deprived of their right to defend which accrued to them on the filing of the suit. In both the revision applications the Appellate Bench accordingly passed orders setting aside clause (b) of the order of the trial Court. It is against those decisions of the Appellate Bench that the present petitions have been filed.

8. Two petitions were filed because although the original order of the trial Court was a single one, the orders passed in the two revision applications were separate. Spl. C. A. 256/67 has been filed against the order passed in the revision application filed by Ramanlal on behalf of the firm, while Spl. C. A. 257/67 has been filed against the order passed in the revision application filed by Parmanand and Priyakant. In the latter Spl. C. A. all the three defendants are made parties while in the former only the firm has been joined as an opponent because to the Revision Application from which it arises, Parmanand and Priyakant were not parties.

9. As both the petitions arise out of the same order of the Court of first instance, I have heard them together. No one appeared on behalf of the firm at the hearing. Mr. Chitale appeared on behalf of Parmanand and Mr. Mukadam appeared on behalf of Priyakant. The case was, however, argu-

ed on behalf of the opponents by Mr. Chitale alone and his arguments were adopted by Mr. Mukadam.

10. On behalf of the petitioners Mr. Tunara contends that the Appellate Bench of the Court of Small Causes was in error in holding that Section 11 (4) of the Rent Act is not retrospective in operation and does not apply to suits which were filed before the date on which it came into force. He bases his argument on two grounds. He contends in the first place that the right of a defendant to appear in the suit and to file defences, is merely a procedural right and the amendment of the Rent Act by the introduction of Section 11 (4) therein being a procedural amendment is necessarily retrospective. Secondly, according to him, even if the new provisions of Section 11 (4) of the Rent Act are not merely procedural and hence retrospective for that reason, the legislature has made them retrospective by necessary intentment.

11. Mr. Chitale does not dispute that if the provisions of S. 11 (4) are merely procedural, they must be taken to be retrospective. He, however, contends that they are not merely procedural but affect the defendants' right to appear in and defend the suit which is a substantive right vesting in them at the institution of the suit. Mr. Chitale does not also dispute that Legislature is competent to enact provisions retrospectively restricting and controlling the vested right of a defendant to appear in and defend the suit but contends that the Legislature has not made the provisions of section 11 (4) of the Rent Act retrospective either expressly or by necessary intentment.

12. Mr. Tunara's first contention need not detain us long. It is a fundamental principle of our legal system that no person should be condemned unheard, no decision affecting him should be reached behind his back, no proceeding which is likely to affect his life and/or property should go on in his absence and no person should be precluded from participating in such proceedings. That principle is a principle of natural justice. The right to appear in and defend the suit cannot, therefore, be said to be merely a procedural right. It is a substantive right which vests in the defendant at the institution of the suit against him. The right thus conferred on the defendant can no doubt be restricted or controlled by legislation but in order to have that effect the legislation in question must say so expressly or by necessary intentment.

13. Even the right of appeal which is a creature of law is not a matter of procedure but is a substantive right vesting in a litigant at the institution of the proceedings. In Messrs. Hoossein Kasam Dada (India) Ltd. v. State of Madhya Pradesh, AIR 1953 SC 221, their Lordships of the Supreme Court observed:

".....a right of appeal is not merely a matter of procedure. It is a matter of substantive right. This right of appeal from the decision of an inferior tribunal to a superior Tribunal becomes vested in a party when proceedings are first initiated in, and before a decision is given, by, the inferior Court. In the language of Jenkins, C. J., in *Nana v. Sheku* to disturb an existing right of appeal is not a mere alteration in procedure. Such a vested right cannot be taken away except by express enactment or necessary intentment."

The following principles regarding the nature of the right of appeal, were laid down by the Supreme Court in *Garikapati Veeraya v. Subbiah Choudhri*, AIR 1957 SC 540.

"(i) That the legal pursuit of a remedy, a suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This a vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intentment and not otherwise."

14. There is stronger reason for holding that the right to appear in and defend the suit is a substantive right which vests in the defendant at the institution of the suit against him and it cannot be restricted, impaired or imperilled thereafter, except by legislation which does so expressly or by necessary intentment.

15. The decision in *Keshavlal Parbludas Choksi v. Manubhai*, 9 Guj LR 177 = (AIR 1968 Guj 223) on which strong reliance is placed by Mr. Tunara does not in fact support his contention but supports the contrary conclusion. It was argued in that case that the expression 'a summons may be issued to the defendant' appearing in Section 27 of the Code of Civil Procedure shows that there is no absolute right in the defendant to appear and answer the claim made against him. Rejecting that contention, the Division Bench which decided the case observed:

"Section 27 appears to be intended to give effect to the principle *audi alteram partem*. When it says that on the institu-

tion of a suit a summons may be issued to the defendant to appear and answer the claim, it does postulate that the defendant should have an opportunity to appear and answer the claim and provides that a summons may be issued to the defendant for such purpose. We may, therefore, proceed on the basis that Section 27 postulates a right in the defendant to appear and answer the claim".

The vested right of the defendant to appear and answer the claim made against him was thus recognised by the Gujarat High Court in the above case.

16. The position is so clear that I do not think it necessary to refer to the other provisions of the Civil Procedure Code and some rulings to which a reference was made by Mr. Tunara. Most of those rulings relate to certain specific statutory provisions materially different from the one with which we are concerned in the present case while the others only state that a statute altering procedure, is ordinarily retrospective. This last proposition is unexceptionable and is not disputed by Mr. Chitale also.

17. Turning to the second contention of Mr. Tunara there is nothing in Sec. 11 (4) or in the amending Act (Maharashtra Act No. 14 of 1963) by which it was introduced in the Rent Act, to make it expressly retrospective and the question which has therefore to be considered is, whether it can be said to be retrospective by necessary intentment.

18. Mr. Tunara argued that Section 11(4) is a 'remedial' measure and hence must be presumed to be retrospective. He relied for this proposition on the decision in *Seth Rajmal v. Dr. Krishan Swaroop*, AIR 1957 Raj 118. This is a decision of a single Judge of the Rajasthan High Court and although it is observed therein that an amending statute which is remedial in its nature has to be construed as being retrospective and applicable to pending suits, no reasons are given for that conclusion. On the other hand we have the decision of the Supreme Court in *Central Bank of India v. Their Workmen*, AIR 1960 SC 12 wherein, after discussing the position relating to 'Declaratory Acts', it has been observed:

"A remedial Act, on the contrary, is not necessarily retrospective, it may be either enlarging or restraining and it takes effect prospectively, unless it has a retrospective effect by express terms or necessary intentment."

No presumption about retrospective operation can, therefore, be drawn from the mere fact that a provision is a remedial one. This does not, however, mean that the fact that a provision is a remedial one has no significance at all. It certainly is an important factor to be taken into account while arriving at a conclusion as to whether the particular provision is intended to be retrospective. The problem always is to find out the real intention of the Legislature in

enacting the particular provision and the answer can generally be found by considering the legislative history of the enactment, the nature of the particular provision, the context in which it occurs and the object which the Legislature in all probability wanted to achieve by enacting it,

19. In *Rustomji v. Bai Moti*, AIR 1940 Bom 90, a Division Bench of this High Court had to consider the question of the retrospective operation of Section 53-A of the Transfer of Property Act. Delivering the judgment of the Bench in that case, Beaumont, C. J. observed:

"No doubt the general principle is that Acts of the Legislature are not given retrospective effect unless the language makes it clear that such was the intention, but I apprehend that in applying that principle one must have regard to the general character of the Act in question, and when construing an Act introduced for the purpose of applying an equitable doctrine to certain transactions considered *ex hypothesi* to be lacking in equity one should not assume that the Legislature intended that the Act should not have retrospective effect, but wished to preserve rights acquired in such transactions".

20. In *Shreekanth Pandurang v. Emperor*, AIR 1943 Bom 169 the same learned Chief Justice quoted with approval the following observations from Halsbury's Laws of England:

"The fact of a statute being remedial, or designed to protect the public interest, is matter to which great weight is to be attached, and a different principle prevails where the statute is one that introduces a new remedy".

That case related to the interpretation of an Ordinance but the following observations of the learned Chief Justice are pertinent:

"In my opinion the normal presumption that a statute is not intended to interfere with vested rights has no application to the construction of this Ordinance. I may also observe that this rule as to the construction of statutes does not apply even to statutes passed for the protection of the public."

(The underlining (here in single ') is mine) The learned Chief Justice went on to observe:

"I would further hold that even if the presumption in question is to apply to this Ordinance, it is clear from the circumstances in which the Ordinance was passed that such Ordinance was intended to apply retrospectively". (The underlining (here in single ') is mine).

21. In *Mst. Rafiqunnissa v. Lal Bahadur*, AIR 1964 SC 1511, the Supreme Court had to consider the question of the retrospective operation of certain provisions of Assam Non-Agricultural Urban Areas Tenancy Act, 1955, and the argument urged was that unless a clear and unambiguous intention is indicated by the Legislature by

adopting suitable express words in that behalf, no provision of a statute should be given retrospective operation if by such operation vested rights are likely to be affected. After referring to this argument their Lordships observed:

"In order to make the statement of the law relating to the rule of construction which has to be adopted in dealing with the effect of statutory provisions in this connection, we ought to add that retrospective operation of a statutory provision can be inferred even in cases where such retrospective operation appears to be clearly implicit in the provision construed in the context where it occurs".

22. Coming now to the provisions of sub-section (4) of Section 11 of the Rent Act over which the controversy has arisen in the present case, it will be convenient to set out here not only sub-section (4) but also sub-section (3) of that section (as it now stands) which was introduced in the Act at the same time and by the same amending Act. These sub-sections read as follows:

"(3) If any application for fixing the standard rent or for determining the permitted increases is made by a tenant who has received a notice from his landlord under sub-section (2) of Section 12, the Court shall forthwith specify the amount of rent or permitted increases which are to be deposited in Court by the tenant, and make an order directing the tenant to deposit such amount in Court, or at the option of the tenant make an order to pay to the landlord such amount thereof as the Court may specify, pending the final decision of the application. A copy of the order shall be served upon the landlord. Out of any amount deposited in Court, the Court may make an order for payment of such reasonable sum to the landlord towards payment of rent or increases due to him, as it thinks fit. If the tenant fails to deposit such amount or, as the case may be, to pay such amount thereof to the landlord, his application shall be dismissed.

(4) Where at any stage of a suit for recovery of rent, whether with or without a claim of possession of the premises, the Court is satisfied that the tenant is withholding the rent on the ground that the rent is excessive and standard rent should be fixed, the Court shall, and in any other case if it appears to the Court that it is just and proper to make such an order the Court may make an order directing the tenant to deposit in Court forthwith such amount of the rent as the Court considers to be reasonably due to the landlord, or at the option of the tenant an order directing him to pay to the landlord such amount thereof as the Court may specify. The Court may further make an order directing the tenant to deposit in Court periodically, such amount as it considers proper as interim standard rent, or at the option of the tenant

an order to pay to the landlord such amount thereof as the Court may specify during the pendency of the suit. The Court may also direct that if the tenant fails to comply with any order made as aforesaid within such time as may be allowed by it, he shall not be entitled to appear in or defend the suit except with leave of the Court, which leave may be granted subject to such terms and conditions as the Court may specify."

A little previous history will show the reason why these two sub-sections had to be introduced in the Rent Act. It is well known that the Rent Act was enacted for the benefit mainly of the tenants and in order to protect them against eviction and against being made subject to payment of exorbitant rents. The Act therefore naturally imposes restrictions on the right of landlords to charge rent as well as to evict the tenants. The Legislature had, however, to see that no injustice was done to the landlords beyond what was absolutely necessary for securing the protection which was being given to the tenants. The protection against eviction which is embodied in section 12 is available to a tenant who pays or is ready and willing to pay and observes and performs the other conditions of tenancy which are not inconsistent with the provisions of the Rent Act. It can hardly be disputed that it is the first and foremost duty of a tenant to go on paying the standard rent and permitted increases regularly. A tenant who is not prepared to do this should have no protection under the Rent Act. However, as the Act stood before its amendment in 1963, there was no way of compelling the tenant to pay or deposit in Court any amount towards rent during the pendency of a suit for recovery of rent with or without a claim for possession of the premises filed against him by the landlord. It is common experience that such a suit under the Rent Act takes several years for its final decision and if during all that period the tenant could withhold the rent on the excuse that it was excessive and standard rent should be fixed, it would cause great injustice and hardship to the landlord. The explanation to Section 12 which is now numbered as Explanation I, provided for a presumption of readiness and willingness to pay in favour of the tenant if within one month of the receipt of the notice under Section 12 (2) from the landlord he made an application for fixation of standard rent and thereafter paid or tendered the amount of rent or permitted increases specified in an order which the Court was required to make on such an application under Section 11 (3) as it then stood. There was, however, no obligation on him to deposit any amount in Court nor had the Court any power to pay out to the landlord such amount, if any, as the tenant chose to deposit during the pendency of his application or of the suit filed by the landlord. The power to pay to the landlord part or whole

of the amount which the tenant may have voluntarily deposited, was for the first time given to the Court by an amendment in 1953. By that amendment which was effected by Bombay Act 61 of 1953, sub-section (4) was added to Section 12. Even then there was no power in the Court to compel the tenant to make any payment to the landlord or to deposit any amount in Court. This was pointed out by Chief Justice Chagla in *Karamsey Kanji v. Valji Virji* (1954) 56 Bom LR 619. The learned Chief Justice had to hold in that case that the Court had no jurisdiction under the law as it then stood, to order the tenant to deposit any amount in Court. That being the position, the tenant could withhold the rent during the pendency of an application under Section 11 filed by himself as well as if a suit filed by the landlord, without any immediate penal consequences following to him on that account.

23. Sub-section (3) of Section 11 as it stood before 28th March, 1963 was in the following terms:

"If an application for fixing the standard rent or for determining the permitted increases is made by a tenant who has received a notice from his landlord under sub-section (2) of Section 12, the Court shall forthwith make an order specifying the amount of rent or permitted increases to be paid by the tenant pending the final decision of the application, and a copy of such order shall be served upon the landlord".

Sub-section (4) of Section 11 as it now stands, is a wholly new provision while the original sub-section (3) has been substituted by the present sub-section (3) which I have already set out. It will be seen that these new provisions now empower the Court to order the tenant to deposit certain amounts in an application for fixation of standard rent made by him, as well as in a suit filed against him by his landlord and to direct that if he fails to deposit those amounts, his application shall stand dismissed and he shall not be entitled to appear in and defend the landlord's suit except with the leave of the Court. This new power is given to the Court evidently for the protection of the landlords and in order to prevent the tenants taking undue advantage of the protection afforded to them by the Rent Act.

24. The Legislature had realised the injustice and hardship which was likely to be caused to the landlords by the tenants unreasonably withholding the rent on the ground that it was excessive and standard rent should be fixed or on other grounds and wanted to avoid that result by enacting sub-section (4) of Section 11 of the Rent Act. Provision of this nature has to be interpreted in such a way as to advance the remedy and suppress the mischief. I may quote here the following observations of Chief Justice Chagla in *Sardar Syedna Taher Saifuddin v. Tyebbhaji Moossji Koicha*, 55

Bom LR 1 = (AIR 1953 Bom 183) in connection with the interpretation of another statute:

"The real question that we have to consider is what was the mischief that the Legislature intended to suppress, because it is clear that the Act we are considering is a remedial measure, and it is well settled that the Court should give full effect to a remedial measure to the extent that the language used by the Legislature is capable of extending the remedy to the mischief which the Legislature had in mind".

As the provisions of sub-section (4) of Section 11 of the Rent Act are intended to protect the landlords against the mischief which might result by the tenants unreasonably withholding the rent, it would be reasonable to suppose that the Legislature intended to extend that protection to all landlords including those whose proceedings were already pending in the Court at the time when the amendment was made. The provision which is made for the benefit of the landlords will have to be interpreted in such a way that the maximum number of that class gets the benefit of it. In that view of the matter it must be held that the provisions of sub-section (4) of Section 11 are retrospective and apply to proceedings pending at the time when the amending Act came into force.

25. Mr. Chitale mainly relied on the presumption against giving retrospective operation to statutes which affect vested rights. No doubt that presumption has generally to be drawn but as I have already pointed out, it is not an absolute rule and where as here the intention of the Legislature to give retrospective operation to the provisions of the statute in question can be clearly seen, the presumption against retrospective operation cannot arise.

26. Mr. Chitale pointed out that Section 11 (4) empowers the Court to pass the orders contemplated therein, even in cases other than those where the tenant is withholding the rent on the ground that it is excessive and standard rent should be fixed. He argued that the tenant may have a good defence unrelated to the question of rent or may have a genuine dispute regarding the amount claimed by the landlord as arrears of rent; he may, for instance, have a good defence of satisfaction. If in such a case the tenant is unable to comply with the order of the Court, the suit would be decreed against him without his defence being considered and grave injustice would be caused to him. I do not think there is any reason to apprehend such a result. The power to make the orders contemplated by Sec. 11 (4) of the Rent Act in cases other than those where the tenant is withholding the rent on the ground that it is excessive, is discretionary and there is no reason to suppose that in arriving at the conclusion that it is just and proper to make such an order the Court will not take into consideration all

the circumstances of the case. In any event the position would be the same whether the order is made in a suit pending at the date when Section 11 (4) was enacted or in a suit filed thereafter.

27. The result of the above discussion is that the provisions of Section 11 (4) of the Rent Act must be taken to be retrospective in their operation and applicable to pending suits. The orders of the Appellate Bench of the Court of Small Causes cannot therefore be sustained.

28. The rule is accordingly made absolute, the orders impugned in both the petitions are quashed and set aside and the order of the trial Court is restored. The petitioners shall get their costs in both the petitions.

Rule made absolute.

AIR 1970 BOMBAY 249 (V 57 C 43)

K. K. DESAI AND VAIDYA, JJ.

Madanlal Shankar Maliwal and another, Petitioners v. State of Maharashtra and another, Opponents.

Special Civil Appln. No. 1435 of 1967, D/- 30-9-1969.

Tenancy Laws — Maharashtra Agricultural Lands (Ceilings on Holdings) Act (27 of 1961), Sections 3, 4, 6 and 2 (20) — Determination of land in excess of ceiling area — Separate holdings held by other family members — Whether can be clubbed as single holding.

Where certain land is gifted by husband to his wife under registered deed of gift executed after getting permission under Section 47 of the Hyderabad Tenancy and Agricultural Lands Act (21 of 1950), the holding belonging to wife cannot be clubbed with the holding of the husband merely on the presumption of Hindu law that husband and wife form a family and the registered deed and the permission granted under Section 47 cannot be ignored. (Paras 8, 10)

In spite of the fact that under clause (20) of Section 2 a father, son, daughter and mother would be members of a family and in spite of the fact that a husband and wife would be members of a family and a brother and brother would be members of a family, there is nothing in the provisions in Section 4 to warrant a finding that separate holdings of these members of a family are liable to be clubbed together and held to be a single holding in connection with ascertainment of lands held by these individuals as being in excess of ceiling area determined under the Act. This is also clear from the provisions of Section 6. Under Hindu Law as well as Muslim and other laws, members of families having joint holdings are permitted to have and can own separate individual properties of their own

ownership. These separate properties could be agricultural lands and provisions in S. 4 could not be held to mean that separate holdings of members of a family were liable to be clubbed into a single holding for ascertaining excess land held by the family as a unit.

(Para 8)

A. V. Sawant, for Petitioners; M. B. Kadam, Asst. Govt. Pleader, for Opponents.

K. K. DESAI, J.:— In this petition under Article 227 of the Constitution the petitioners challenge the correctness of the Commissioner's order and decision dated May 30, 1967 whereby in the suo motu enquiry held by the Commissioner under sub-section (2) of Section 45 of the Maharashtra Agricultural Lands (Ceilings on Holdings) Act, 1961, the Commissioner held that six lands of the second petitioner Godavaribai, (being the wife of the first petitioner), consisting of the aggregate area of 83 acres 4 gunthas, were liable to be added to the 112 acres and 19 gunthas of the land-holding of the first petitioner for ascertaining the surplus lands held by the first petitioner in excess of the ceiling area fixed under the above Act.

2. On the return being filed by the first petitioner originally the Collector, Parbhani by his decision and order dated November 30, 1964 held that the first petitioner was the owner of lands of the aggregate area of 110 acres 32 gunthas. One hundred and eight acres was the ceiling fixed for the area. He, therefore, held that the first petitioner held 2 acres and 32 gunthas of land as surplus land and directed notice under Section 16 of the Act to issue in respect of that surplus holding. The Commissioner in the suo motu enquiry held by him held that the first petitioner's lands aggregated to 110 acres and 19 gunthas. His wife, the second petitioner, owned six other lands of the aggregate area of 83 acres and 4 gunthas. In connection with that holding of the second petitioner, the argument before the Commissioner on behalf of the second petitioner was that these lands had been acquired by the second petitioner under registered deeds of gift executed after permission was granted in that connection under Section 47 of the Hyderabad Tenancy and Agricultural Lands Act, 1950. As these lands were of the separate ownership of and were held separately in exclusive possession by the second petitioner, these lands were not liable to be included under the above Act in the aggregate land-holding of the first petitioner for ascertainment of the surplus lands held by the first petitioner. The Commissioner rejected that contention by observing that the important point for consideration was as to whether Godavaribai (second petitioner) was joint or separate from land-holder (first petitioner) and mere omission of her name in the return made by the first petitioner did not establish that she was separate from the first petitioner. He stated:

"No substantial evidence has been produced to the effect that she is separate in estate

from her husband. Under the Hindu Law wife is presumed to be joint in all respects with her husband, unless contrary is proved. As such the land held by her will have to be included while counting the holding of the land-holder" (first petitioner.)

For the above reason, he rejected the contentions made on behalf of the second petitioner and made the findings as already noticed above.

2A. On behalf of the petitioners the main contention of law that is made is that on a true construction of the relevant provisions of the Act, lands held by members of a family separately from other members of the family cannot be considered as a single holding for ascertainment of surplus lands in excess of ceiling area held by the family. The submission was that even though having regard to the definitions contained in Section 2 of the Act, the second petitioner, as wife, must be held to be member of the family consisting of herself and her husband, (the first petitioner), her separate holding cannot be considered as holding of the family or the same person under Section 4 (1) of the Act. Her holding must be considered independently and separately in ascertainment of surplus lands held in excess of ceiling area by the first petitioner, her husband.

3. The first contention on behalf of the respondents was that a "person" was defined in Section 2 (22) of the Act to include a family and the language of Section 4 (1) has the effect of directing that holdings of all the members of a family must be considered holdings of a single person and the holdings of all members of the family were liable to be clubbed together for ascertainment of surplus lands held by the family in excess of ceiling area.

4. A separate and important second contention made on behalf of the petitioners was that the finding of fact made by the Commissioner that the second petitioner was in respect of her properties not separate from the first petitioner was based on a presumption of Hindu Law which was not applicable in connection with findings to be made under the Act. The provisions of the Act excluded application of presumption of Hindu Law in respect of matters to be considered under the provisions of the Act. In connection with this finding the Commissioner failed to consider documentary evidence produced on behalf of the second petitioner by the first petitioner in the enquiry proceedings before the Commissioner.

5. In connection with the first contention the following provisions in the Act require to be noticed. The Act was enacted to impose a maximum limit (or ceiling) on the holding of agricultural land and to provide for acquisition and distribution of land held in excess of such ceiling and for matters connected with purpose aforesaid. The preamble as above quoted requires to be noticed because in our view, the Act which

provided for compulsory deprivation of properties which were surplus held by agricultural owners was liable to be strictly construed.

6. In the definition Section 2 clauses (11), (14), (20) and (22) run as follows:—

"(11). "Family" includes, a Hindu undivided family, and in the case of the other persons, a group or unit the members of which by custom or usage, are joint in estate or possession or residence.

(14) "To hold land", with its grammatical variations and cognate expressions, means to be lawfully in actual possession of land as owner or as tenant and "holding" shall be construed accordingly.

(20) "Members of a family" means a father, mother, spouse, brother, son, grandson, or dependent sister or daughter, and in the case of a Hindu undivided family a member thereof and also a divorced and dependent daughter.

(22). "Person" includes a family." The relevant provisions in Sections 4 and 6 are as follows:—

"4 (1) Subject to the provisions of this Act, no person shall hold land in excess of the ceiling area, as determined in the manner hereinafter provided.

6. Where a family consists of members which exceed five in number, the family shall be entitled to hold land exceeding the ceiling area to the extent of

Provided that for the purpose of increasing the holding of a family in excess of the ceiling area as aforesaid, if any member thereof holds any land separately, he shall not be regarded as a member of that family for such purpose."

7. The main contention of the parties must arise on the provisions of Section 4 whereunder no person can hold land in excess of ceiling area as determined under the Act. The phrase "hold" as contained in this Act must be construed in accordance with the language in clause (14) of Section 2 and must, therefore, mean "to be lawfully in actual possession of the land as owner". The contention on behalf of the respondents, after relying upon the definitions of "member of a family" and "family" in clauses (20) and (11) of Section 2, is that the phrase "person" as contained in Section 4 means "all the members of a family whether joint or separate". In the present case, therefore, the phrase "person" includes the first petitioner and his wife, the second petitioner. Between both of them, in the submission of the respondents, if they hold lands as "owners in possession" in excess of ceiling area, the surplus lands held could be acquired from them and distributed in accordance with the provisions of the Act.

8. In our view, there is no justification in accepting the above submission of the respondents. In spite of the fact that under clause (20) a father, son and daughter and

mother would be members of a family and in spite of the fact that a husband and wife would be members of a family and a brother and brother would be members of a family, there is nothing in the provisions in Section 4 to warrant a finding that separate holdings of these members of a family were liable to be clubbed together and held to be a single holding in connection with ascertainment of lands held by these individuals as being in excess of ceiling area determined under the Act. Now, this finding can be justified by the language in the proviso of Section 6 which clearly indicates in respect of the single unit of a joint Hindu family that if any member of such family holds any land separately, he shall not be regarded as a member of the family for the purposes of Section 6. The language of the proviso indicates that under the Act, separate holdings of coparceners of a joint Hindu family were not liable to be included in the holding of the joint family under Section 4 for ascertainment of the land held by such family in excess of the ceiling area determined under the Act. This construction can be justified also by noticing that under Hindu Law as well as Muslim and other Laws, members of families having joint holdings are permitted to have and can own separate individual properties of their own ownership. These separate properties could be agricultural lands and provisions in Section 4 could not be held to mean that separate holdings of members of a family were liable to be clubbed into a single holding for ascertaining excess land held by the family as a unit.

9. These findings have the consequence of setting aside of the Commissioner's order which was made on the footing that separate holdings of a female, being a wife of a landholder, were necessarily liable to be clubbed with the holding of her husband under Section 4 for ascertaining land in excess of ceiling area held by him. The Commissioner was liable to proceed to decide the questions which arose before him on the footing that the true construction and effect of the provisions in Section 4 was as stated above.

10. Mr. Sawant for the petitioners is right in his submission that along with the written statement filed by the first petitioner, documentary evidence in the shape of sanctions for alienation granted under Section 98A (2) of the Tenancy Act and the registered deeds of gifts dated 2-4-1953 and February 21, 1953 executed by the first petitioner in favour of the second petitioner in respect of the aforesaid lands mentioned in the Commissioner's order and the VII-XII extracts in respect of these lands showing separate individual possession of the second petitioner of these lands since the date of the deeds of gift in her favour were produced. But in making his findings, the Commissioner has failed to look into these documents. It is quite clear that in connection with the sepa-

rate ownership of these lands as claimed on behalf of the second petitioner, the Commissioner should not have proceeded to decide the question merely on the presumption of Hindu Law as he did. The Commissioner should have examined these documents which were on the record before him for finding out as to the transfer of physical possession of all these lands by the first petitioner to the second petitioner and in that connection to ascertain as to how from the dates of the deeds of gifts executed in her favour, the second petitioner had dealt with these lands in her own right. Upon examining all these documents, the Commissioner was at liberty to hold that in fact that the second petitioner had never acquired possession or separate ownership of these lands. Without making such a finding, it was impossible for the Commissioner to hold that the second petitioner was not in separate divided possession of these lands or that these lands were in possession of and held by the first petitioner as his own lands, as was necessary under Section 4 (1) of the Act. It is necessary to remand the matter of the enquiry proceedings under sub-section (2) of Section 45 of the Act to the Commissioner to enable him to look into all the relevant documentary and oral evidence that may be produced before him on behalf of the petitioners. The Commissioner will proceed to decide the questions which will arise before him in the above enquiry in accordance with law including as declared above.

11. Rule absolute. Directions as above mentioned. There will be no order as to costs.

Rule made absolute.

AIR 1970 BOMBAY 251 (V 57 C 44)

DESHMUKH, J.

Govindram Mihamal, Appellant v. Chetumal Villardas, Respondent.

A. F. A. D. No. 118 of 1962, D/- 30-6-1969, from decision of Dist. J., at Wardha, in Civil Appeal No. 34-B of 1960,

(A) Limitation Act (1908), Section 19 — Stamp Act (1899), Sch. I, Article I — Acknowledgments under — Distinction between, pointed out — Documents of acknowledgment — Construction of — Intention of parties to be ascertained — To ascertain intention, surrounding circumstances to be taken into consideration — Held, on construction, that documents in question did not fall under Article I of Sch. I of Stamp Act — Even though unstamped, they were admissible in evidence for proving acknowledgment of debt.

The moment a document falls under Article I of Schedule I of the Stamp Act, it is required to be affixed with the requisite

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stamp. In the absence of any such stamp, the document would be inadmissible in evidence for any purpose as laid down by Section 35 of the Stamp Act. However, an acknowledgment which is not one under Article 1 of Schedule I of the Stamp Act but is otherwise an acknowledgment of the debt saving limitation under Section 19 of the Limitation Act, 1908, the insufficiency or want of stamp is irrelevant and the document would still be admissible for proving the acknowledgment. (Para 7)

The distinguishing feature between the two acknowledgments is that the acknowledgment under the Limitation Act merely acknowledges the liability in respect of any property or right. The acknowledgment falling under the Stamp Act, however, requires that it should supply evidence of such debt in any book or a separate piece of paper and that such book or piece of paper is to be left in the possession of the creditor. This being the distinction, by looking to the document executed by the debtor, it is necessary to ascertain the intention of the parties. Since a document could contain in it several kinds of averments it is necessary to determine the dominant intention of the parties in executing the document concerned. In order to find out the real intention of the parties, it is permissible to take into account the surrounding circumstances. If the result of such examination leads to the conclusion that the document was not intended to supply evidence of the debt, then it may not fall under Article 1 of Schedule I of the Stamp Act. AIR 1959 Bom 289, Foll.

(Para 9)

Original sarkat note was admitted in evidence. The two subsequent unstamped sarkat notes were being used by the plaintiff for the purpose of bringing the suit within limitation. The entire writing of the two Sarkat notes was in the handwriting of the debtor (defendant). He has signed below those entries and there was also an attestation by a witness below those entries. The defendant admitted in those entries in the account books that the amount was Khata baki from the last page of the note book.

Held on construction of the documents that they did not fall under Article 1 of Sch. I of the Stamp Act. Both the documents were therefore, admissible in evidence for proving the acknowledgment of the debt. They also provided a fresh cause of action. The dominant intention of the defendant was not to supply evidence of debt. (Paras 7, 10)

(B) Hindu Succession Act (1936), Sections 6, Explanation 1 and 30 — Contract Act (1872), Section 45 — Money advanced by deceased belonging to joint Hindu family — Deceased leaving behind him, among other heirs, two married daughters — Suit by eldest son of deceased for recovery of money without joining the two daughters as parties — Suit, held was not properly re-

presented and was not maintainable — Effect of Section 6 and its Explanation 1, stated.

Both parts of Section 6, namely, the opening section and the proviso are substantive provisions enacted by the Hindu Succession Act for the purpose of modifying the customary Hindu Law and creating new heirs and heirships to the property of a deceased Mitakshara coparcener. Whenever there are female relatives specified in that Class claiming through the female relatives, the interest of the deceased in the Mitakshara coparcenary property has to "devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship". The partition contemplated by Explanation 1 is a notional partition. It need not be taken to be an actual partition. (Paras 17, 18, 23)

In a Hindu coparcenary family, on the death of one of the coparceners, the interest of the deceased has been ascertained for the purpose of separate succession under the Act and that succession introduces a new class of heirs who are not or may not be members of the joint Hindu family. (Para 24)

When the death of a coparcener takes place in a family falling under the proviso to Section 6, the female heirs like the daughters who are married long before inherit an interest in the joint family property by succession under the Hindu Succession Act, and that interest or share becomes vested in them. The representative character of the Karta is clearly affected. He cannot represent that property which vests in a person other than a coparcener. The nature of the property also suffers to some extent. The undivided coparcenary property had certain special characters. The essence of coparcenary under the Mitakshara law is the unity of ownership. Case law discussed.

(Para 25)

Therefore, where the money advanced by the deceased who left behind him among other heirs two married daughters, belonged to the joint Hindu family, the suit filed by the eldest son of the deceased without joining the daughters as parties was, held, not maintainable as not being a properly representative suit. The two married sisters of the plaintiff who were married long back before the institution of the suit had vested shares in the interest of their deceased father in the joint Hindu family of which the plaintiff claimed to be the Karta. That interest ceased to have the character of joint family property and as such the plaintiff could not represent that interest as a Karta of the joint Hindu family. Since the interest of the two married daughters was not represented, the frame of the suit was defective and the suit was liable to be dismissed. (Para 27)

Cases Referred: Chronological Paras
(1969) AIR 1969 Cal 69 (V 56) = 73
Cal WN 253, Narayan Prasad v.
Mutuni Kohain 18
(1968) AIR 1968 Bom I (V 55) = ILR
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v. Krishnavenamma 14
- (1964) AIR 1964 Ker 125 (V 51)=
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- M. N. Phadke and M. W. Puranik, for Ap-
pellant; B. B. Ranade, for Respondent.

JUDGMENT:— This is plaintiff's appeal, whose suit for recovery of an amount under a sarkat note has been dismissed by the two Courts below.

2. So far as this appeal is concerned, no dispute on facts survives for consideration. Certain findings have been given by the two Courts below which are normally binding on this Court. Even otherwise, they appear to be in consonance with the facts and circumstances and do not require to be reconsidered. The position of facts that appears to be proved and which could be taken as a basis for the decision of this second appeal is this: Mithamal, the father of the plaintiff, as a karta of the joint Hindu family, advanced a loan to the defendant on 19-6-1950 under a sarkat note. The loan was renewed or acknowledged by another sarkat note, dated 9-6-1953. There was a third sarkat note, dated 9-6-1956. After their renewal Mithamal died in or about February 1958. The plaintiff, who is the eldest son of Mithamal, has filed the present suit on 15-6-1959 for recovery of the amount duo under the sarkat note. The plaintiff has claimed the principal amount under the sarkat note together with interest.

3. Several defences were raised. The defendant pleaded that he was not paid any amount at all. Alternatively, it was pleaded that Mithamal never advanced the amount as a karta of the joint Hindu family. It was his personal transaction and the suit by the plaintiff alone is not valid. Mithamal left behind, among other heirs, two married daughters. Without joining them as parties, the suit was not a properly representative suit and must fail. Yet another defence was that the sarkat note was an acknowledgment within the meaning of Article 1 of Schedule I of the Stamp Act. As the subsequent acknowledgment notes do not bear any stamp, they are inadmissible in evidence for any purpose. In that event the suit on

the original cause of action would be barred by limitation. It was also pointed out that the advance was in the nature of money-lending transaction and the plaintiff or his father not having had any licence under the Moneylenders Act the suit ought to be dismissed.

4. The Trial Court as well as the first Appellate Court gave concurrent findings on some of the points and differing ones on some others. Both Courts held that the defence of non-payment had no substance and the consideration of the document had been proved. They also held concurrently that Mithamal and the plaintiff formed a joint Hindu family, and the money advanced belonged to the joint family. It was, therefore, a transaction of the joint family. The Trial Court held that the transaction was a money-lending transaction, whereas the Appellate Court held that this was a single transaction of the plaintiff's family and could not be described as a moneylending transaction. However, both Courts unanimously held that the sarkat notes of 1953 and 1956 were in the nature of acknowledgments within the meaning of Article 1 of Schedule I of the Stamp Act, and in the absence of proper stamp, they were not admissible in evidence at all. Both of them further held that, by the death of Mithamal, the principle of representation of the joint family property by its karta was not available to the present plaintiff. Mithamal is survived by two married daughters who are female relatives specified in Class I of the Schedule to the Hindu Succession Act as laid down by the proviso to Section 6 and, as such, the interest of the deceased Mithamal in the joint Hindu family property partly devolved on them by succession. The plaintiff could not represent his sisters as their interest could not be described as joint family property. By the principle of Section 45 of the Contract Act, the suit by the plaintiff alone is not maintainable and deserves to be dismissed. With these findings, both the Courts below dismissed the suit. Plaintiff, being aggrieved has filed this second appeal.

5. For the purpose of this appeal, I may point out that the finding of the Appellate Court that the suit transaction was a single transaction of the plaintiff's family and as such did not amount to moneylending business, is not being challenged before me. I will, therefore, take it that the sarkat note of 1950 was a transaction with consideration and it was a single transaction of the plaintiff's family. I will also hold it proved that Mithamal and the plaintiff formed a joint Hindu family and the suit transaction was that of the joint Hindu family. With these findings of fact, only two questions of law survive for consideration. The first is whether the sarkat notes of 1953 and 1956 amount to acknowledgments within the meaning of Article 1 of Schedule I of the Stamp Act, or they are otherwise acknowledgments only for the purpose of Section 19 of the

Limitation Act. The second point for consideration is whether the present suit by the plaintiff without impleading his sisters, either as plaintiffs or defendants, is legally maintainable.

6. So far as the first point is concerned, the original sarkat note of 1950 has already been admitted by the Courts below in evidence. As pointed out by the first Appellate Court, no particular objection was raised to it and the suit did not seem to be based upon that document. Under the circumstances, the sarkat note having been admitted in evidence, it was not open to the defendant to challenge its admissibility at a later stage. However, the two subsequent sarkat notes of 1953 and 1956 are being used by the plaintiff for the purpose of bringing the suit within limitation, as well as basing the claim on them. It is, therefore, necessary to examine the nature of these two documents.

7. It is not being disputed or doubted that both these documents are acknowledgments. Unless they are acknowledgments, they would not fall either under Section 19 of the Limitation Act, or Article 1 of Schedule I of the Stamp Act. The entire writing of the two sarkat notes of 1953 and 1956 appears to be in the handwriting of the defendant. He has signed below those entries. There is an attestation by a witness below each of these entries. The defendant admits in these entries in the account books that the amount of Rs. 2000/- and Rs. 2200/- respectively was Khata held from the last page of the note book. It is, therefore, an unconditional acknowledgment that he is liable to pay the amount mentioned as brought forward in the account books. Would such an acknowledgment fall only under Section 19 of the Limitation Act of 1908, or would it fall under Article 1 of Schedule I of the Stamp Act? It is possible that a particular document in question may fall under both the provisions. It may serve as an acknowledgment under Section 19 of the Limitation Act, but the contents and the surrounding circumstances might show that it is also an acknowledgment under Article 1 of Schedule I of the Stamp Act. The moment a document falls under Article 1 of Schedule I of the Stamp Act, it is required to be affixed with the requisite stamp. In the absence of any such stamp, the document would be inadmissible in evidence for any purpose as laid down by Section 35 of the Indian Stamp Act. However, an acknowledgment which is not one under Article 1 of Schedule I of the Stamp Act but is otherwise an acknowledgment of the debt saving limitation under Section 19 of the Limitation Act, 1908, the insufficiency or want of stamp is irrelevant and the document would still be admissible for proving the acknowledgment.

8. What is it therefore that distinguishes the acknowledgment under the Limitation Act from that under the Indian Stamp Act.

The wording of Section 19 of the Limitation Act, 1908, shows that where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. If the writing did not bear any date, it is open to prove by evidence that it was executed on a particular date.

9. As against this, acknowledgment falling under Article 1 of Schedule I of the Stamp Act requires that it should be in writing relating to a debt exceeding Rs. 20/-. It should be a writing written or signed by, or on behalf of, a debtor in order to supply evidence of such debt in any book (other than a banker's pass book) or on a separate piece of paper when such book or paper is left in the creditor's possession. There is a proviso which lays down that such acknowledgment does not contain any promise to pay the debt or any stipulation to pay interest or to deliver any goods or other property. The distinguishing feature between the two acknowledgments appears to be that the acknowledgment under the Limitation Act merely acknowledges the liability in respect of any property or right. The acknowledgment falling under the Stamp Act, however, requires that it should supply evidence of such debt in any book or a separate piece of paper and that such book or piece of paper is to be left in the possession of the creditor. This being the distinction, it appears to me that by looking to the document executed by the debtor, it is necessary to ascertain the intention of the parties. Since a document could contain in it several kinds of averments it is necessary to determine the dominant intention of the parties in executing the document concerned. Was it meant to be a document supplying evidence of the debt or was it merely an acknowledgment of liability in respect of the debt or property supplying a fresh period of limitation? In order to find out the real intention of the parties, it is permissible to take into account the surrounding circumstances. If the result of such examination leads to the conclusion that the document was not intended to supply evidence of the debt, then it may not fall under Article 1 of Schedule I of the Stamp Act.

10. In *J. C. Mehta v. P. C. Mody*, AIR 1959 Bom 289 a Division Bench of this Court observed as follows:

"The question as to whether a document falls within Article 1 of Schedule I of the Stamp Act depends, as the article itself says, on the decision whether the document was given in order to supply evidence of a debt, and that must be the paramount intention of the person giving the document. The ques-

tion that the Court has to ask looking at the document and looking at the surrounding circumstances is whether the document is given in order to supply a statement of account or whether the document is given in order to supply evidence of a debt."

When I examined the wording of the two acknowledgments of 1953 and 1956 in the light of the above principle, I am satisfied on the wording as well as the surrounding circumstances that the dominant intention of the defendant was not to supply evidence of the debt. There was already enough evidence of the debt. The writing appears to be in a bound book and the endorsement starts with the word 'Khata baki'. Interest is added to the principal amount from the date of the previous entry. Such an entry in a bound book, written and signed by the defendant is obviously in the nature of accounts stated. By the statement of account, the defendant merely acknowledges the debt and does not supply evidence of such debt. It appears that the defendant was accommodated by the plaintiff's father by making an advance of Rs. 2000/- and the defendant was unable to return the amount. Instead of precipitating the action, acknowledgments were executed from time to time, so that a fresh period of limitation could be computed and immediate filing of a suit may not become necessary. The dominant intention of the executant, therefore, was not to supply evidence of debt, but was merely to acknowledge unconditional liability to pay. The drawing of proper inference from proved facts is a mixed question of law and fact. Both the Courts below have fallen into an error in thinking that any acknowledgment immediately falls under Article 1 of Schedule I of the Stamp Act. The distinction between the two acknowledgments is clear, and how to distinguish one from the other is also laid down by clear authorities in that behalf. I am, therefore, satisfied on examination of the two documents of 1953 and 1956 that they do not fall under Article 1 of Schedule I of the Stamp Act. Both the documents are, therefore, admissible in evidence for proving the acknowledgment of the debt. They also provide a fresh cause of action and the suit based on them is clearly within time.

11. This brings me to the consideration of the last defence which is also more or less a technical defence. Undoubtedly, there was a joint Hindu family between the plaintiff and his deceased father Mithamal. Mithamal died in February, 1958 when the Hindu Succession Act had already come into force. Section 4 of this Act enacts the overriding effect of the Act over what may be described as the traditional Hindu Law settled and laid down by judicial pronouncements from time to time. Sub-section (1) of Section 4 lays down that—

"Save as otherwise expressly provided in this Act — (a) any test, rule or interpretation of Hindu Law or any custom or usage as

part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act." Clause (b) further provides that any other law in force immediately before the commencement of this Act shall cease to apply to Hindus insofar as it is inconsistent with any of the provisions contained in this Act. What is obvious from these provisions is that to the extent of the matter covered by this Act and to the extent to which the provisions have been made by this Act, the customary Hindu law together with its interpretation by Courts ceases to have any effect. It also follows from the provisions of Section 4 that if a particular matter is not covered or is not provided by the Act, the customary Hindu Law prevalent before the passing of this Act continues to operate in the field which is not covered by the new Act.

12. Section 6 is introduced in the Hindu Succession Act for the purpose of effecting a change in the normal mode in which the joint family property used to pass from one person to another in a joint Hindu family. In a joint Hindu family possessing joint family property, the male members form a coparcenary. When a coparcener dies, his right, title and interest in the joint family property go by survivorship to the other coparceners. This normal mode in which the property passed from person to person in a joint Hindu family was sought to be changed by introducing a certain type of succession in the case of the interest of the coparcener in the joint Hindu family property. Section 6 in the first instance speaks of Mitakshara coparcenary property. The opening substantive part of Section 6 provides that when a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act. The normal devolution by survivorship, which was a distinguishing feature of the Mitakshara coparcenary, is sought to be maintained even by the Hindu Succession Act. However, there is a proviso added to this section which carves out a case when the family consists of certain types of members. The proviso to Section 6 and Explanation I are the main provisions which fall for consideration in this appeal. For the purpose of ready reference, I would reproduce the provisions of Section 6 including Explanation 1.

"6. When a male Hindu after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased has left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1. — For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not."

If the deceased had left behind him any female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship. This is provided by the proviso. How the interest of the deceased in the Mitakshara coparcenary property shall be determined for the purpose of devolution, whether testamentary or intestate contemplated by the proviso, is provided in Explanation 1. Explanation 1 lays down that for the purposes of this section, the interest of a Hindu Mitakshara Coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. Explanation 1 introduces as if (sic) a fictional or a notional partition immediately before the death of the coparcener concerned. The share, which would have been allotted in that imaginary fictional or notional partition, is his interest which is now to devolve by testamentary or intestate succession under the Act. Section 30 of this Act provides for the testamentary disposition of the undivided interest in the joint Hindu family property belonging to a Hindu Mitakshara coparcenary. What precisely then is the effect of the death of a coparcener upon the joint family property of the coparcenary. According to Mr. Ranade, learned Counsel appearing for the respondent, the effect of the operation of Section 6 of the Hindu Succession Act is to bring about a partition of the joint family property so far as the interest of the deceased is concerned. His interest is separated from the joint family and devolves upon the relatives specified in class I of the Schedule by succession. The interest of the deceased does not devolve upon the remaining members of the family by survivorship. The minimum effect of such a devolution obviously is that the representation of the entire property by the karta of the family ceases. He could not effectively

represent the entire interest including the interest devolved upon the females or male heirs claiming through females, and to that extent, their presence either as plaintiffs or defendants in a suit relating to the estate of the deceased is absolutely necessary. Mr. Ranade also relies upon the judgments of the Calcutta and the Kerala High Courts in this behalf. I will presently examine them and consider their effect.

13. As against this, Mr. Phadke, learned Counsel appearing for the appellant, argues that the anxiety of the Legislature as may be seen from the opening part of section 6 of the Hindu Succession Act, is to maintain the Mitakshara coparcenary and the devolution of property by survivorship among the members of the coparcenary which is a special and distinguishing feature of the Mitakshara joint Hindu family. Since section 4 of that Act says that the customary Hindu Law shall be deemed to have been overridden to the extent of the provisions enacted in the Hindu Succession Act, but will save those provisions which are (not?) expressly provided for in this Act, it is important to consider the effect of the substantive part of Section 6. It has been expressly provided that the Mitakshara coparcenary together with its special feature of the devolution of property by survivorship shall be maintained and will not be affected. He concedes that the proviso undoubtedly grafts an exception over the broad principle of continuance of Mitakshara coparcenary and its property. Since the proviso carves out only one kind of case where Courts come across facts falling under the proviso, the operation of that proviso should be so restricted as to give effect to that proviso within the limited field covered by it. In order that the proviso should be given effect to, the interest of the deceased coparcener had to be determined or declared. That function is performed by Explanation 1. The Hindu Succession Act does not declare that the death of a coparcener in a Mitakshara Coparcenary amounts to a partition of the property. It also does not declare that the death brings about disruption of the joint Hindu family. The Explanation merely resorts to a fiction for the purpose of ascertaining the interest of the deceased. When fictions are introduced in statutes for the purpose of achieving certain objects the operation of such fictions should be restricted to the purposes they are supposed to serve. He, therefore, says that the married daughters may have a share in the interest which their father Mithamal had in the Mitakshara coparcenary and, to that extent, a part of the property may devolve upon them by intestate succession. If this fiction of a notional partition is to be resorted to only for the purpose of ascertaining the share or interest of the daughters in the interest of the deceased coparcener, it could not have and should not be allowed to have the effect of disrupting the joint family. The

joint family continues as before with the additional liability as it were to carve out an interest of the heirs mentioned in Class I of the Schedule to the Hindu Succession Act. In spite of the fact that the two married sisters of the plaintiff have some share or interest in the joint family property, the plaintiff should still be held to be the karta and representative of the entire family property. In that case, so far as the representation to the outsiders like the defendant is concerned, the plaintiff should be held to be the proper representative of the family and as such entitled to file the suit alone in his own name.

14. Before I refer to the judgments of the Calcutta and the Kerala High Courts on which Mr. Ranade particularly relies, I may point out that a large number of cases relating to the provisions of the Hindu Women's Rights to Property Act, 1937 were cited at the Bar. The main purpose in citing those judgments was to suggest an approach to the interpretation of the Hindu Succession Act. Under the provisions of the Hindu Women's Rights to Property Act and particularly sub-sections (2) and (3) of Section 3, additional rights were conferred upon widows in a joint Hindu family. Before that Act, the only right of a Hindu widow was the right of maintenance and, to that extent only, it was a right in property. As a mother, the widow could get a share equal to that of the sons when the sons were out to partition. However, by Act No. 18 of 1937 as amended by Act No. 11 of 1938 a special position was given to a widow in the family so far as the joint family property was concerned. After the coming into operation of that Act, whenever a Hindu died, having at the time of his death an interest in the joint Hindu family property, his widow was entitled to, subject to the provisions of sub-section (3), the same interest in the property which he himself had. Sub-section (3) of Section 3 of the Hindu Women's Rights to Property Act, 1937, provides that any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Woman's estate, provided however that she shall have the same right of claiming partition as a male owner. In other words, the Hindu widow is made a representative of her deceased husband, but with the restriction that the interest shall be the limited interest known as Hindu Woman's estate. Several questions arose for consideration under the provisions of that Act. When the interest of the deceased in a coparcenary devolves upon his widow in the manner indicated under the provisions of that Act, does it amount to a cessation of the joint Hindu family? Does the Act virtually make the widow a coparcener in the family? If the widow enforces a right of partition given to her which right has been described as "the same right as a male

owner", what is the effect? Does the partition merely enure to her own personal benefit and does the property revert back to the family for the purpose of further devolution by survivorship, or in the alternative, does it amount to a partition as if effected by her own husband and disrupt the family once and for all? These questions are answered in various judgments cited before me. It is not necessary to take a complete resume of all the cases. However, I will refer to a few of them for pointing out the assistance which Mr. Phadke wants to draw from the principles evolved in those cases. For instance, in *Nagappa Narayan v. Mukambe*, AIR 1951 Bom 309 the nature of the widow's right under the Hindu Women's Rights to Property Act fell for consideration. The Division Bench observed that the interest which the widow got in the joint family property was neither an interest by survivorship nor one by inheritance but was one specially created under the terms of the Act. By the mere fact that the widow has been given the same interest which her husband has had, there is no disruption of the joint Hindu family. On the contrary, there is continuance of the joint Hindu family with the additional feature that a widow has been given certain interest in the property. That interest of the widow is the same interest which her husband has had. Until, therefore, she effects a partition, or until otherwise the joint family comes to an end by disruption, that interest is a fluctuating interest which is liable to be increased or decreased according to the incidence of deaths and births in the family. The unity of the estate and community of possession still continue and the alienation by a karta for legal necessity will bind the interest of the widow in the family property. This principle has been reiterated by this Court again in the later judgments in *Shivappa v. Yellawa*, AIR 1954 Bom 47 and *Mahadu v. Gajarabai*, AIR 1954 Bom 442. This approach is endorsed by the Supreme Court in *Lakshmi Perumallu v. Krishnavenamma*, AIR 1965 SC 825. The Supreme Court has very briefly summarised the nature of interest of the widow and it may be noted in their words. In para. 12 this is what their Lordships say:

"As we have already pointed out the interest devolving upon the widow need not necessarily be either by survivorship or by inheritance but could also be in a third way i. e. by statute and where the interest is taken by her under a statute no further difficulty arises."

15. Mr. Phadke argued before me that the same approach should be adopted in the case of the provisions of the Hindu Succession Act. As has been pointed out by this Court in AIR 1954 Bom 47, piecemeal legislation made with the intention of making progressive changes is bound to lead to some complication. The Courts must, there-

fore, make an effort to reconcile the customary Hindu Law and the new provisions. Unless the new provisions specifically override the customary Hindu Law in terms of the provisions of Section 4 itself, the Courts are bound to give effect to the customary Hindu Law. The cases under the Hindu Women's Rights to Property Act have no direct bearing upon the interpretation of the provisions of the Hindu Succession Act. They were canvassed before me only with the limited object of indicating an approach to the new statutory Hindu Law. I find that the premises of the Hindu Women's Rights to Property Act and that of the Hindu Succession Act are not similar and, therefore, though the principle is evolved earlier, it may not be possible to use it to the fullest extent when specific words of the statutes are to be considered and interpreted.

16. This brings me to the consideration of the two judgments on which Mr. Ranade heavily relies. The first of them is a Full Bench judgment of the Kerala High Court in the case of Venkiteswara Pai v. Luis, AIR 1964 Ker 125 (FB). The facts of that case show that three members of the Hindu coparcenary made a contract for sale of property. A suit was filed against all three of them for specific performance of the contract of sale relating to the landed property belonging to the joint Hindu family. During the pendency of the suit and after the Hindu Succession Act came into force, one of the defendant members died intestate leaving behind a widow, daughters and sons. The plaintiff failed to implead all the legal representatives of the deceased and particularly the married daughters. The question that arose before the Kerala High Court was whether the failure to so implead the legal representatives of the deceased led to the abatement of the suit either wholly or partially. In that context, the Kerala High Court points out that the deceased member having left behind him a widow, sons and daughters, the proviso and the Explanations to Section 6 of the Hindu Succession Act were attracted and the result was that the share of the deceased in the coparcenary property must be deemed to have been partitioned out immediately before his death and to have devolved on his heirs. That share, being no more part of the coparcenary property is not within the competence of the Karta of the joint family to represent in the suit. On the facts of that case, it appeared that the coparcener had died pending the suit. Hence an ingenious argument was pressed in service on behalf of the plaintiff that the notional partition contemplated by Explanation 1 to Section 6 is an event which has taken place pending the suit. The partition and the devolution of interest under that partition is effected by the provisions of Section 52 of the Transfer of Property Act. This argument was negatived by the Kerala High Court by pointing out that the notional partition is solely for the pur-

pose of ascertaining the extent of such interest as would be the subject matter of devolution when the deceased Hindu died undivided from his coparceners. That notional partition could not be stretched beyond and could not be said to be a transfer inter vivos. There is not much discussion in the judgment on the main point of interest of the deceased devolving upon the heirs by intestate succession. A conclusion is drawn after quoting the provisions of Section 6 of the Hindu Succession Act that that share, being no more part of the coparcenary property, is not within the competence of the first defendant as the Karta of the joint family to represent in the suit. Having made this statement, the judgment proceeds to say that faced with this obvious difficulty, counsel contended that the partition deemed to have taken place in the life-time of the second defendant must be deemed to be a partition inter vivos. It, therefore, appears that the devolution of interest by succession to married daughters who are not members of the family as such, and cessation of the competence of the Karta to represent that interest was obvious to all concerned. It is entirely different that the Kerala High Court pressed into service Section 15 of the Specific Relief Act and proceeded to dispose of the case on the footing that the suit may be deemed to have abated only so far as the right, title and interest of the deceased coparcener and could be continued successfully against the other coparceners. The other judgment relied upon is Narayan Prasad v. Mutuni Kohain, AIR 1969 Cal 69. The proceeding before the Calcutta High Court was a writ petition arising out of rent control proceedings. One Narayan Prasad as a Karta of the joint Hindu family initiated proceedings against the tenant for eviction before the Rent Controller. The family consisted of himself, three minor sons Mahendra Kumar, Surendra Kumar and Mahesh Kumar. Surendra Kumar a minor, died pending the lis before the Rent Controller, leaving behind his mother as his sole heir belonging to Class I of the Schedule to the Hindu Succession Act. The mother was not brought on record as legal representative of the deceased minor son. The question that arose for consideration was whether the proceedings could be continued lawfully by Narayan Prasad Ruia as a Karta? The Rent Controller merely expunged the name of the minor and proceeded with the case. In the appeal, the Appellate Authority held that the lis for eviction itself was not maintainable in the absence of the deceased Surendra Kumar Ruia. It is against that order that a writ petition was filed in the High Court. The discussion by the learned Single Judge of the Calcutta High Court regarding the provisions of Section 6 of the Hindu Succession Act is also very brief. He merely summarises the effect of the provisions and draws his final conclusion in the following words:

"4. Such then is the effect, by the conjoint operation of the proviso and Explanation 1 to Section 6. What is seen, therefore, is a notional partition coupled with devolution of such notionally partitioned property upon Surendra Kumar Ruia's mother. What remains then of Narayan Prasad Ruia as the Karta? A Karta of a joint family property is quite an understandable concept. But a karta for a divided property, of property partitioned, notionally though, appears to be incomprehensible. So, the old karta theory cannot help matters forward for the petitioner before me, and Narayan Prasad Ruia as karta cannot represent his deceased son's mother and necessarily his wife upon whom devolves the share of the property after partition. The very nexus of the joint family property is gone. A conclusion as this is to be regretted, but cannot perhaps be helped." The judgment proceeds to point out what is decided by the Full Bench of the Kerala High Court and quotes a passage from that judgment with approval. As yet there appears to be no reported judgment of this Court dealing with the question under consideration. Hence it is necessary to decide the effect of the Hindu Succession Act upon the suit of the present plaintiff in the light of the arguments raised and the authorities cited above.

17. It is true that the first portion of Section 6 of the Hindu Succession Act appears to be in the nature of a substantive provision exhibiting an anxiety to retain the Mitakshara coparcenary with its special incident of the principle of survivorship upon the death of a coparcener. The second part looks like the proviso qualifying the first portion. However, on a proper approach to the purpose and function of the Hindu Succession Act, it appears that the opening portion, as also the proviso, must be read together for finding out whether they constitute one substantive provision. The very name of the Act suggests that it is meant first to amend the customary Hindu Law and to codify the Hindu Law to the extent provided in this Act. The Act has introduced several new heirs who had no locus standi at all under the various schools of Hindu Law. Restricting the discussion to the Mitakshara School, which is applicable to the parties before me, the mother and the daughter, for instance, or the male heirs claiming through the daughter, had no place in the hierarchy of heirs and survivors when there was a son living at the death of a coparcener. Undoubtedly, therefore, the Act contemplates giving heirship and, to that extent, share in the property represented by the deceased. The Legislature however, contemplated both kinds of females. There would be coparcenaries where the deceased coparcener may leave behind female heirs or male heirs claiming through female relatives mentioned in Class I. There may be coparcenaries where the deceased may not have survived him any of the female rela-

tives or male relatives mentioned in Class I. Both these types of coparcenaries must be covered by the new legislation. In those cases, where there is no female relative mentioned in Class I or male relatives claiming through female relatives mentioned in Class I, the opening part of Section 6 applies and it lays down that the principle of survivorship will operate as before in respect of such a coparcenary. If, however, the deceased coparcener has female relatives or male relatives claiming through female relatives mentioned in Class I to the Schedule, then the proviso becomes operative and not the opening portion of the section. Both the parts, therefore, simultaneously operate and are applicable either to one set of circumstances or the other. It is not possible for me to say that the proviso is in the nature of an exception to the earlier part of the section. On the contrary, the two provisions read together cover every type of case. As I pointed out earlier, there can be only two types of cases, one where the coparcener leaves behind female relatives or male relatives claiming through female relatives mentioned in Class I to the Schedule, and the other where no such relatives survive the deceased. Both these types of cases are equally normal and quite possible in almost all Mitakshara coparcenaries. Both parts of Section 6, namely, the opening section and the proviso are substantive provisions enacted by the Hindu Succession Act for the purpose of modifying the customary Hindu Law and creating new heirs and heirships to the property of a deceased Mitakshara coparcener.

18. If this is the correct premises, then whenever we find that there are female relatives specified in Class I to the Schedule, or male relatives specified in that Class claiming through the female relatives, the interest of the deceased in the Mitakshara coparcenary property has to "devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship". This ending portion of the proviso again furnishes further clue to the interpretation of this Act. When the female relatives or the male relatives claiming through female relatives specified in Class I exist, the interest of the deceased has to devolve "not by survivorship but by testamentary or intestate succession." There is a further qualification that this testamentary or intestate succession is to take place "under this Act".

19. It may be relevant to refer to the provisions of Section 30 under which a testamentary disposition of the undivided interest of a coparcener in the coparcenary property has become possible. Such a right was not available to a Hindu coparcener before. This right has been given to him by this Act. If the coparcener exercises his right vested in him under Section 30 and makes a testamentary disposition, his interest would devolve by testamentary succession upon the

legatees and the beneficiaries under the will. If he does not exercise this right duly vested in him but dies intestate leaving behind female relatives specified in Class I or male heirs claiming through female relatives, then his interest will devolve on them by intestate succession and "under this Act". When a testamentary as well as intestate succession had to take place "under this Act" and of the "interest of the deceased", how is that interest to be found out? In a customary Mitakshara coparcenary, that interest was always fluctuating. It was not a settled or fixed interest. It was liable to be increased or decreased according to the deaths and births in the family. When the Legislature decided to provide for testamentary as well as intestate succession to the interest of the deceased coparcener under certain circumstances, that interest had to be defined. Explanation 1, therefore, becomes relevant for the purpose of finding out that interest.

20. In order to ascertain the interest of the deceased coparcener, a fictional or a notional partition immediately prior to his death has been conceived of. That share, which would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not, now represents the interest which shall devolve by succession under this Act. It was argued before me by Mr. Ranade by relying upon the judgments quoted above that the effect of Explanation is virtually to bring about a partition in the family. The Calcutta High Court points out that the very nexus of the joint family property is gone. If this is the effect of the succession under the new Act, whether testamentary or intestate, what else could we say than that there was a partition?

21. I will at once hasten to point out that it is not necessary for the purpose of disposing of this litigation to decide whether a full partition of the family property takes place or it is a piecemeal partition with respect to the interest of the deceased and what is the effect in either case on the entire family property or the interest and rights and liabilities inter se between the other coparceners in the family. For instance, there may be a Mitakshara coparcenary joint family of four brothers in which one dies leaving behind him sons and daughters. Even if the one-fourth interest of the deceased is liable to devolve by succession on the sons and daughters, what happens to the remaining three brothers? Do they continue joint and also continue to form a Mitakshara coparcenary of the customary type? Does the death of one brother together with the effect of succession of his interest under the Hindu Succession Act more or less operate as a partial partition to the extent of that brother, leaving the rest of the family joint and undivided? In a proper case where the facts demand a decision on this point, it

would be appropriate to consider the argument that will be advanced and then decide the issue.

22. Yet another instance may be taken. In a coparcenary of four brothers, one brother dies leaving behind him daughters alone. The remaining three brothers immediately after the death of the fourth brother pay a definite amount to the daughters of the deceased and obtain from them full discharge in regard to their succession to the interest of the deceased in the coparcenary property. Do the three brothers in this instance continue joint and form a Mitakshara coparcenary, or the event of the death of the fourth brother has brought about disruption even among them. The theory of partition incorporated in Explanation 1 would require a closer examination when circumstances as mentioned above may arise for consideration. In the circumstances, I will confine my decision to the facts which arise for my consideration in this litigation and not go to generalisations relating to the theory of partition incorporated in Explanation 1 to Section 6.

23. For that purpose, I agree with Mr. Phadke that the partition contemplated by Explanation 1 is a notional partition. It need not be taken to be an actual partition. The Kerala High Court has provided a further clue to this approach by pointing out that it is not an act inter vivos by the deceased as it is not a partition by him at all. It is a concept evolved by the Legislature merely to ascertain the share of the deceased or the quantum of property that is liable to testamentary or intestate succession under the provisions of this Act.

24. Even then, after confining myself to the theory of notional partition which shall not be stretched beyond, what I find is that the interest of the deceased has to devolve by succession under the provisions of the Hindu Succession Act, and it is not to devolve by survivorship as contemplated by the customary Hindu Law. The Hindu Succession Act introduces a new class of heirs, and the devolution of interest on them by succession is a reality which must be accepted and faced. In a Hindu Coparcenary family, on the death of one of the coparceners, what we find is that the interest of the deceased has been ascertained for the purpose of separate succession under the Act and that succession introduces a new class of heirs who are not or may not be members of the joint Hindu family. I am aware that a joint Hindu family is a larger body and the daughters are members of the joint family until they are married though they are not coparceners. Women introduced in the family by marriage are also members of the joint family though they could not be coparceners. Hence I say that the relatives, who are entitled to succeed under the Hindu Succession Act, may or may not be members of the joint Hindu family. As it happens, in the present case, the two daughters of

the deceased Mithamal are married long before the present suit came to be filed; they could not, therefore, be the members of the joint Hindu family of the plaintiff. They have, on the death of the deceased, succeeded to a certain interest in the property. What that interest works out is a matter of calculation. As a matter of law, the interest which they inherit by succession vests in them immediately on the death of the deceased. This is a circumstance which must be recognised as a fact and must be given its due effect.

25. The minimum that can be said, therefore, is that when the death of a coparcener takes place in a family falling under the proviso to Section 6, the female heirs like the daughters in the present suit inherit an interest in the joint family property by succession under the Hindu Succession Act, and that interest or share becomes vested in them. When an outsider to a joint family gets vested interest in a part of the property, the fact that that share is yet to be worked out and a particular piece of property or share in every piece of property is to be handed over to him or her in lieu of the share, does not seem to be of any consequence. The property of the joint family is at that stage partly vested in members who are already members of the coparcenary and partly in some heirs who have nothing to do with the joint family as such. At any rate, the unmarried daughters, who may be members of the family, inherit the interest by succession under the Hindu Succession Act and not under the provisions of the customary Hindu Law. To that extent, they have an independent right which is vested in them and may be continued to be enjoyed jointly until physical separation takes place. With that result following, one thing seems to be clear. The representative character of the karta is clearly affected. He cannot represent that property which vests in a person other than a coparcener. The nature of the property also suffers to some extent. The undivided coparcenary property had certain special characters. The essence of coparcenary under the Mitakshara law is the unity of ownership. As observed by the Privy Council in *Katama Natchiar v. Rajah of Shivagunga*, (1864) 9 Moo Ind App 543 (PC).

"There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession."

This being the real nature of the coparcenary and its ownership of property, it is the introduction of an owner of property with a vested right other than the coparcener which vitiates this concept. Whether the karta still continues to represent the interest of the other coparceners or not may be open

to debate but it is difficult to assume that the karta will represent the right, title and interest of a female relative or a male relative claiming through the female relative specified in Class 1 of the Schedule to the Hindu Succession Act. Such an owner of interest could obviously be a tenant-in-common with the other co-owners of the property. If there are more such heirs than one succeeding to the deceased how they take among themselves is provided by Section 19 of the Hindu Succession Act. They take in the first instance per capita and not per stirpes save as otherwise expressly provided in this Act. They also take as tenants-in-common and not as joint tenants. No survivorship is permitted even to the limited extent of joint tenancy of the English law among such heirs. The Hindu Succession Act has not enacted any such provision relating to the interest vesting in the female relatives or male relatives claiming through female relatives specified in Class 1 of the Schedule as it was unnecessary to do so. So far as the other coparceners in the family are concerned, they would take them and there would be no question of joint tenancy between such members and the remaining members of the family. In order to avoid any possible conflict of inheritance, a specific provision has been made under Section 19 of the Hindu Succession Act.

26. Before I finally conclude, I may point out that there is considerable difference between the provisions of the Hindu Women's Rights to Property Act, 1937 and the Hindu Succession Act. The Hindu Women's Rights to Property Act, 1937 was enacted to enlarge the rights of a class of persons, namely, the widow, and what was given to her was the representation of her husband in the family estate in spite of the husband's death. She is declared to have in the property the same interest as the husband himself had. She is also given a right of partition which is described as a right of partition "as a *malo owner*". The reference to the interest of the husband and the right to partition as a *malo owner*, are also indicative of the way of improvement in the Hindu Law in favour of a class of persons. Both these references clearly indicate that the improvement of the status of the widow was made within the framework of the customary Hindu Law. A Full Bench judgment of this Court in *Ranu Thaku v. Santu Goga*, AIR 1968 Bom 1 (FB) will clearly indicate the principles on which that Act was interpreted. Two important conclusions have been drawn by the Full Bench. It is pointed out that the interest which the widow represents is the same interest which her husband had in the coparcenary. The effect of that representation obviously was that the joint family continued as it was, and her interest was a fluctuating interest liable to normal incidence of increase or decrease. It got settled only when a partition was effected. For the purpose of considering the interest

which the husband had, one has to go to the customary Hindu Law to find out the nature of the husband's interest. In the same manner when she was given a right to enforce partition as a male member, the Full Bench points out that the right to effect partition was given to a coparcener and to none else. The reference to "a male member" was advisedly made not to make her a full-fledged coparcener but to give her the same right of partition which the coparcener had. While considering the nature of right of claiming partition of a male member, one has again to go back to the customary Hindu Law. Contrary to this, the present enactment, namely, the Hindu Succession Act, includes some provisions which are clearly inconsistent with the customary Hindu Law. As I have pointed out above a new class of heirs is created, and in cases falling under the proviso to Section 6, survivorship has been statutorily banned and testamentary and intestate succession has been introduced. The manner in which the case law under the Hindu Women's Rights to Property Act, 1937 was handled and approached may, therefore, be of very limited assistance in the construction of the provision of the Hindu Succession Act.

27. As a result of the discussion above, I would hold that the two married sisters of the plaintiff who were married long back before the institution of the suit had vested shares in the interest of their deceased father (Mithamal) in the joint Hindu family of which the plaintiff claims to be the karta. That interest ceased to have the character of joint family property and as such the plaintiff could not represent that interest as a karta of the joint Hindu family. Since the interest of the two married daughters is not represented, the frame of the suit is defective and the suit is liable to be dismissed. In the circumstances, I would uphold the decree of dismissal of the suit passed by the two Courts below, though for reasons mentioned above. I would, therefore, dismiss this appeal.

28. Regarding the question of costs, I may point out that the effect of the Hindu Succession Act is not yet fully realised and appreciated by the people at large. The law has gone ahead in the matter of giving rights to certain heirs but the implications of those provisions are not properly understood. The claim of the plaintiff has been held proved by all the three Courts but his failure is more or less on technical grounds of want of proper parties. In the circumstances, so far as this Court is concerned, I make no order as to costs.

29. At this stage, an oral request is made on behalf of the appellant to file an appeal in Letters Patent. The prayer is granted.

Appeal dismissed.

AIR 1970 BOMBAY 262 (V 57 C 45)

(NAGPUR BENCH)

BHOLE, J.

Harikumar Radhakisan and others, Appellants v. Uderam Ramkuwar Firm by owners Ramkuwar Uderam and others, Respondents.

A. F. A. D. Nos. 313 and 315 of 1962, D/-24-4-1969, against decision of Dist. J., Amravati in Civil Appeal Nos. 55 and 59 of 1961.

(A) Provincial Insolvency Act (1920), Sections 28 and 37 — Limitation Act (1963), Sections 6, 15 and Article 22 — 'A' during pendency of insolvency proceedings against him making deposit of money with another — Notice by 'A' for return of deposit also during pendency of insolvency proceedings — 'A' not taking any further action on notice — Adjudication of 'A' as insolvent annulled — Fresh notice of demand made by 'A' against deposit, followed by a suit — Suit filed within three years of second notice but more than three years after first notice — Suit held was governed by Article 22 Limitation Act — Time started running from first notice and hence suit was barred — No disability attached to A due to pendency of insolvency proceedings.

'A' during the pendency of an insolvency proceedings against him deposited certain sums with 'B' and during the pendency of the insolvency proceedings made a demand for the return of the amount but did not proceed to sue. Later after the adjudication of the insolvency was annulled, 'A' served fresh notice on the deposit, and filed a suit against him within three years from the second notice but after more than three years from the first notice. On a contention that the suit was barred by limitation under Article 22 Limitation Act, 'A' pleaded that as he was under a disability due to the pendency of insolvency proceedings against him, and that the first notice was of no avail to him, his suit was within limitation per his second notice.

Held that 'A's' insolvency having been annulled under Section 37 Provincial Insolvency Act all the property reverted back to him as if the property never vested in the Court from the date of adjudication till the date of its annulment. Hence if he had filed the suit after the first notice it would have been tenable. (Para 10)

Flea of disability due to pendency of insolvency proceedings is nowhere included in the Limitation Act, like disability due to minority, insanity or idiocy included in Section 6 of Limitation Act. AIR 1954 Mad 604 (FB), Rel. on. (Para 12)

Held further that period of pendency of insolvency proceedings could not also be excluded under Section 15 Limitation Act except where there was an order of Court refusing leave to commence a suit. (Para 14)

That the suit was governed by Article 22 Limitation Act and limitation commenced

from the date of demand in the first notice and time once started running did not stop.

(Para 15)

(B) Debt Laws — C. P. & Berar Money Lenders Act (13 of 1934), Section 11 (H) — Maintainability of suit for recovery of deposit — Deposit found to be a loan — Plaintiff unable to produce Money Lenders' licence — Suit is untenable. 1965 Mah LJ 797, Rel. on. (Para 16)

Cases Referred: Chronological Paras
(1965) 1965 Mah LJ 797 = ILR (1966)

Bom 402, Hazarimal v. Harinarayan 16

(1954) AIR 1954 Mad 604 (V 41) =

ILR (1954) Mad 80 (FB), Subbaiah

Goundan v. Ramaswami 18

(1854) 52 ER 465 = 19 Beav 551,

Wood v. Surr 11

(In No. 313/62): M. W. Samudra, for Appellants; J. N. Chandurkar, for Respondents; (In No. 315/62): M. W. Samudra, for Appellants; M. W. Palekar, for Respondent No. 2.

JUDGMENT:— I am disposing of both these appeals by a common judgment because the common questions of law and also the similar facts have to be dealt with in these two appeals. The plaintiff in both these suits which are the subject-matters of these two appeals is the same although the defendants are different. Both these appeals are by the plaintiff against the judgment and decree passed by the District Judge, Amravati, dismissing the plaintiff's suits by confirming the decree of the Trial Court. These suits by the plaintiff are for the recovery of certain sums with interest on account of deposit with the defendants. In Appeal No. 313 of 1962, before me, the suit is for the recovery of a sum of Rupees 977-3-0 with interest. The suit is for the recovery of Rs. 2600/- with interest in the Appeal No. 315 of 1962. The plaintiff, in the suit which is the subject-matter of Appeal No. 313, had deposited with the defendant's firm Rs. 500/- on 23-2-1950 under a deposit chithi scribbled by the defendant. It was agreed that the defendants would pay interest at 9% per annum. The plaintiff gave a notice to this defendant on 22-5-1957 demanding the deposit and the defendants refused the notice. The plaintiff, therefore, had to file this suit for the recovery of his dues. In the other appeal, the plaintiff had deposited a sum of Rs. 1,500/- with the defendants on 21-4-1950. The plaintiff gave a notice to them on 11-3-1957 demanding the deposit and the defendants received the notice but failed to comply with the demand. The plaintiff, therefore, had to file this suit for the recovery of total sum of Rs. 2600/- with interest.

2. In both these suits, which are the subject-matter of these two appeals here, the defendants resisted the claim of the plaintiff stating that the plaintiff had already served other notices to them in 1952. The plaintiff in one case had served a notice on

24-7-1952 and in the other case had served a notice of 8-10-1952. It is therefore the contention of the defendants that the plaintiff not having filed the suit within three years from the first notice, the suit is time barred. It is further contended by the defendants that the transaction was one of loan under the C. P. & Berar Money Lenders Act, 1934. That the plaintiff having no money lending licence, under the Act, the suit was not maintainable.

3. There are other contentions also raised by the defendants but in view of the arguments by the learned advocates for the appellant, which are confined only to few contentions, it is not necessary for me to recite them.

4. On the pleadings of the parties, the Civil Judge, who tried the suits, framed a large number of issues and amongst other conclusions, he also came to the conclusion that the sums which are the subject-matters of the deposit belong to the plaintiff. As regards the nature of the transactions, he is of the view that the transaction was one of loan and not of deposit and that therefore the suit was time barred under Article 59 of the Indian Limitation Act (1908). According to him, even if this transaction was one of deposit, it is still time barred under Article 60 of the Indian Limitation Act (1908) because the first notice of demand in both the cases was in the year 1952. He also came to the conclusion that the transaction was one of loan under the C. P. & Berar Money Lenders Act, 1934 and that therefore the suit was not maintainable for want of a money lending licence by the plaintiff. There was an appeal by the plaintiff being aggrieved by this decree and the learned District Judge also framed several issues and found that the transaction is one of deposit; that the notice of demand issued in the suits in 1952 was valid, that therefore the suits are not within time. He also came to the conclusion that the suits are not maintainable in view of Section 11 (H) of the C. P. & Berar Money Lenders Act, 1934. Accordingly, therefore, he confirmed the decree of the Trial Court. It is against this decree that the original plaintiff has come up in appeal here. The original plaintiff is now dead and therefore his legal representatives are brought on record and they are therefore the appellants here.

5. The learned advocate for the appellant concedes that the transaction is one of deposit. He also concedes that the plaintiff was unable to produce any money lending licence of the year 1950. The deposit receipts in both the suits are dated 23-2-1950 and 21-4-1950. Therefore, if this transaction can be said to be a loan under the C. P. & Berar Money Lenders Act, then he will have to produce a money lending licence of the year 1950. I have heard this appeal partly some time back and at that time the learned advocate for the appellant stated that if possible he would produce the money lend-

ing licence of the year 1950 afterwards. It however appears that the learned Advocate after attempts did not succeed in getting the said licence. It would also be difficult for him now to get it after a long time. The learned Advocate for the appellant therefore did not produce any licence even after a long time till this day.

6. The only points that are raised by the learned Advocate for the appellant are—

(1) Whether the suit is barred by limitation?

(2) Whether the suit is maintainable under the C. P. & Berar Money Lenders Act, 1934?

7. I will have to recite briefly some facts before discussing these issues which are raised by the learned Advocate for the appellant. The plaintiff was declared insolvent on an application by the creditors on 8-2-1950. We have seen that he had deposited a sum of Rs. 500/- with the defendants (respondents) in Appeal No. 313 of 1962 on 23-2-1950. He has also deposited a sum of Rs. 1,500/- with the defendants (respondents) in Appeal No. 315 of 1962 on 21-4-1950. Therefore, he has deposited these sums after he was declared insolvent on 8-2-1950. It appears that after he was adjudged an insolvent, his insolvency was also annulled unconditionally on 15-12-1956. It is admitted that his insolvency was annulled after all the creditors were paid in full. Therefore, we are concerned in both these matters with the deposits made by the plaintiff while he was an insolvent and with the notices of demand dated 24-7-1952 and 8-10-1952 which are also during the pendency of the insolvency proceedings. It appears he did not file any suit after his service of notices of demand on the defendants in the year 1952. After his insolvency was annulled on 15-12-1956, he again served another notice in one case on 25-2-1957 and in the other on 11-3-1957. The suits with which we are concerned in these two appeals, as per the pleadings of the plaintiff, are, on the basis of these notices of the year 1957. Therefore, the contention of the plaintiff is that the suit is tenable because it is well within three years after the service of notice in the year 1957. On the other hand, the contention of the defendant is that the second notice of the year 1957 cannot be taken into account at all because of the first notice of demand by the plaintiff in the year 1952. Their contention, therefore, is that this suit, which is filed long after 3 years after 1952, is not tenable. We have, therefore, to decide the issue of limitation on the basis of these facts and circumstances.

8. The learned Advocate for the appellant contended here that the appellant-plaintiff was an insolvent at the time when he gave the notice to the defendants in the year 1952, and, therefore, according to him, he could not have filed a suit as an insolvent without the permission of the Insolvency Court. He, therefore, urges that because

he could not have filed any suit after the notice of 1952, therefore, he was under a disability. Because of his disability, he says, he did not file this suit. He had, therefore, under the circumstances, to send another notice in the year 1957 and file this suit on the basis of the second notice. He further says that in the circumstances of the case, the notice is a part of the suit and because he could not file this suit being an insolvent, therefore, this suit on the basis of the second notice is tenable. The learned counsel for the respondent in both the appeals contends here that the suit is not tenable on the basis of the second notice. According to him, he could have filed his suit on the basis of the first notice. Therefore, this suit is not maintainable. I have asked both the learned Advocates if they have in support of their contentions any case-law; both of them expressed their inability to find any appropriate case-law to justify their contentions. I will, therefore, have to examine these contentions.

9. Admittedly, this transaction is one of deposit, and, therefore, a suit on the basis of this deposit will be governed by Article 22 of the Limitation Act 1963 (Article 60 of the old Act). Article 22 provides a period of 3 years for money deposit under an agreement that it shall be payable on demand. The period of limitation starts from the date when the demand is made. Now, admittedly, the demand was made by the plaintiff first on 24-7-1952 in one case and on 8-10-1952 in the other. It was an unqualified demand for payment of the sum due to him. In my view, it was a legal demand by a person capable of giving valid discharge made directly on the party with whom a sum lies as a deposit. It was not necessary for the plaintiff to have made this demand in the year 1952 if he felt that he was under a disability or inability to file a suit. Since the limitation under Article 22 runs from the date of demand, which is entirely within his operative volition, the period of limitation could have been indefinitely prolonged by him; the institution of the suit may itself also be a demand. Therefore, if the plaintiff had wished to prolong the limitation, he need not have made a demand by his notice in the year 1952. But he chose to serve a notice in the year 1952. In my view the period of limitation, therefore, had to run from the date of demand (in this case 1952) which he voluntarily chose; but the learned Advocates for the appellant contends here that he could not have filed a suit without the consent of the Insolvency Court; but is this contention valid?

10. We have seen that the plaintiff became an insolvent and was adjudged as such on 8-2-1950. Under Section 28 of the Provincial Insolvency Act, 1920, the whole of the property of the insolvent vests in the Court or in a Receiver on the making of an order of adjudication. All that property becomes divisible amongst the creditors of the

insolvent. No creditor, to whom the insolvent is indebted in respect of any debt, provable under the Insolvency Act, shall, during the pendency of the Insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or commence any suit or other legal proceedings except with the leave of the Court and on such terms as the Court may impose. Under Section 28-A of the Act, the property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge. Therefore, the plaintiff knew that he was adjudged as an insolvent. Naturally, therefore the whole of his property was vested in the Court or in the Receiver. Yet he had kept some sum and deposited that sum with the defendants during the pendency of his insolvency. On the top of it, on having deposited the money which rightly ought to have been vested in the Court, he wanted to collect the same and, therefore, he had also served a notice of demand to the defendants in 1952. Therefore, the plaintiff cannot, in these circumstances, be allowed to say that he could not have filed a suit because he had to take leave of the Court for doing so. Whatever, in my view, may be the position regarding the position of the Official Receiver, the plaintiff-insolvent cannot be allowed to take an objection that because he had served a notice in 1952, without the leave of the Official Receiver and because he had to file a suit with the leave of the Receiver, he could not do it. It is true that if the Official Receiver was not a party to either the notice or to the suit filed thereafter by the insolvent, the proceedings would not be binding on him. It appears to me, therefore, that in the circumstances which are brought about by the plaintiff himself, the plaintiff cannot be allowed to take these pleas. Although the suit by the plaintiff may be in a way defective by reason of his insolvency, the assignee alone could take advantage of this defect. The plaintiff himself could not take advantage of it. In fact we have seen that the plaintiff's insolvency was also annulled later on 15-12-1956. Because of this annulment he could not now turn round and say that he could not have filed a suit after his first notice in the year 1952. Under Section 37 of the Provincial Insolvency Act, 1920, "where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts therefore done by the Court or receiver, shall be valid; but subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest there-

in on such condition as the Court may, by order in writing, declare." The plaintiff's adjudication admittedly was annulled unconditionally. All the creditors were paid in full. Therefore, all the property except the property which might have been distributed to the creditors, reverted to the plaintiff. In other words, the property reverted back to the debtor as if the property never vested in the Court from the date of adjudication till the date of annulment of adjudication. Therefore, he could not under these circumstances, have said that his suit if he had filed after the first notice could not have been tenable.

11. In *Wood v. Surr*, (1854) 52 ER 465 Sir John Romilly M. R., while dealing with some circumstances similar to that of the insolvent before me, had made some observations which are very useful. In that case one Davis was adjudged an insolvent while his mortgage suit was pending. The assignees were not made parties to the suit and the matter proceeded. During these proceedings accounts were made and certain due sum was fixed for the payment. Because of certain fault made in payment, the suit was ultimately dismissed. The effect of this was that the mortgagor became foreclosed. During these proceedings, Davis mortgaged the equity of redemption of the same property to one Mrs. Cuppage who sold the property to one Wood. Wood, it appears, later on filed a suit out of which an appeal arose before the Master to set aside the proceedings and the foreclosure made earlier in that suit of Davis. It was held that though the assignee in insolvency was not bound by the foreclosure, Wood and Cuppage who knew about it were bound by it and that they were not entitled to raise the objection of the absence in the suit of the assignees in the Insolvency of Davis. Sir John Romilly M. R. observed:

"The proceedings having gone on exactly as if no insolvency had taken place, the subsequent proceedings would, in my opinion be wholly inoperative against the assignee in insolvency and if he thought fit to contest the validity of the decree or foreclosure against Davis, it could not be held to be binding on such assignee. But that does not conclude the question, which really is, whether the plaintiff who, but for this, would in truth have been bound, can take advantage of this objection? I am of opinion that, although the suit was undoubtedly defective, by reason of this insolvency the assignee alone could take advantage of this defect. It is obvious that Davis himself could not take advantage of it, or if from any subsequent cause, or any subsequent circumstance, the insolvency or bankruptcy had been superseded or annulled he could not have "said that the foreclosure was not absolute against him,"

Therefore, this statement of law, in my view, applies to the present case and the plea

which the plaintiff is now making cannot be available to the quondam insolvent. The plea of disability, which is now being raised by the plaintiff is also not anywhere to be found in the provisions of the Indian Limitation Act.

12. Moreover, under Section 6 of the Limitation Act, 1963, where a person entitled to institute a suit or make an application for the execution of a decree, is at the time from which the prescribed period is to be reckoned, minor or insane, or an idiot, he may institute the suit or make the application within the same period after disability has ceased, as would otherwise have been allowed from the time specified therefor in the third column of the Schedule. Under Section 9 of the same Act, where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it. There is a proviso but we are not concerned with this proviso. Therefore, the legal disabilities are mentioned in the Limitation Act. The pendency of the insolvency proceedings is not mentioned as a legal disability. We have seen that the plaintiff has served a notice on his own. That was a legal notice of demand. The time, therefore, under Article 22 starts running and it cannot therefore stop for any disability or inability of the plaintiff.

13. Now, let us also see what exactly is the position if an insolvent files a suit pending the insolvency proceedings. In Subbalah Goundan v. Ramasami, AIR 1954 Mad 804 (FB), which is a Full Bench case, the Madras High Court was dealing with the Provincial Insolvency Act, the Official Receiver was not made a party to a mortgage suit. The effect on the title of the property on annulment was being considered. It is mentioned that if a decree is passed without making an official assignee a party to the suit and the decree-holder purchases in execution of the decree, the decree and the proceedings are not null and void in the sense that they have no legal effect at all. The proceedings are only ineffective to hinder the equity of redemption which is vested in the receiver. It is also observed that the effect of annulment is to vest the property retrospectively in the insolvent. In other words, consequences of annulling the order of adjudication is to wipe out altogether the insolvency and its effect except to the limited extent reserved under the section. In view of this, the alienations made of the property moveable or immovable by the insolvent after adjudication or the decree or execution proceedings suffered by him during such insolvency notwithstanding the property is taken away and transferred from him are all restored and validated with effect from the date on which the insolvency petition was filed. Their Lordships in that case have referred to a large number of cases. They also observed that during the insolvency proceedings the insolvent's property vests in the Official Receiver for the purpose of ad-

ministering the estate and for meeting the claim of the creditors. The Act does not affect the capacity of the insolvent to enter into the contract and otherwise deal with the property. He is in the position of a person who has alienated all his property or otherwise lost it. But his position cannot be equated to that of a minor or a lunatic. He can be sued with or without the leave of the Court, as the case may be, and in that suit he can properly represent himself. But any decree that might be obtained against him would not bind the Official Receiver in whom his entire property vests. With respect I agree with this statement of law. Therefore, the plaintiff could have properly represented himself, if he had filed a suit. We have seen that his insolvency was also annulled later on. At any rate, having chosen once to give the notice in the year 1952, which he was not bound to, he could not now take up a plea and say that he could not have filed a suit because he had to ask for leave of the Court for it.

14. It can also be looked in another way. The plaintiff on his own has given a notice of demand to the defendants in the year 1952. When the insolvency proceedings were pending, he could as well have taken the leave of the Court and ask the Official Receiver to file this suit against the defendants. The Official Receiver could as well have filed the suits against the defendants. In this view of the matter also, the plaintiff cannot now take a plea saying that it was not possible for him to file any suit at all after the first notice. Moreover, as mentioned earlier, neither Section 6 nor Section 9 of the Indian Limitation Act also provides any assistance to the plaintiff when he pleads that because of the insolvency proceedings, the period of limitation does not start from the demand notice of the year 1952. A period of pendency of insolvency proceedings cannot also be excluded under Section 15 of the Indian Limitation Act except where there is an order refusing the leave to commence a suit. Even if the pendency of the insolvency proceedings may have the effect of preventing any suit or application being filed against the insolvent, the bar of interdiction does not arise by any order of the Court but under the law. Hence, Section 15 (1) of the Indian Limitation Act does not apply. Under this section, in computing the period of limitation for any suit, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded. Therefore, this section of the Indian Limitation Act also does not assist the plaintiff.

15. For the aforesaid reasons, therefore, the period of limitation would start under Article 22 of the Indian Limitation Act when the demand is made. The demand made by the plaintiff in one suit is on 24-7-1952 and

in the other on 3-10-1952. The period is of three years. Therefore, the suits in both these matters are not tenable. The notice given afterwards by the plaintiff in the year 1957 will not be of any use to him. In this view of the matter, therefore, the suits in each of the appeals are barred by limitation.

16. The other point as regards the maintainability of the suit under the C. P. & Berar Money Lenders Act, 1934, depends upon the production of a money lending licence by the plaintiff. Both the Trial Court as well as the learned District Judge found that this was a loan transaction under the provisions of the C. P. & Berar Money Lenders Act, 1934. The suit filed by a money lender for the recovery of such a loan has to be dismissed if the plaintiff does not hold a valid registration certificate issued under the Money Lenders Act on the date of the transaction to which the suit relates. However, if a money lender holds a valid licence even at the time of the hearing, the suit need not be dismissed. In *Hajarimal v. Harinarayan*, 1965 Mah LJ 797, this Court, while dealing with Section 11 (H) of the C. P. & Berar Money Lenders Act, 1934, was of the view that it contemplates that if the Court finds that the plaintiff does not hold a valid licence, it shall stay the suit for a reasonable time until a valid registration certificate was produced. If no certificate is produced thereafter, the Court will not pass a decree in the plaintiff's favour. As mentioned earlier, no licence was filed at any time at any stage of the proceedings from the Trial Court till now. It, therefore, appears that no valid licence is with the plaintiff. The plaintiff, therefore, would also fail on the ground. His suit, therefore, will not be tenable because he has no money-lending licence for this loan transaction under the C. P. & Berar Money Lenders Act, 1934.

17. For the aforesaid reasons, therefore, both these appeals should fail. I, therefore, confirm the decrees of the Appellate Court and dismiss both the appeals with costs. Permission for L. P. A. granted as per request.

Appeals dismissed.

AIR 1970 BOMBAY 267 (V 57 C 46)

K. K. DESAI, J.

M/s. Manubhai Kikabhai and Co. Bombay, Applicants v. Shri Babajee Rajaram since deceased by his proposed heir: Smt. Baiyobai Rajaram, Opponent.

Civil Revn. Appln. No. 248 of 1969, D/- 14-11-1969, against order of Commr. for Workmen's Compensation, Bombay, D/- 20-12-1969.

(A) Workmen's Compensation Act (1923), Section 4 — Compensation, application for — Death of applicant during compensation

DN/DN/B521/70/BDB/D

proceedings — Application does not abate — There is no fixed time limit for heirs to be substituted — Order 22 of Civil P. C. and provisions of Limitation Act, do not apply to such applications.

There is nothing in law to suggest that applications for compensation under the Act cannot be continued by heirs of deceased applicants. There is no time fixed within which heirs of deceased applicants must come on record to enable them to continue the applications originally filed by deceased applicants. Applications filed under the Act being for recovery of money must be held to be in respect of rights to debts which survive to heirs of deceased applicants. As the right to the debt is not personal right of the deceased applicant, a widow of a deceased applicant is entitled to continue the original application in her own right. The provisions in Order 22 of the Code of Civil Procedure are not made applicable to applications made under the Act. (Para 5)

(B) Civil P. C. (1908), O. 22, R. 3 — Death of applicant — Claim under Workmen's Compensation Act (1923) for compensation — No time limit for bringing heirs on record to continue application — Order 22 and Limitation Act have no application to such applications. (Para 5)

N. N. Rele and M. M. Vyas, for Applicants.

ORDER:— The grievance of the petitioners in this revisional application is that the Commissioner for Workmen's Compensation wrongly held in favour of the opponent that she was entitled to continue the original application filed for compensation by her deceased husband, and in that connection the Commissioner wrongly rejected the contention made on behalf of the petitioners that the application for bringing the opponent on record was not made within the period of limitation prescribed.

2. In the submission of Mr. Rele for the petitioners, the application for bringing the opponent on record was much after the application had abated and was barred by limitation. The application should have been rejected.

3. Mr. Rele's attempt was to rely upon the provisions in Order 22, Rule 3, of the Code of Civil Procedure in support of his above submission. The contention was that the original applicant died on September 25, 1967, and the application for bringing the opponent, being the widow of the deceased applicant, on record was made on February 21, 1968. The original application must be held to have abated. The present application for bringing the opponent on record was made on February 21, 1968, and was beyond the time prescribed.

4. In connection with these submissions, I repeatedly requested Mr. Rele to point out provisions in the Workmen's Compensation Act providing for application of the provisions of Order 22 of the Code of Civil Pro-

cedure to applications for compensation made under the Act. Mr. Relu candidly admitted that these provisions have not been made applicable to such applications. I also requested Mr. Relu to point out how provisions in the Limitation Act are made applicable to applications for compensation made under the above Act. He did not point out any such provision.

5. It must under the above circumstances, be held that there is nothing in law to suggest that applications for compensation under the Act cannot be continued by heirs of deceased applicants. There is no time fixed within which heirs of deceased applicants must come on record to enable them to continue the applications originally filed by deceased applicants. Applications filed under the above Act being for recovery of money must be held to be in respect of rights to debts which survive to heirs of deceased applicants. As the right to the debt was not personal right of the deceased applicant, the opponent as his widow was entitled to continue the original application in her own right. The debt survived to the opponent and was claimable by her. As the debt survived, the application cannot be held to have abated at any date. This is so because the provisions in Order 22 of the Code of Civil Procedure are not made applicable to applications made under the Act. The Commissioner was, therefore, right in granting the application and ordering the amendment, and in making the order dated December 20 1968.

6. Rule discharged. No order as to costs.
Rule discharged.

AIR 1970 BOMBAY 263 (V 57 C 47)

(AT NAGPUR)

DESHMUKH, J.

Nandlal Shankarlal Tiwari and others, Applicants v. Laxman Umakant Malkarjun and others, Opponents.

Misc. Civil Applns. Nos. 114, 115 & 143 of 1969, D/- 17-10-1969, against decision of Deshmukh, J., in S. A. Nos. 168, 182, D/- 19-6-1969 and 281 of 1969, D/- 17-7-1969.

Civil P. C. (1909), Order 41, Rule 11 — Summary dismissal of appeal — Not necessary to write a judgment of detailed order — Civil Cir. 51 of 1890 (Bom). does not affect interpretation of Rule 11. (1911) 13 Bom LR 1002, Rel. on; (1913) 15 Bom LR 765 (FB), Explained; AIR 1934 Pat 341, Rel. on. (Paras 7, 11)

Cases Referred: Chronological Paras
(1968) AIR 1968 Bom 334 (V 53) =
67 Bom LR 231, Gangabai Tokernay
v. Gouri Shankar 10
(1934) AIR 1934 Pat 341 (V 21) =
ILR 13 Pat 540, Mahku Sahu v.
Kamta Prasad Sahu 10

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(1913) 15 Bom LR 765 = ILR 37 Bom
610 (FB), Hanmant Rukhamaji v.
Annaji Hanmant 7

(1911) 13 Bom LR 1002 = ILR 86
Bom 118, Tanaji Dagde v. Shankar
Sakharam E

(1903) 5 Bom LR 233, Puttappa v.
Yellappa 7

B. R. Mandlikar, for Applicants (In all the
Appeals).

JUDGMENT:— These are three applications for permission to file Letters Patent Appeal. All the three second appeals were summarily dismissed by one-word order "dismissed". Leave is being refused in all the three applications to file an appeal under Clause 15 of the Letters Patent as none of them involves any point of law which requires to be considered by Division Bench. However, Mr. Mandlikar has raised a technical question which he thinks, is an important point of law for which leave ought to be granted. Hence this order.

2. Mr. Mandlikar argued that Order 41, Rule 11 of the Civil Procedure Code applies to the further hearing of appeal before this Court and a judgment including reasons for the summary dismissal of the appeal must be made by this Court. The one-word order of dismissal is not a judgment according to law. The legal position in this behalf so far as this Court is concerned is already concluded by judgments as well as by long standing practice. However, since this question is being raised recently in this Court particularly by petitioners who have hardly any point to urge for obtaining a leave to file a Letters Patent Appeal, it is better that the legal position is once more summarised.

3. What is argued is that the provisions of Order 41, Rule 11 of the Civil Procedure Code must be read along with Rule 31 of the same order as well as Sections 2 (9), 33 and Order 20, Rule 4 sub-rule (2). The argument in short is that even while the appeal is being summarily dismissed under Rule 11, the Court ought to make a judgment according to law. The word 'judgment' has been defined in clause (9) of Section 2 and means the statement given by the judge of the grounds of a decree or order. Order 20, Rule 4, deals with the contents of judgments. Sub-rule (1) of Rule 4 relates to the judgment of a Small Causes Court and it is enough if the judgment of that Court contains the points for determination and the decision thereon. Sub-rule (2) of Rule 4, however, requires that judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. Along with this provision Rule 31 of Order 41 is read to point out that the judgment of the Appellate Court shall be in writing and shall state (a) the points for determination; (b) the decision thereon; (c) the reasons for the decision; and (d) where the decree appealed from is reversed or varied,

the relief to which the appellant is entitled. At the time this judgment is pronounced it shall be signed and dated by the Judge or by the Judges concurring therein. In short, even while the appeal is being summarily dismissed under Order 41, Rule 11 of the Civil Procedure Code a regular judgment as is made at the end of the final hearing of an appeal ought to be made by the Judge or Judges in motion hearing.

4. The provisions relating to appeals are contained in Order 41 of the Civil Procedure Code 1908. The various rules in this order are grouped under appropriate headings dealing with particular topics. Rules 1 to 4 deal with the form of appeal and the compliance with the technicalities before an appeal memo is considered to be in order and is directed to be entered in the register of appeal maintained in Court. Rules 5 to 8 deal with the provisions of stay order and security to be taken in relation to the stay order. Rules 9 to 15 deal with the procedure on admission of appeal. After the appeal is found in order it is entered into the register under sub-rule (1) of Rule 9. After an appeal is so entered in the register of appeals, the Appellate Court sets it down for what is known as motion, hearing or the state of admission of the appeal. Rule 11(1) which is the subject-matter of dispute is in the following terms:—

“Order 41, Rule 11 (1):

The Appellate Court after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.”

If the Court does not dismiss an appeal under this rule, it has to set down a date for hearing and issue notice to respondent.

5. Rules 16 to 22 of Order 41 of the Civil Procedure Code deal with the procedure on hearing. Once the appeal is admitted for final hearing a notice thereof is issued to the respondent. The procedure to be adopted is laid down by these rules. It may be noted that under sub-rule (1) of Rule 17 it is open to the Court to dismiss the appeal for default if the appellant does not appear when the appeal is called on for hearing. If the appellant commits default in payment of process charges and the notice of hearing of the appeal could not be served upon the respondent because of this default of the appellant it is again open to the Court to dismiss the appeal under Rule 18. The provisions contained in these two rules indicate that in certain circumstances it is open to the Court to dismiss the appeal without writing a detailed judgment. It may incidentally be noted that it is open to the Court under sub-rule (1) of the Rule 3 to reject a memorandum if it is not presented in the proper

form nor is it amended in spite of the directions of the Court. Sub-rule (2) of Rule 3, however, requires that where the Court rejects any memorandum, it shall record the reasons for such rejection. There is a marked difference between the language of sub-rule (2) of Rule 3 and the language of sub-rule (1) of the Rule 11. The language of sub-rule (1) of Rule 11 is more analogous to the language of Rules 17 and 18.

6. Rules 30 to 34 of Order 41 deal with the judgment in appeal. Rule 31, which has already been referred to earlier, requires the judgment of the Appellate Court to be in a certain form. It also lays down what the judgment shall contain. However, Rule 30 says that the Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court. Obviously therefore, Rule 30 comes into operation only where a notice of appeal is being sent to the respondent and the parties are heard and in which hearing points are raised for the consideration of the Appellate Court. It is only when such a stage is reached that the judgment contemplated in the manner provided by Rule 31 has to be made. Rules 35 to 37 deal with the decrees in appeal.

7. On a plain reading of the scheme of Order 41, it does not seem to be necessary for the Appellate Court to write any judgment or a detailed order while dismissing an appeal summarily under Rule 11. *Tanaji Dagde v. Shankar Sakharam*, (1911) 18 Bom LR 1002, a Division Bench of this Court considered this question where the District Court passed a very brief order under Order 41, Rule 11 of the Civil Procedure Code while dismissing an appeal. The order passed was “the lower Court has given good reasons for holding that plaintiff appellant was a mere benamidar for the defendant-respondent (who is in possession) and not a real purchaser”. In the face of a such a cryptic order, the argument addressed to this Court was that the judgment is not according to law. *Hayward, J.*, referred to an earlier judgment of this Court in *Puttapa v. Yellappa*, (1903) 5 Bom LR 233 in which a Division Bench expressed the view that a formal judgment was necessary in the case of an appeal dismissed without sending notice to the lower Court. However, it is pointed out that no reasons were assigned for that decision. The learned Judge proceeds to consider the scheme of Order 41 and points out that the reference to “a judgment in appeal” arises only when that stage is reached when both sides are to be heard and the Court is to write a judgment under Rule 30. The final conclusion drawn by the learned Judge with whom the other learned Judge *Beaman, J.*, concurred, is as follows:—

“It appears to me therefore, looking to Order XLI as a whole, and to the position in

it of Rule 11 relating to the summary dismissals of appeals, as also of Rules 17 and 18, relating to dismissals for default of the appellant, and having regard to the practical difficulty of applying to any such dismissals the provisions of Rules 30 and 31 relating to judgments, that those provisions cannot be held, and were never intended by the Legislature to be held, applicable to any but regular hearings of appeals in the presence of the parties and with the record before the Court."

This judgment has been overruled by a subsequent Full Bench judgment of this Court in Hanmant Rukhamaji v. Annaji Hanmant, (1913) 15 Bom LR 765 (FB). It may be remembered that the question before the Division Bench of this Court in (1911) 13 Bom LR 1002 was whether the District Court was justified in passing a very brief and unspeaking order while dismissing the appeal under Order 41, Rule 11 of the Civil Procedure Code. On an interpretation of the provisions of Order 41 the view taken was that the order was thoroughly justified and legal. Before the Full Bench, the question canvassed was that Tanaji Dagde's case was wrongly decided. The learned Chief Justice points out that a Civil Circular 51 was published in 1890 under the provisions of the High Courts Act. The Civil Circular provides that when an Appellate Court subordinate to this Court dismisses an appeal under Section 551 of the Code of Civil Procedure, a judgment should be written and a formal decree drawn up. The Full Bench proceeds to point out that there was nothing in the new Code of Civil Procedure which introduces any change in law, except in so far as the rules commencing with Rule 9 of Order XLI are headed "Procedure on admission of appeal". That change is not sufficient to abrogate the rule published under the High Courts Act, which is quite consistent with the provisions of the Code. The rule in the Civil Circulars is the basis of all the Bombay judgments referred to by the learned Chief Justice in that judgment except the one reported in (1911) ILR 36 Bom 116 = 13 Bom LR 1002. It is, therefore, pointed out that the practice laid down in that circular must still be observed by the Courts in the Presidency subject to the superintendence of the High Court.

8. The net result, therefore, is that so far as the Courts subordinate to the High Court in this State are concerned Civil Circular 51 issued in 1890 still holds good, and the subordinate Courts are obliged to write a judgment and draw up a formal decree.

9. It may be noticed that Beaman, J., who was a party to Tanaji Dagde's case and concerned with this judgment of Hayward, J., was also one of the judges constituting the Full Bench deciding Hanmant Rukhamaji's case. In view of the Circular 51 pointed out by the Chief Justice, Beaman, J., agreed with the judgment proposed by the Full Bench but has observed as follows:—

"Had we nothing more to do here than give a true construction of O. XLI, then notwithstanding the conflicting decisions which have been cited to us, I should certainly have adhered to the view expressed by my brother Hayward, in which I concurred, in Tanaji Dagde v. Shankar Sakhamar. But in view of the circular order which has been mentioned, I feel that so long as that Circular Order stands, and has the force of law, I ought to concur, and therefore I do concur in the judgment which has just been pronounced by my Lord the Chief Justice."

Ever since, the District Courts have been pronouncing formal judgments and drawing up decree where appeals are summarily dismissed under Order 41, Rule 11 of the Civil Procedure Code. It may be noted, however, that in spite of this judgment which is meant for the guidance of subordinate Courts, the practice of passing one-word dismissal order is in vogue in this Court throughout these years. It is not because a mere practice has developed but because on a true construction of Order 41 read as a whole it is not obligatory on an Appellate Court to pronounce a judgment when an appeal is being summarily rejected. The Full Bench dealt with a limited issue as to how the Courts subordinate to the High Court should conduct themselves while dismissing appeals under Order 41, Rule 11 of the Civil Procedure Code. It has not either considered or disapproved the true construction of the provisions of Order 41, Rule 11 as pointed out by the Division Bench in Tanaji Dagde's case. The interpretation of Order 41, Rule 11 made in Tanaji Dagde's case is still good law so far as the dismissal of appeals by this Court under Order 41, Rule 11 is concerned.

10. The opinion on this point is not unanimous between the various High Courts. The Calcutta High Court has for a long time taken a view that a reasoned judgment must be made in dismissal of appeal under Order 41, Rule 11 of the Civil Procedure Code. The Rangoon High Court has followed the judgment of this Court because the High Court of Burma had issued a rule similar to Civil Circular 51 of this Court. A Division Bench of the Patna High Court in Makhu Sahu v. Kamta Prasad Sahu, AIR 1934 Pat 341 has approved and agreed with the view of this Court in Tanaji Dagde's case. After an exhaustive analysis of the provisions of Order 41 was done, the observation of the Patna High Court is as follows:—

"A simple order of dismissal may be passed if the appeal is not admitted and it is not until after admission and after hearing that a judgment is required." Mr. Mandlikar argued before me that the judgment in Tanaji Dagde's case having been overruled by a Full Bench it would not be permissible for this Court to act upon the interpretation made in Tanaji Dagde's case. I do not think that this approach is correct. A very limited issue was decided by the

Full Bench and to the extent that the Full Bench gave direction based upon a Circular issued by this Court, the point is concluded so far as the judgments to be made by the Courts subordinate to this Court are concerned. The provisions of that Circular are not confined to the District Courts alone but they control all subordinate Courts. That view has been recently taken by a Division Bench of this Court in *Gangabai Tokersay v. Gouri-shankar Chhitarmal*, 67 Bom LR 231 = (AIR 1966 Bom 34). Under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, an appeal lies under Section 29 from a judgment of a Judge of the Court of Small Causes Bombay to the Division Bench of the same Court. The Appellate Division Bench of the Small Causes Court summarily rejects an appeal without giving reasons or without writing a judgment. When that order was challenged as not in accordance with law, the Division Bench of this Court points out that the Civil Circular 51 of 1890 is applicable to all Courts subordinate to this Court which hear appeals according to the provisions of the Civil Procedure Code. For the Appellate Bench of the Small Causes Court, Bombay, it is obligatory to follow that circular and make judgment even when the appeal is being rejected under Order 41, Rule 11.

11. These judgments, according to me merely point out the extent of the operation of the Civil Circular 51 of 1890 and do not in any manner impair the authority of the interpretation of the provisions of Order 41, Rule 11 as made by the Division Bench in *Tanaji Dagde's case*. That appears to me to be the consistent view of this Court and nothing seems to have happened which requires a reconsideration of that view. Thus, the point raised by Mr. Mandlekar is without substance. Leave refused in all the three petitions.

Leave refused.

AIR 1970 BOMBAY 271 (V 57 C 48)

PATEL AND WAGLE, JJ.

Pushpabai Shankarlal Sura and others, Appellants v. The Official Liquidator, Sholapur Oil Mills Ltd., Respondent.

First Appeal No. 116 of 1964 from Original Decree, D/- 3-4-1970 against decision of Asst. J. Sholapur in Misc. Appln. No. 38 of 1951.

(A) Court-fees and Suits Valuations — Bombay Court-fees Act (36 of 1959), S. 49 — Central Court-fees Act (1870) not applicable to Maharashtra State since enforcement of Bombay Act 36 of 1959. (Para 3)

(B) Court-fees and Suits Valuations — Court-fees Act (1870), Prc. — Interpretation of Statutes — Taxing statutes should be construed not only strictly but also reasonably — Case falling within statute — In

case of ambiguity statute should be resolved in favour of citizen. (Para 5)

(C) Civil P. C. (1908), Section 2 (2) — Decree — Order made during winding up of a Company and which is enforceable has the force of a decree. (Para 10)

(D) Court-fees and Suits Valuations — Bombay Court-fees Act (36 of 1959), Sch. II, Article 13 — "Decree or an order" — Words not restricted to decrees and orders of Civil Courts — Substance and not form of order is the guide — Orders made during winding up proceeding of a Company — Order capable of valuation in terms of monetary gain or prevention of monetary loss has the force of a decree — Test to determine — Court-fees on an appeal and cross objections against such an order would not be under Schedule II, Article 13 but under Schedule I, Article 7. (1895) ILR 17 All 238 and AIR 1966 Mys 150 and AIR 1945 Lah 146 (FB), Dissented (but rider by Marten, J., Approved.)

In considering the expression "an order having the force of a decree", the Court must be guided by the substance of the matter and not merely by the form.

The words "a decree or an order" in Schedule II, Article 13 are not confined to decrees or orders only of civil courts.

There is no distinction between an order creating liability made by the Court in winding up proceedings granting substantive relief capable of being valued in terms of monetary gain or prevention of monetary loss and a decree of the Civil Court granting similar relief. (Para 9)

In an appeal and cross-objections against such an order Court-fee is payable under Schedule I, Article 7 and not under Sch. II, Article 13. AIR 1945 PC 60, Rel. on; (1895) ILR 17 All 238, AIR 1966 Mys 150, Dissented; AIR 1945 Lah 146 (FB), Dissented but rider stated by Marten, J., Approved; AIR 1956 Bom 563, Dist.

(Paras 7, 8, 9, 10, 14)

(E) Companies Act (1956), Section 634 — Winding up of Company — Order made capable of valuation in terms of money — It has the force of a decree. (Para 10)

Cases Referred: Chronological Paras
(1968) L. P. A. No. 44 of 1968, D/- 15-10-1968 = 1970 Mah LJ 238,
Indumatiben Chimanlal Desai v.
Union of India 6

(1966) AIR 1966 Mys 150 (V 53) =
1965-1 Mys LJ 557, Dundappa
v. S. G. Motor Transport Co. 15
(1956) AIR 1956 Bom 563 (V 43) =
55 Bom LR 139, Taxing Officer v.
Jamnadas 16

(1945) AIR 1945 PC 60 (V 32) =
47 Bom LR 640, Lyallpur Bank
Ltd. v. Ramji Das 10

(1945) AIR 1945 Lah 146 (V 32) =
221 Ind Cas 114 (FB), Official Liquidator v. M. U. Qureshi 13, 15

(1895) ILR 17 All 238 = 1895 All

WN 56, Reference under S. 28,
Court-fees Act (7 of 1870) 11

(1885) Printed Judgment P. 214

(Bom), Nawab of Bela Spinning
and Weaving Co. Ltd. v. Atma-
ram Parbhudas 11V. V. Albal, for Appellants; U. R. Lalit,
for Respondent; Govt. Pleader as amicus
curiae.

PATEL, J.: On November 1, 1968 this appeal was before us and we had held that on the memorandum of appeal and the cross-objections both the sides were liable to pay ad valorem court-fee on the amount either decreed or disallowed. A note was

subsequently filed that to such a case the provisions of Article 13 of Schedule II of the Bombay Court-fees Act, 1959 (hereinafter referred to as the Act) should be applicable and not Schedule I, Article 1 or 7 of the said Act as held by us. We have, therefore, reheard the matter.

2. The order in the present case is made in a winding up proceeding under circumstances which we have already stated in our order dated November 1, 1968. The two provisions which are relevant for the present purposes and which need be considered are Schedule I, Article 7 and Schedule II Article 13 of the said Act. Schedule I, Article 7 of the Act reads as follows:—

"7. Any other plaint, application or petition (including memorandum of appeal), to obtain substantive relief capable of being valued in terms of monetary gain or prevention of monetary loss, including cases wherein application or petition is treated as a plaint or is described as the mode of obtaining the relief as aforesaid."

A fee on the amount of the monetary gain, or loss to be prevented, according to the scale prescribed under Article 1".

Schedule II Article 13 of the said Act reads as follows :

"13. Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree and is presented—

- (a) to any Civil Court other than the High Court or to any Revenue Court or Executive Officer other than one the High Court or Chief Controlling Revenue or Executive Authority;
(b) to the Chief Controlling Executive or Revenue Authority;
(c) to the High Court.

one rupee

Two rupees fifty paise.
Five rupees.

3. As we have recently observed in a similar case L. P. A. No. 44 of 1968, D/-15-10-1968 (Bom) the said Act has been recast in 1959 and the Indian Court-fees Act 1870, is no longer applicable to this State. We will, consider the question in the first instance on first principles without referring to authorities.

4. In order that Schedule II, Article 13 of the said Act should apply, the appeal must be from an order and not from a decree and must be presented to the various authorities mentioned in column 2 of the said article. The question then is whether the order passed by the learned Judge under the Indian Companies Act in a winding up proceedings is a decree or an order having the force of a decree.

5. It is argued that the Court-fees Act being a taxing statute must be strictly construed. There can be no quarrel with the principle. But it is equally well settled that every statute must be reasonably construed, and if a case is brought within a particular provision it must be applied. It is only if there is ambiguity that the question of strict construction in favour of the citizen can be applied.

6. In order that the order should be a decree the proceedings must be under the Civil Procedure Code, must commence by a

plaint, and as defined by Section 2 (2) of the said Code, there must be a formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, as regard the Court expressing it. This is sine qua non for an order being a decree. In a winding up proceeding, when an order is made it may in some cases indeed decide the rights between the Company and the third person whether he is a creditor or a shareholder or an officer of the Company. The proceedings, however, are not like proceedings in a suit, though the Court may have got powers analogous to those in a suit for deciding the question at issue between the two parties and there may not necessarily be a formal expression of the adjudication as understood under the Code of Civil Procedure as in the case of a decree. An order means a formal expression of a decision which is not a decree. In order that a decision should be an order, no particular form of order could be prescribed. Each case must depend upon its own facts. The order in the present case is:

"The Trustees of the Debenture-Holder shall get Rs. 7,691.61 nP. from the Official Liquidator as the costs and expenses incurred by them for the period for which they were in possession of the Mill. The remain-

in sufficient comfort and it will be inclined to infer either insincerity in the complaint, or an acquiescence in the injury whether real or supposed or a condonation of it."

It is observed that the matrimonial jurisdiction of the Court is intended to afford relief to a husband or to a wife who feels that he or she has been grievously wronged by the other party and therefore desires to have the marriage dissolved. Further, the Court is not to be used merely as an engine for enabling a husband or a wife to retaliate on the other by reason of some injury which has been done outside the matter of violation of conjugal rights of the parties as such. In AIR 1930 Cal 418 (supra), this Court declined to grant the relief claimed, holding that the question of delay is always a matter of discretion of the Court, and, as the inaction on the part of the husband shows not that he was insincere in his complaint in the sense of not believing that his wife had committed adultery, but because there was an acquiescence by him in the injury which he knew he had suffered, the Court ought not to exercise the discretion in favour of the husband. Though the adultery was discovered by the husband on June 17, 1926, the husband was finally aroused the (sic) action when the wife removed certain articles of furniture, and for the first time publicly made a charge against the wife as having committed adultery by institution of proceedings in 1928 under the Indian Divorce Act, which, as already indicated were accordingly dismissed.

12. Mr. Ghosh also relied on the decision in *Llewellyn v. Llewellyn*, 1955-1 WLR 480, where the Court of Appeal affirmed the order dismissing the application for divorce by wife on the charge of cruelty on the sole ground of delay. It was found that the husband was guilty of cruelty and assaulted the wife in 1946, 1947 and 1951, and after June 1951, the husband had done nothing which in any way amounted to cruelty. During the period from June 1951 to January 1953, when she left, parties remained living together, the wife did not condone her husband's cruelty, though he pleaded with her to forgive him, but instead acted in an objectionable way and was hostile to him. In October 1953, the wife petitioned for divorce on ground of cruelty. The Court of appeal in affirming the trial Court's order dismissing the petition observed that the Court is not to be used as a place to which people can come for redress just when it suits them, and if it is found that a weapon is being held in reserve over the head of the spouse who is affected, the Court is entitled in the exercise of its discretion to refuse to accede to the prayer of the peti-

tion. Denning L. J. concurring observed:—

"If the husband repents of his wrongdoing and seeks forgiveness, as he has done here, the wife cannot stay in the house and refuse to forgive him, and all the while hold the past over his head, ready to strike with divorce whenever it suits her. She cannot play fast and loose with marriage in that way." The principle in *Boulting v. Boulting*, (1864) 3 Sw & T 329 was quoted with approval—

"The petitioner must feel and suffer under the wrong of which the complaint is made, and the Court must be satisfied that the remedy is sought as a genuine relief from the pressure of that grievance."

Accordingly it could not be said that the wife, when she left the house still suffered under the grievance of 18 months before.

13. On the above authorities Mr. Ghosh contended that it is the duty of the Court, to grant the relief prayed for, if only it is satisfied but not otherwise, that there has not been any unnecessary or improper delay in instituting the proceedings. In view of the statutory provision, it is not of much consequence that the objection on the ground of delay was not specifically taken by the husband nor was any issue framed on the said ground of delay. The marriage of the wife's sister which was taken as a plea to explain the delay took place in 1956 and according to her, the desertion commenced from 1952 onwards, and in October 1954, she left husband's residence, the statutory period of desertion being three years. More, according to the wife, the husband had been persistently cruel since the marriage, and apart from the physical violence, ending lastly with the unfortunate incident of May 16, 1955, she had no company of the husband since January 1948. This unnecessary and improper delay has not been explained at all by the wife, and accordingly, the learned Judge should have dismissed the application in limine, on the ground of unnecessary and improper delay, indicating that she had no genuine grievance and her complaint was insincere.

14. Mrs. Jyotirmoyee Nag, the learned counsel appearing for the wife, has disputed the above contentions and has submitted that there had been no unnecessary and improper delay in institution of the proceeding by the wife. After her return from England in January 1952, the wife returned to the husband's place at Lake Place where she resided till October, 1954, and during this period, the husband did not misbehave with the wife though they had no relationship as husband and wife each having his or her own way of life. In May, 1955, the father of the

wife came down to Calcutta and on May 16, 1955, he proceeded to the house of the husband with a view to coming to some sort of understanding about the future course of life of the parties. The attempt however ended in disaster, wrecking their marital life and on from that day, the rupture was complete and beyond all chances of retrieval. At about the time, the younger sister of the wife was not still married and the wife, as she stated in her evidence, could not institute the proceeding earlier and the sister was married in 1956. Since then there has not been any unnecessary or improper delay the proceedings being instituted on October 3, 1958, if it is considered that the attitude of woman, particularly of our society, is rather to endure and suffer than to rush in Court and be the topic of a public scandal.

15. Mrs. Nag referred to the decision in *G (the husband) v. M (the wife)*, (1985) 10 AC 171, where Fitzgerald L. J. made the following observations:—

"It is said that the pursuer ought sooner to have instituted the suit. I ventured to observe in the course of the case, and I repeat it now, that there is not one of us who cannot recall to memory the experience of some case in which a woman submitted to the worst of treatment, treatment degrading and humiliating, and allowed it to continue rather than permit her name to become the subject of a public scandal. And when we add to this that the lady in question had two sisters, young and unmarried, who would necessarily be implicated in any disclosure as to her character, that would greatly strengthen her motives for silence, and probably she would have submitted to much more if she had not been driven to her present course (action for nullity of marriage) by the institution of the action for divorce."

Mrs. Nag also relied on the decision in *Moreno (Husband) v. Moreno (Wife)*, AIR 1920 Cal 439, where it was held by this Court that delay will generally be excused if it is really due to poverty. Reliance was also placed in the decision in *Becker v. Becker*, 1966-1 WLR 423 where a delay of fifteen years after desertion in the institution of the proceedings was not considered as a bar when the parties lived far away and the marriage was as dead as could be. Denning M. R. quoted with approval the observations of Hodson L. J. in *Crump v. Crump* in C. A. No. 69 of 1957 (unreported):

"In dealing with the question of desertion it seems to me entirely different considerations apply and the fact that a person does not, immediately the three years lapses, take proceedings for divorce is not of itself a matter calling for adverse criticism at all. In fact one would regard it rather from the opposite point of

view. It would in many cases, and perhaps in most cases, be praiseworthy if a person who had been deserted by their spouse did not at the first possible moment when the law allowed it petition for divorce. One knows in a great many cases such spouses endure with patient hope for many years before taking advantage of the right which is now available to them."

In *Adelaide Mande Tobias v. William Albert Tobias*, AIR 1968 Cal 133, a delay of 26 years in the institution of proceeding by the wife after desertion was not considered as a bar to the relief of divorce as the Court accepted the wife's explanation that she did not consider it wise to have the divorce until the children were brought up, educated and settled.

16. The delay to be a bar to relief must be unnecessary and improper in the circumstances of the case. In the present case the wife has stated candidly that her younger sister was still unmarried, when the final rupture took place on May 16, 1955. It was natural for her therefore to wait until the sister was married and settled in her new family, the marriage having taken place in 1956. And certainly to get settled takes time. Further the natural reluctance of the wife to be the subject of public scandal rather than endure the agony, the honour of the family, and the status of the divorced wife as unwanted woman in our society all these considerations keep away the wife from rushing to Court for relief of divorce and other reliefs to which she may be otherwise entitled in law. We also do not find here a wife acquiescing in the marital offences of the husband or taking from the husband any advantage of her position as the injured spouse or retaliating for some other injury caused by the husband. On the contrary, we find here a wife, who after prolonged years of the miserable life of a wrecked marriage, simply wants the freedom from a husband who, according to her, had blasted her life. We are convinced that there is no lack of sincerity in the complaint of the wife and that her suffering of an unfruitful and painful married life is genuine. In this background and looking at the marriage which is already dead, a delay for a period of about 21 months (January 1957 to September 1958) in our mind, is of no consequence, and is neither unnecessary nor improper when she was going to take, of her own, the most fateful decision in her life.

17. Mr. Ghosh in course of his submissions was candid enough to admit that the matrimonial home had been irretrievably broken down and that there is no meaning in the parties giving out further as a married couple. None the less, the husband is not willing to accept the position that the marriage has been

wrecked for reasons given by the wife and the husband further is not willing to leave the Court room with such ignominy hanging over him. Mr. Ghosh submitted that under Section 35 of the said Act, his client is entitled to get the same relief against the wife as if he had presented a petition seeking such relief. Mr. Ghosh contended that his client's written statement contains ample and sufficient allegations corroborated by legal testimony to grant him a decree for divorce on the wife's adultery with several persons, and, no less on the grounds of her cruelty and desertion.

18. Mrs. Nag has opposed the above contentions of Mr. Ghosh and has further contended, apart from merits, that under Section 41 of the said Act, this Court has framed the rules of procedure, known as the Special Marriage Act (Calcutta High Court) Rules 1955. The said rules have been incorporated in the Civil Rules & Orders, Volume I, as Rule 340-A. Under sub-rule (18), it is provided that in a proceeding for divorce, if the respondent asks for relief under Section 35 of the said Act, the answer shall contain particulars of adultery, cruelty or desertion, as if it were a petition *mutatis mutandis*. Sub-rule (19) again provides for an opportunity to the petitioner who may file a reply within 14 days from the filing of the answer or such extended time as may be allowed by the Court. Further, if the husband alleges adultery by the petitioner, he shall have to give the name, address and description of the alleged adulterer (vide Rules 20 and 21). In such case, a writ of summons, to which shall be annexed a true copy of the answer, shall be served on the alleged adulterer in the same manner as a summons of a petition for divorce to be served on the respondent who is to be impleaded as "co-respondent" and such adulterer may file an answer to that of the respondent (Rule 22).

19. It is obvious that in his written statement the husband did not ask for relief under Section 35 of the said Act and accordingly the wife was not called upon to give her reply to the said allegations made in the written statement. There was no application nor any proceedings taken before the learned Judge for relief under Section 35 of the said Act and it is too late in the day for Mr. Ghosh now to come and pray before us, in this appeal, the relief to which his client, the husband, would have been entitled if he had presented a petition seeking the relief.

20. Before we enter into the merits of the appeal, we shall consider the position in law relating to cruelty and desertion as matrimonial offences. The wife in the connected proceeding has applied for divorce on the ground that the respondent

has deserted the petitioner without cause for a period of over three years immediately preceding presentation of the petition and also has since the solemnisation of marriage treated the petitioner with cruelty. The relevant provisions of the Special Marriage Act, 1954, are as follows:—

"Section 27. Divorce. Subject to the provisions of this Act and the Rules made thereunder, a petition for divorce may be presented to the District Court either by the husband or by the wife on the ground that the respondent—

(a) —

(b) has deserted the petitioner without cause for a period of at least 3 years immediately preceding the presentation of the petition

(c) —

(d) has, since the solemnisation of marriage treated the petitioner with cruelty.

Section 34. Duty of Court in passing decrees.

(1) In any proceeding under Chapter V (restitution of conjugal rights and judicial separation) or Chapter VI (nullity of marriage and divorce) whether defended or not, if the Court is satisfied—

(a) any of the grounds for granting relief exists and

(b) —

(c) —

(d) the petition is not presented or prosecuted in collusion with the respondent and

(e) there has not been any unnecessary or improper delay in instituting the proceeding, and

(f) there is no other legal ground why the relief should not be granted; then, and in such case, but not otherwise, the Court shall decree such relief accordingly."

21. We are not concerned with the other ground of divorce as the learned Judge has decreed the suit on these two grounds only rejecting the other ground alleged by the wife.

22. As was approvingly quoted by the Supreme Court in *Bipin Chandra v. Prabhavati*, AIR 1957 SC 176 the legal position is summarised in *Halsbury's Laws of England*, Third Edition, Volume XII in the following words:

"453. Meaning of desertion. In its essence desertion means the intentionally permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion there being no general principle applicable to all cases.

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be, termed, for short, "the home"..... The person who actually withdraws from cohabitation is not necessarily the deserting party.....

454. Duration of desertion. The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition or where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding on the cause of action of desertion is not complete but inchoate until the suit is constituted. Desertion is a continuing offence.

... ..

456. Elements of desertion; factum and animus. For the act of desertion to exist there must be both the factum or physical separation, and the animus deserendi or intention to desert. All the necessary ingredients of desertion must continue throughout the statutory period.

A de facto separation may take place without there being an animus deserendi, as where there is a separation by mutual consent or a compulsory separation, but if that animus supervenes, desertion will begin from that moment, unless there is consent to the separation by the other spouse. On the other hand there may be animus deserendi without separation, as whether the parties live not as two households under the same roof but as one household.

... ..

459. Doctrine of constructive desertion. Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves his wife and the case of a man which compels his wife by his conduct, with the same intention, to leave him.

23. In AIR 1957 SC 176 (supra), the Supreme Court also laid down that in any proceedings for divorce, the plaintiff must prove the offence of desertion, like any other matrimonial offence, beyond all reasonable doubt. Further though corroboration is not regarded as an absolute rule of law, the Courts insist upon corroborative evidence, as a matter of precaution, unless its absence is accounted for to the satisfaction of the Court.

24. The other ground on which the wife seeks divorce is for cruelty and as already seen cruelty has not been defined in the said Act. In Halsbury's Laws of England (ibid), cruelty is defined as follows:—

"514. Meaning of cruelty. The legal conception of cruelty, which is not defined by statute, is generally described as conduct of such character as to have caused danger to life, limb, or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger.

516. Considerations which in general are material. The general rule in all question of cruelty is that the whole matrimonial relations must be considered, that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints accusations or taunts."

25. In Rayden "On Divorce", Tenth Edition at page 148, it is laid down:

"To obtain a divorce on the ground of cruelty it must be proved that one partner in the marriage, however mindless of the consequences, has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in a case of cruelty, from the petitioner's side ought this petitioner to be called on to endure the conduct; from the respondent's side, was this conduct excusable?"

26. Further "Assuming that injury or apprehended injury to health is found, the Court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which this respondent might have in the circumstances, the conduct is such that the petitioner ought not to be called upon to endure it."

27. For the purpose of convenience, the matrimonial life of the parties may be divided in four distinct periods. We shall consider each phase of the matrimonial life of the couple as borne out by the evidence. The first phase is from January 21, 1945, (date of solemnisation of marriage) to September 5, 1945. During this period, the wife stayed at the Lansdown Road, residence of the husband and appeared in her M. A. examination in August 1945. The husband left for England for his business in June 1945 and returned on September 5, 1945. The evidence of the wife is that immediately after marriage she found the husband unusually cold, indifferent and rude to her. He was unsympathetic and had no understanding and if she asked the reasons of such behaviour, he would use to

be rude to her and in later years started beating her. The wife complained that she was not treated by the husband as his wife. She also did not get his company as he was too busy with his other affairs. Even during this period there was no sexual relationship between the parties and when she invited his company, he said that as examination was ahead, there should be no sexual relationship. Dr. Hem Chandra Choudhury, the father of the wife and her witness in this case corroborated that her daughter, the wife, had told him, at about the time, of the husband's cold and indifferent attitude to her, her failure to have his company and also of the non-consummation of the marriage.

28. The husband in his evidence stated that the wife was found to be cold from the very beginning. He generally denied the other allegations made by the wife while admitting that the feelings were strained for first five months. In his written statement, the husband stated that during January to June, 1945, they cohabited but voluntarily restrained themselves in view of the wife's examination.

29. On a consideration of the evidence, we have no doubt that the relationship between the parties was far from normal and that the husband denied his company to the wife. We have also no hesitation in holding that there was no sexual intercourse between the parties during the period even though both of them were then young. Though the wife was keen for the husband's company, the husband kept her away on pretexts. This indicates the husband's utter callousness and indifference to the wife as has been alleged by her.

30. The second phase of the marriage life covers the period from September 5, 1945 to August 19, 1947. The husband according to him returned from his foreign tour on or about September 5, 1945, and the wife left for Lahore, where her parents resided, on September 6, 1945. According to the wife, however, the husband returned in August, 1945, and, after two to three weeks of his return, she left for Lahore, returning in December 1945. Even during this time she asked for his company and the husband was as cold and indifferent as before and used to abuse the wife saying that she was too demanding. She, however, returned from Lahore in December, 1945, and stayed at the husband's Lansdown Road residence. During this period, the husband, according to wife's evidence denied her company on the plea of his being busy with his club. Even he could not tolerate her if she was present at the time of his lunch and would be annoyed and beat her. He would not return home from his office after office

hours but used to go straight to his club and return home at night at 10 or 10-30 p.m. and then he used to go to his mother and talked to her. If the wife wanted the husband to come to her, he would beat her, his mother taking the side of the husband. The husband used to say to wife that she was so ugly that he felt ashamed to take her with him. The wife, thus, had no sleep in day or at night and during the period from December, 1945 to March, 1947, when she left for Lahore, there was again no sexual relationship between the parties. In October/November, 1946, the husband left for England and returned on January 12, 1947, and on the day he returned, according to the husband, she left for Lahore. It appears that the father of the wife was transferred to Jaipur and at his request the husband came in August, 1947, to Jaipur in the Hotel where the wife's parents were then putting up. On the two nights the husband spent there, there was no sexual intercourse and the husband did not behave properly with her, on the contrary, on the first night as she was persuaded to go to him, he was rude, and hit her and the wife came out weeping after some time, as it was impossible for her to stay with him. According to the wife, her father impressed upon her that her place was at Calcutta with the husband and accordingly she returned to Calcutta with her husband to stay with him. According to the husband as stated in his written statement, during his absence in foreign lands in October, 1946, to January, 1947, the wife became very intimate with one Himangshu, her class-mate, and Himangshu, at that time went to Jaipur at the call of the wife. The husband's case about this sojourn is that he was taken to Jaipur by the father of the wife and at Jaipur the wife promised to be a dutiful wife giving up her old habits. The husband forgave and accepted the wife again and they came to Delhi at the Agra Hotel and they went on sight-seeing while at Kutub Minar the wife confessed that she wanted to take away her life as she felt guilty in her conscience. Such confession on her part melted the heart of the husband and they returned to Agra Hotel and enjoyed each other's company and cohabited each other. They again left Delhi for Jaipur and on August 16, 1947, they left Jaipur reaching Calcutta on August 19, 1947. The alleged assurance by the wife at Jaipur and her confession at Delhi and their cohabitation in Agra Hotel, Delhi do not find any place, however, in the evidence of the husband and we are unable to accept the same as true. There is also no evidence about the alleged bath-room incident or of an alleged attempt of suicide by the wife on August 14, 1947, at Jaipur which is also not stated by the husband in his evidence and

we are unable to accept the same as true. The relationship of the parties during the period is also evidenced by some correspondence before the parties met at Jaipur. In his letter Ext. E dated July 6, 1947, the husband complained about the movement of the wife and mixing with Himangshu. In her letter Ext. E (19) dated July 16, 1947, the wife informed the husband that, Himangshu or no Himangshu, they could not carry on life as they were going on and that it was absolutely an abnormal sort of life to her. It was necessary for some sort of settlement to be reached and about some misunderstanding over her behaviour and action, she had offered to clear up everything and do the penance of her wrongs by coming over to Calcutta in spite of the unwelcome staring at her face. The offer was not accepted and the wife also complained in that letter that the husband always shirked his responsibilities and duties as a husband and did not give the wife the right to call herself as the wife of the husband and be proud of him. His attitude to her had been cold and indifferent, he being too busy with his plans of the future and works in devote any time in the wife and the family.

31. In the context of the evidence, oral and documentary, as stated above it again seems in us plain that the husband was as indifferent and cold in the wife as before. We have no doubt in our mind that the relationship between the parties was most abnormal and the reason for such relationship was due in the husband whose marital lapses caused the bitter and unfortunate situation. We have also a letter from the mother of the husband to the wife dated August 6, 1947, Exhibit E(8) where the mother complained about the wife's relationship with Himangshu. It may be mentioned that the husband in his evidence said that he had condoned the wife's conduct in relation in Himangshu and in fact, there is nothing incriminating in the conduct of the wife in so far as Himangshu is concerned, and to the husband, the intrusion of Himangshu in the scene did not have anything to do with the husband's relation with the wife. We also find in the letter Exhibit E(8) that the husband has not been performing his duties to the wife including sexual intercourse. We therefore find that the husband continued in his attitude of apathy and indifference to the wife and did not cohabit with her at all during this period.

32. The third phase is from August 20, 1947 to August 1948. The wife stated that after return to Calcutta from Jaipur the coldness persisted. Only for a short period they had the relationship and also had sexual intercourse for four or five times within one month during December, 1947/January, 1948, and there was no

attempt for sexual intercourse after that. As the husband was proceeding in Olympics in June/July, 1948, he desired that the wife should go in England and resume her studies as she should be sent away from Himangshu. It was obvious that Himangshu and not the wife was responsible for creating disturbances by telephone calls. In her letter to her father Exhibit E(2) dated October 3, 1947, the wife was telling him that the husband felt that the wife had been the cause of the detriment of his social status in Calcutta and he would be able to put up a bold face against the social and public scandal if she would make up her lack of beauty with her education, so that she could be presented in the society. In this, according to the wife, the husband was trying to get rid of the wife's company but there was no way out of her problem. Even during this period, in May 1948, when the father of the wife was on a holiday at the Lansdown Road residence, the husband continued beating and illtreatment of the wife in his presence, as testified by the wife and her father. She acknowledged that she went in United Kingdom on the initiative of the husband who introduced her to some persons in furtherance of her studies and bore part of the expenses. During her stay in England, she wrote several letters to the husband, the letters usual from a wife containing much warmth Exhibits E(3), E(4) and E(5), but none of these letters was replied in. It is obvious that the husband never desisted from illtreating the wife throughout the sojourn of the wife who had left for England in August, 1948.

33. The last phase of the marital life starts from the return of the wife in January 1952 from England, who stayed back in complete her course of study, and completed her Ph.D. and ends on May 16, 1955, the day of final rupture. After her return, she went straight to Jaipur but her father forced her to stay with the husband. Accordingly she stayed with the husband at the Lansdown Road residence and after August 1952, at the Lake Place Road residence of the husband. In July, 1952, the wife was appointed as lecturer in the Calcutta University but this was not liked by the husband. During this period according to her there was no relationship between the husband and the wife, each having his or her own way. There was no sexual relationship any more and the wife resigned in her frustrated marriage life. There was no physical torture, violence or mental shock in her. The wife began to feel that the husband had deserted her in his own house and under the same roof they became strangers. The wife could realize that the husband had developed a feeling of hatred and abhorrence for her and wanted her to desert

him and live elsewhere as he had deserted her in his own house. She was troubled by her feeling of loneliness and without having any companion and later on in April 1954 when her mother and sister came to reside in a rented room in the neighbourhood in Raja Basant Roy Road, she used to seek relief and solace from them. Thereafter a flat was taken at 51-M Keyatala Road, Calcutta in November 1954 and the wife left her husband's place at about this period for good. The father of the wife stated in evidence that from May 1952 to November 1954, she was both mentally and physically broken.

34. The husband in his evidence stated that the wife willingly left his protection in November 1954 and she was not compelled to leave. Further, he did not refuse his company to the wife whenever she asked for it. It was his further evidence that she fled to her mother when towards end of 1955, the husband discovered a bunch of highly indecent letters written to her by her boy friends like Poonka and Manon. His further evidence was that he lived happily with her from August 1947 to till 1954. During the period of her stay in Lake Road house from August 1952 to November 1954, the husband had sexual intercourse with the wife on one or two occasions, and the wife was frigid.

35. Upon a consideration of the evidence as also the statements made by the wife in her petition for divorce, which under Section 32(2) of the said Act, we refer as evidence, we hold that the husband during this period also persisted in his attitude of utter indifference, callousness and apathy towards the wife and lived with the wife as strangers under the same roof. We are also satisfied that there was no sexual relationship between the parties during the period, due to the husband's antipathy to it. We are also inclined to accept the statement of the wife made in her petition that the husband developed an attitude of hatred and abhorrence to her. It is obvious that in the context of her suffering and loneliness of a frustrated married life, the husband created a situation in his house that it was impossible for the wife to stay there longer. The husband, thus forcing the wife by his conduct to leave the matrimonial home, became himself really guilty of desertion, even though it is the wife who had in fact deserted the house. The action on the part of the husband, is based, as the entire course of matrimonial life bears out, on his intention to repudiate the obligation of the marriage and the requisites of desertion in law, factum of desertion and animus diserendi were present in the case. As the statutory period of three years had passed away since November 1954 prior to the presentation of the petition for divorce in Octo-

ber 1958, without any attempt on the part of the husband to determine the desertion at any time there is no legal bar or any other impediment or ground on the way of the wife having the relief she prays for.

36. Mr. Ghosh has contended with great emphasis that the real ground for leaving the matrimonial home was not the alleged acts of the husband, but it was the discovery of the bunch of indecent and despicable letters which came into the hands of the husband on opening an almirah exclusively used by the wife. Some of the letters which are Exhibits E(10), E(11), E(12), E(13), E(15), E(16), E(17), E(18), are undoubtedly highly indecent and improper and indicate an amorous feeling of their writers for the wife and Mr. Ghosh wanted us to find an explanation there for the conduct of the husband. These letters are, however, only one-way traffic and there is no letter from the wife to the writers to indicate her amorous feelings for them. The one that is there, dated September 6, 1954, Ext. E(10), written by her to Poonka, is simply a letter from a friend to a friend introduced to her by none else than her husband. To smell something erotic here or in the other letters, referred to above, on the part of the wife is impossible. And to infer adultery from this or even the Himangshu affair, put at its highest, upon the existing evidence is to subvert reason and common sense. Even a judicial personage must move with the times only to find that the latitude in the relations of sexes we see around us today is something which would have perhaps shocked our grandmothers, and possibly mother, to death. To judge therefore a matter as this of the mid-twentieth century in the light of the rigid conventions of the mid-Victorian era will be to misjudge the whole thing. Such a common-sense perspective apart, let it not be forgotten for a moment that a high standard of proof, not a mere balance of probability, is required to prove adultery, as held in *Bastable v. Bastable*, (1963) 1 WLR 1684, the decision of the House in *Blyth v. Blyth*, 1966 AC 643, notwithstanding, a decision which by three voices to two accepted the standard of balance of probability, but only about bars to relief: Condonation, connivance and the like, not about grounds for relief: adultery and the like, as we took pains to point out in *Sachindra Nath Chatterjee v. Smt. Nilima Chatterjee*, A.F.O.D. No. 399 of 1965, in which we rendered judgment on 16-5-1969 (since reported in AIR 1970 Cal 38). And the law laid down by the Supreme Court — a law which binds us more than the law laid down by the House of Lords or the English Court of Appeal — has uniformly been that every matrimonial 'offence' must be proved beyond reasonable doubt.

AIR 1957 SC 176, White v. White, AIR 1958 SC 441, Lachman v. Meena, AIR 1964 SC 40, Mahendra v. Sushila, AIR 1965 SC 364. These letters, by themselves, therefore, do not prove as indeed they cannot, that there was any illicit relationship between the writers of the letters and the wife nor that the feelings were ever reciprocated by the wife as was held with respect to such letters to the wife by the Supreme Court in Chandra Mohini v. Avinash Prasad, AIR 1967 SC 581. In any event, in the present proceedings, they appear us to be wholly irrelevant, as it is never and could not be the case of the husband nor his evidence that because of the lack of fidelity on the part of the wife even if indicated by the said letters, the husband kept himself away from the wife, became cruel to her and also deserted her repudiating the bonds of marriage.

37. As to the discovery of the said letters being the immediate cause of the desertion by the wife, there is a serious discrepancy about the dates, proclaiming the falsity of the cause asserted on behalf of the husband. It is said in paragraph 34 of the written statement, as also in the evidence of the husband that the letters were discovered towards the end of 1955. Even assuming that the letters were discovered in November 1954, as appears from paragraph 42 of the written statement, it is not the husband's evidence nor was it put to the wife that she left the husband's Lake Place house on the discovery of the said letters. We are, therefore, unable to accept the contention of Mr. Ghosh that she deserted the matrimonial home on account of the discovery of the letters, and hold that the wife left the husband's place on the grounds alleged by her which have been duly proved by legal testimony.

38. The last incident in the matrimonial life of the parties took place on May 16, 1955. The facts have been narrated by the wife in her petition and have been testified to by Dr. Hem Chandra Choudhury. He narrated that, on the morning of the fateful day, he went to the husband for making a final arrangement regarding the wife. On that, being highly enraged, and taking an umpire stick (a stick 3 feet long with a pointed spike at the bottom and a folded leather seat at the top), the husband dragged Dr. Choudhury to his Keyatala Lane house. The husband proceeded there even though he was told by Dr. Choudhury that the wife and her sister were to appear in B.T. examination on that day. At the sitting room, abutting the road, he demanded the presence of the wife and she and her sister came inside the room. Then the husband gave her two alternatives: one to sue for divorce and the other to

give up the job and to go with her father to Mandalay, as she would not be allowed to live in Calcutta. Both the proposals were unacceptable to the wife, as suing for divorce would mean a scandal and might be an impediment for her sister's marriage, who was still unmarried, and the other proposal was impracticable as that would leave her without means of livelihood. At this the husband flew into a rage and struck the wife with the stick. The father stood up in protest and as the husband tried to strike him with the stick, the father raised his hand and received a stroke and thereafter he and the sister caught hold of the stick and there was a tussle. Then the husband gave slaps to the father and sister and twisted her hand also. The mother of the wife came into the room and cried aloud and the people of the locality came and forced down the husband to the chair. Thereafter the father took the daughters to the Loretto house for examination and the husband was taken, as it appears, to the Tollygunj Police Station.

39. Shorn of details, the incident was as stated above and in material particulars has been corroborated by the wife. The husband's version was that there was some altercation in Keyatala house and he never struck the wife there and in his written statement, he admitted that the discussion was heated, that he asked the wife to leave her job and to live at Mandalay. On the refusal of the offer by the wife, he in protest raised his stick which unfortunately touched the father lightly. In his evidence, he stated that his offer was, either live with the husband as a Hindu wife or go to Mandalay. But he never asked her to divorce him.

40. On a consideration of the evidence we have no doubt in our mind that the version of the incident as given by the wife and her father is the correct and true picture of the events that took place there and we reject the version of the husband as untrue. We also reject the husband's case made out in his evidence and not in his written statement that he made an offer to the wife to return to him and live as a Hindu wife. It is obvious that even at this stage, the husband failed to make any genuine attempt to terminate the desertion caused by him as has been found by us. The acts on the part of the husband also constitute the acts of utter cruelty and callousness and we shall deal with the same hereafter.

41. From the entire course of the matrimonial life, it is clear that the husband, since the early days of married life and throughout, was cold and indifferent to the wife, and soon he started beating her, off and on, as corroborated by the father Dr. Chaudhury, we have definite evidence of such assaults on the wife, at

Jaipur in August 1947, May 1948 and lastly on May 16, 1955, and we reject the husband's evidence that he never assaulted her. It is further in the wife's evidence that sexual intercourse on four or five occasions the couple had in December 1947 or January 1948, apart from the fact that the marriage held in January 1945 was not consummated even till September 1945. The husband lends assurance to such evidence by saying towards the close of his testimony that he had sexual intercourse on one or two occasions during the period 1952-54, when they were living in their Lake Place residence. The wife's evidence also is that, during the whole period of their matrimonial life, she had always the desire for sexual intercourse and on many occasions even asked for the husband's company. The husband however, without reasonable cause, refused to have sexual intercourse and deprived her of the same. The wife, who says too that she had no sexual relationship with her husband between December 1945 and March 1947, suggested sexual debility as the reason, but the husband denied that he ever suffered from sexual debility. He charged her instead with frigidity. The husband's statement that he had normal sexual life with his wife is unworthy of credence and we reject the same as untrue. The wife's testimony on this aspect, as also the conduct of the husband to her, are amply corroborated by her father, to whom she confided, off and on, and, at about the time, her relations with her husband.

41-A. Cruelty, as a matrimonial offence, is to be determined by taking into account the particular individuals concerned and the particular circumstances of the case, rather than by any objective standard, as was reiterated in *Gollins v. Gollins*, (1963) 2 All ER 966. It was further laid down that the cumulative conduct must be sufficiently weighty to say that from a reasonable person's point of view, after a consideration of any excuse which the respondent may have in the circumstances, that the conduct is such that the petitioner ought not to be called on to endure it and an intention by the respondent to injure the other spouse is not necessary. In the instant case, the cumulative conduct of the husband to the wife, his coldness, apathy and indifference to her, his assaults on her off and on and at his pleasure, his refusal to have sexual intercourse with her—all throughout the period of the matrimonial life, and without any justifiable and reasonable cause and excuse, caused serious and deep impact and injury in her health and mind, leading her to desperation and almost on the verge of mental breakdown. In such gloomy and despondent life to which she was forced to live, she realized that her life was frustrated and she was

destined to such misery and suffering. We have it from Dr. Choudhury that the wife was mentally and physically broken down during May 1952 to November 1954. Any further continuance of this miserable existence could reasonably be apprehended to cause further and serious injury in her health and mind. In this state of affairs, when there is no cause or excuse on the part of the husband for such reprehensible conduct, it is impossible from the reasonable man's point of view to call upon the wife to endure such treatment any longer. In agreement with the learned Judge, we hold that the wife has established that the husband has been guilty of cruelty to her and she is entitled in law to a decree of divorce.

42. Before passing, a word may be said about the refusal of the husband to have sexual intercourse with the wife. In *Sheldon v. Sheldon*, 1966 Probate 62, the wife was held entitled to the decree for divorce when the husband while sleeping with the wife had persistently, without the least excuse, refused her sexual intercourse for six years and her health being broken, she could not be asked to endure it any longer. In this case also, the wife was persistently refused sexual intercourse without any reasonable excuse, ever since the solemnisation of marriage and practically throughout the period of marital life, causing depression and frustration in her mind and there was or could be no reason for calling her to endure it further. Even on this solitary ground of refusal to have sexual intercourse without reasonable excuse, the wife, in the circumstance of the case, is entitled, in our opinion, to a decree for divorce.

43. The last act of cruelty of the husband in the incident of May 16, 1955, is also grave and serious enough to cause a grave apprehension in the mind of every reasonable person that it will even be risky to take any further chance of reconciliation between the husband and the wife. The cruelty exhibited by the husband on that day, the assaults committed by him on the wife, her father and sister and the threatening and peremptory demands on the wife in the garb of his terms for reconciliation, all indicate the high temper of the husband and his fury on the wife. It is therefore obvious that it will be futile in the circumstances to maintain the bond of marriage and ask the wife to endure the married life when she also indicated her firm intention not to return to the husband's house and be subject to mental and physical torture in his hand.

44. In the view we have taken, in agreement with the learned Judge, we hold that the wife is entitled to a decree for divorce on the ground of cruelty and

desertion. The appeal accordingly fails and is dismissed, each party, in the circumstance bearing its own costs, in this appeal.

45. BIJAYESH MUKHERJI, J.: I agree.

Appeal dismissed.

AIR 1970 CALCUTTA 282 (V 57 C 55)

P. BANERJEE, J.

Subhas Chandra Paul, Petitioner v. University of Calcutta and others, Respondents.

Matter No. 160 of 1969, D/- 17-9-1969.

(A) Education — Calcutta University First Ordinance (1966), R. 62 (3) — Rules of natural justice require that student charged against must be given opportunity to cross-examine witnesses who had given evidence against him behind his back — Student not given such opportunity — Student cannot be said to have had opportunity to defend himself — Hence principle of natural justice is violated in such a case, AIR 1966 SC 875 & AIR 1963 SC 375, Foll.; AIR 1967 SC 122, Dist.; AIR 1958 SC 394, Ref. — (Constitution of India, Art. 226 — Certiorari — Natural Justice). (Para 5)

(B) Education — Calcutta University First Ordinance (1966), R. 62 (3) — Charge-sheet given to delinquent student not stating from which book he had copied in the examination — Charge-sheet cannot be said to be vague for that reason. AIR 1966 SC 875, Foll. (Para 5)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 122 (V 54) =
1966 Supp SCR 401, State of
Jammu and Kashmir v. Bakshi
Gulam Mohammad 6

(1966) AIR 1966 SC 875 (V 53) =
(1963) 3 SCR 767, Board of High
School and Intermediate Educa-
tion U. P. Allahabad v. Baglesh-
war Prasad 5, 6

(1963) AIR 1963 SC 375 (V 50) =
(1953) 2 SCR 943, State of Mysore
v. Sivabasappa 5

(1958) AIR 1958 SC 394 (V 45) =
1958 SCR 1287, Salla Bala Dassi
v. Nirmala Sundari Dassi 6

P. K. Mukherjee, for Petitioner; Ranajit K. Banerjee, for Respondents.

ORDER: This Rule is directed against an order of cancellation of the examination of the petitioner for the year 1963 and debarring the petitioner from appearing in the examination of Pt. I and Pt. II of B. A. for the year 1969-70. The petitioner was a student of Surendra Nath College affiliated to the University of Calcutta. The petitioner sat for the examination of B. A. Pt. I in the year 1968 of the Calcutta University and his ex-

amination Centre was at Taltala High School. When the result of the examination came out, it appeared that against his name there was a remark "reported against". By a letter dated 19th November, 1968 issued by the Secretary Board of Discipline, the petitioner was charged with breach of discipline at the B. A. Part I Examination, 1968 alleging that in contravention of the rules of examination, the petitioner was found copying from books and notes while appearing in Bengali, Paper II Examination. The petitioner was directed to appear before the Sub-Committee on 25th November, 1968 at 1 P. M. The show cause notice which was served on the petitioner as annexure "A" to the petition is in the following terms:—

SENATE BOUSE
CALCUTTA

The 19-11-1968

CALCUTTA UNIVERSITY

From:—

Sri A. C. Banerji, M. A.,
Secretary, Board of Discipline,
Calcutta University.

To:—

Sri Subhas Chandra Pal,
Roll. Call No. 3594.
B. A. Part I, Examination, 1968

He/She is hereby informed that a meeting of the Sub-Committee of the Board of Discipline, constituted to investigate the cases of breach of discipline at the B. A. & B. Sc. Part I, Examination, 1968 will be held in the meeting room of the Secretary, Board of Discipline, Centenary Building, 3rd Floor Calcutta University, on the 25th November, 1968, at 1 P. M. to investigate his/her case regarding a report against him/her that he/she committed breach of discipline at the B. A. Part I, Examination, 1968.

He/She is hereby directed to appear before the said Sub-Committee on the date and at the hour and place mentioned above and furnish an explanation of his/her conduct.

A charge-sheet is annexed herewith.

If he/she does not appear before the Sub-Committee as directed, it will be presumed that he/she has nothing to say in his/her defence and his/her case will be decided ex parte without any further reference to him/her.

Sd/- A. C. Banerji.

(A. C. Banerji)

Secretary,

Board of Discipline.

Encl: One copy of Charge-sheet.

Name: Subhas Chandra Pal.

Roll. Call No. 3594.

You are hereby charged with having committed breach of discipline at the B. A. Part I, Examination, 1968.

PARTICULARS

1. That in contravention of the rules of the Examination you were found copying from some book and notes while appearing in Bengali Paper II.

Sd/- A. C. Banerji,
Secretary,
Board of Discipline.

Dated, Calcutta the 19th
November, 1968.

The petitioner appeared before the Sub-Committee and denied the charges levelled against him whereupon the members of the Board of Sub-Committee put question to the petitioner to which the petitioner replied. It is alleged by the petitioner that the relevant answer paper was not shown to the petitioner nor the books and notes from which the petitioner is alleged to have copied were produced and/or no one came forward to prove the charges. It is alleged after the hearing on 25th November, 1968 by Sub-Committee, no order was communicated to the petitioner but from circular dated 10th December, 1968 issued to the Principals of all the Colleges, it appeared that the petitioner was debarred from appearing in B. A. Part I, Examination to be held in 1969 and 1970. It may be stated here that the examination for the year 1969 has already been held and the petitioner has already lost his chance of appearing in that examination. It is further stated by the petitioner as it appears from the petition that the enquiry continued on other dates also and after the examination of the petitioner, the Head Master of Taltala High School on whose complaint the charge-sheet was drawn up was heard on these allegations. The petitioner challenged the order and obtained the present Rule. The University of Calcutta appeared in the matter and filed an affidavit supporting their case. It is stated in Paragraphs 15 and 16 that the petitioner and 47 other candidates took recourse to unfair means on 28th May, 1968 when the examination of Bengali Paper II was going on at the Taltala High School Centre. It is stated that the answer scripts of the petitioner along with those of 47 other examinees were received from the Officer-in-charge of Taltala High School Centre with the remark "reported against." It is stated that the Head Master of the School made a report about it on 28th May, 1968 and sent the report along with the answer scripts but the relevant letter having been misplaced the University asked the Head Master for the copy of the same and a copy of the letter dated 28th May, 1968 was sent to the respondents. On the basis of the said letter the proceeding was drawn up. It is stated that the petitioner was examined by the Sub-Committee on 25th November, 1968 and the petitioner was interrogated upon by the members of the Sub-

Committee. The report of the Officer-in-Charge was shown to the petitioner but no explanation was forthcoming from the petitioner. Thereafter it is stated that on full consideration of the facts the Sub-Committee of the Board of Discipline submitted a report on 29th November, 1968 against the petitioner on the cases of breach of discipline. The said report was confirmed by the Board of Discipline which was ultimately confirmed by the Syndicate of the University of Calcutta and the petitioner was debarred from appearing in the examination B. A. Part I & II for the year 1969 and 1970.

2. On behalf of the Sub-Committee a joint affidavit by Sm. Mira Dutta Gupta, Sri Kiron Chandra Choudhury and Sri Paresh Chandra Bhattacharyya was filed. In paragraph 6, it is stated that on 25th November, 1968 the petitioner appeared before the Sub-Committee and the petitioner was interrogated by them. It is further stated that petitioner was shown the report of the Presiding Officer of Taltala High School and it explained the contents of the charge. The petitioner denied the said charges and further stated that there was no disturbance in the examination Hall. In paragraph 7 of the said affidavit it is stated as follows:—

"That on 27th November, 1968, we called for the Head Master, Taltala High School, who was the Presiding Officer of the said Examination Centre. One M. R. Dey, who was an assistant teacher of the Taltala High School and acting as a Supervisor during examination at the Taltala High School Centre met us with a forwarding letter dated 27th November 1968 from the Head Master, while we were holding a meeting of the Sub-Committee as will appear from a copy of the said letter hereto annexed and marked "A". The said M. R. Dey explained to us the circumstances in which the petitioner and 47 other candidates took recourse to unfair means in the said examination Centre and copied from the notes and books."

On the basis of the said affidavit it is stated by the University that the order is valid and there was no denial of the principles of natural justice.

3. Mr. P. K. Mukherjee appearing for the petitioner contended that the proceeding is, on the face of it, without jurisdiction as the charges are vague and cannot be sustained and as such the petitioner could not make any proper representation to the said charge. Secondly the report on which the charge was based was never shown to the petitioner and thirdly witnesses were examined and the report of persons was considered without giving the opportunity to the petitioner to test the evidence taken behind back of the petitioner by cross-examining them.

4. Mr. Ranjit K. Banerjee for the respondent, however, contended that the University has given all opportunities to the petitioner as is envisaged under R. 62 and sub-rule (3) of the first Ordinance of the University of Calcutta and as such there was no violation of the principle of natural justice as stated.

5. The Rule 62 (3) of Calcutta University First Ordinance and sub-rules (4), (5) and (6) run as follows:—

(3) "On receipt of reports of cause of breaches of discipline the Secretary of the Board shall inform the student concerned of the charges against him and ask him to appear before the Board or the Sub-Committee appointed for the purpose as mentioned in Cl. 5 below, and furnish an explanation verbally or in writing, with regard to the charge made against him. The student shall also be informed that in case he fails to appear before the Board or the Sub-Committee mentioned above, and explain his conduct on the date fixed for the purpose, his case may be decided *ex parte* without further reference to him.

(4) If the board or the Sub-Committee holds that the charges referred to in Clause (3) have been proved it may recommend cancellation of the examination of the candidate concerned, or his debarment from appearing at a University Examination for such period as it may deem fit, or both.

(5) Decisions of the Sub-Committee appointed by the Board for the purpose shall be subject to confirmation by the Board of Discipline, and the proceedings of the Board shall be placed before the Syndicate for confirmation;

Provided that the Board may appoint one or more sub-committees, each committee shall consist of not more than five members of whom not more than three members shall be nominated by the Vice-Chancellor who may not be members of the Board of Discipline. The sub-committees will consider any matter particularly involving breaches of discipline referred to in Cls. (2) and (3).

(6) Decisions of the Board of Discipline shall be subject to confirmation by the Syndicate."

The rule envisages that on receipt of the reports the Secretary to the Board shall inform the student concerned about the charges levelled against him and ask him to appear before the Board or Sub-Committee for the purpose. The student being so charged has a right to furnish the explanation verbally or in writing. In case of non-appearance, his case may be decided *ex parte*. After bearing the student the sub-committee may recommend cancellation of the examination or his debarment from appearing in the University examination for such period as

it may deem fit, or both. The decision of the sub-committee is subject to confirmation by the Board of Discipline and thereafter by the Syndicate. It is for the consideration of the Court what is the nature of the enquiry envisaged in R. 62 (3) of the Calcutta University First Ordinance 1966. It is not disputed before me that in coming to the finding of the guilty of the petitioner, it is incumbent on the part of the sub-committee to follow the principles of natural justice and Mr. Banerjee on behalf of the University contended that they have followed the said principle inasmuch as they have given the charge-sheet to the petitioners and heard them in defence. That is what is exactly needed, in the submission of Mr. Banerjee, under the statutory provision made under Rule 62 (3) of the said rules. In support of his contention Mr. Banerjee relied on the case reported in AIR 1966 SC 875 at p. 878. The Supreme Court held as follows:—

"In dealing with petitions of this type, it is necessary to bear in mind that educational institutions like the Universities or appellant No. 1 set up Enquiry Committees to deal with the problem posed by the adoption of unfair means by candidates, and normally it is within the jurisdiction of such domestic Tribunals to decide all relevant questions in the light of the evidence adduced before them. In the matter of the adoption of unfair means, direct evidence may sometimes be available, but cases may arise where direct evidence is not available and the question will have to be considered in the light of probabilities and circumstantial evidence. This problem which educational institutions have to face from time to time is a serious problem and unless there is justification to do so, Courts should be slow to interfere with the decisions of domestic Tribunals appointed by educational bodies like the Universities. In dealing with the validity of the impugned orders passed by University under Article 226, the High Court is not sitting in appeal over the decision in question, its jurisdiction is limited and though it is true that if the impugned order is not supported by any evidence at all, the High Court would be justified to quash that order. But the conclusion that the impugned order is not supported by any evidence must be reached after considering the question as to whether probabilities and circumstantial evidence do not justify the said conclusion. Enquiry held by domestic Tribunals in such cases must, no doubt, be fair and students against whom charges are framed must be given adequate opportunities to defend themselves, and in holding such enquiries, the Tribunals must scrupulously follow rules of natural justice; but it would, we think, not be reasonable to import into these enquiries all

considerations which govern criminal trials in ordinary Courts of law."

Therefore, the Supreme Court has held that in the enquiry held by the domestic Tribunals the students against whom the charges are framed must be given an adequate opportunity to defend themselves and in holding such enquiries the Tribunals must scrupulously follow the principle of natural justice. We are now to see whether that has been followed in the present case. In my opinion, on consideration of the records of the case, and the affidavits filed, it is quite clear to me that there was clear violation of the principles of natural justice. It appears that the report of the Enquiry Officer was considered by the sub-committee. The Examination of the Head Master and one Mr. M. N. Roy was heard behind the back of the petitioners and the petitioners were not given any opportunity of testing their evidence by cross-examination of those witnesses. It is stated in the joint affidavit filed by Mrs. Mira Dutta Gupta, Sri Kiron Chandra Choudhury and Paresh Chandra Bhattacharyya that the Head Master and one M. R. Dey were examined on 27th November, 1968 and it is nowhere stated that these gentlemen were produced for cross-examination by the petitioners. It appears to me that it cannot be said in the circumstances of the case that the petitioner had opportunity to defend himself. It is now well settled that the rules of natural justice require that if any evidence or statement is considered against the petitioner, the petitioner must be given the opportunity of cross-examining the person who made the statement against the petitioner behind his back. This principle has been held by the Supreme Court in AIR 1963 SC 375 at p. 378 as follows:—

"The person against whom a charge is made should know the evidence which is given against him, so that he might be in a position to give his explanation. When the evidence is oral, normally the examination of the witness will in its entirety take place before the party charged, who will have full opportunity of cross-examining him. The position is the same when a witness is called, the statement given previously by him behind the back of the party is put to him, and admitted in evidence a copy thereof is given to the party, and he is given an opportunity to cross-examine him....In our opinion they are sufficiently complied with when previous statements given by witnesses are read over to them, marked on their admission, copies thereof given to the person charged, and he is given an opportunity to cross-examine them."

If that is the position in law, it cannot be doubted in the facts of the present case, that the principle of natural justice has not been followed. In so far as the charge-

sheet is concerned, I am however, of the opinion that there is nothing wrong in the charge-sheet and the charge-sheet cannot be said to be vague because it is not stated from which book the petitioner copied. In the Supreme Court decision reported in AIR 1966 SC 875, it is stated in page 878, as quoted above that in cases of adoption of unfair means by the candidates, the question will have to be considered in the light of probabilities and circumstantial evidence. In that view of the matter it cannot be said that the charge-sheet is vague as alleged.

6. Mr. Banerjee on behalf of the respondent relied on the decisions, AIR 1967 SC 122 and AIR 1958 SC 394. It is argued by Mr. Banerjee that they have followed the statute itself and therefore, there cannot be any violation of the principles of natural justice. In my opinion the first case arose out of Commission of Enquiries Act of 1952 and the second in the Assam Excise Act and not a matter concerning the University students. The case reported in AIR 1966 SC 875 is a case regarding a student who had taken an unfair means in the examination hall and applies on all force in this case. In my opinion it must be held that in the matter like this the principle of natural justice should be scrupulously followed.

7. In that view of the matter this rule must be made absolute and the order of debarring the petitioner from appearing in the B. A. Part I examination for the years 1969 and 1970 must be quashed. I have no doubt in my mind that the allegations made against the petitioner are quite serious and has, in fact, of late grown as a serious problem in the field of education and must be stamped out. But in the facts of this case the impugned order cannot be sustained and it must be set aside. Liberty is given to the respondents to proceed again in accordance with law, on the basis of the charge-sheet issued against the petitioner if they are so minded. It is for the Respondents to consider whether they will proceed again, in view of the fact that the petitioner has already lost one year.

8. The Rule is therefore, made absolute. A writ in the nature of certiorari and mandamus be issued accordingly. There will be no order as to costs.

Petition allowed.

AIR 1970 CALCUTTA 285 (V 57 C 56)
S. K. DATTA, J.

Aswini Kumar Dey and another, Appellants v. Sm. Angur Bala Kundu and others, Respondents.

A. F. A. D. No. 1910 of 1961, D/- 7-3-1969.

DM/GM/B876/69/SSG/P

Civil P. C. (1908), Pre. and S. 9 — Interpretation of Statutes — Retrospectivity of statute — Principles — W. B. Estates Acquisition Act (1 of 1954), S. 6 (1) (b) (as amended by S. 4 (1) (a) of W. B. Amendment Act, 9 of 1961) — Amendment to S. 6 (1) (b) is retrospective — Plaintiff having no right to retain suit land — Suit held not maintainable — (W. B. Estates Acquisition Act (1 of 1954), S. 6 (1) (b) (as amended by W. B. Act 9 of 1961)).

The legislature is undoubtedly competent to take away vested rights by means of retrospective legislation. Unless a clear and unambiguous intention, however, is indicated by the legislature by suitable express words in that behalf, no provision of a statute should be given retrospective operation if by such operation vested rights are likely to be affected. Further, retrospective operation of a statutory provision can be inferred even in cases where such retrospective operation appears to be clearly implicit in the provision construed in the context it occurs. AIR 1964 SC 1511, Rel. on. (Para 23)

It is not necessary for the retrospective operation of the provisions of the Act that it must be stated that its provisions would be deemed to have always existed. That is one mode and may be an effective mode of providing that the provisions would have retrospective effect. Retrospective effect of an enactment can also be gathered from its language and the object and intent of the legislature in enacting it. AIR 1966 SC 1953, Rel. on. (Para 24)

The W. B. Amendment Act 9 of 1961 in its Section 4 (1) (a) provides that provisions therein "shall be, and shall be deemed always to have been substituted" in Section 6 (1) of the West Bengal Act 1 of 1954. This is a clear expression without any ambiguity of the retrospective character of the amending statute by incorporation of the words "owned by the intermediary or by any person not being a tenant, holding under him by leave or license" in substitution of the words "whether erected by the intermediary or not" in the said section. Such substitution is to be deemed to exist in the Act always, thus, on the date the relevant provisions came into force, that is, on April 10, 1956. (Para 25)

Where during pendency of appeal arising from suit by a raiyat filed in 1959 for khas possession of certain raiyati land with katcha structures thereon against persons in possession under Kabuliyat from that raiyat, the W. B. Amendment Act 9 of 1961 amending Section 6 (1), W. B. Estates Acquisition Act (1 of 1954) came into force on 24-4-1961 and the plaintiffs had no right to retain the suit land as it rested in State, the suit filed by them was not maintainable. (Paras 25, 28)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 1953 (V 53) =
(1965) 3 SCR 708, Sree Bank Ltd.
v. Sarkar Dutt Roy & Co. 24
(1964) AIR 1964 SC 1511 (V 51) =
(1964) 6 SCR 878, Mt. Rafiqueunessa
v. Lal Bahadur 23, 27
(1962) AIR 1962 SC 1230 (V 49) =
1962 Supp (1) SCR 123, Haji Sk.
Subhan v. Madharao 22
(1959) 63 Cal WN 939, Kinuram
Sadhukhan v. Hazi Md. Yusuf 8
(1953) AIR 1953 Cal 566 (V 40) =
89 Cal LJ 122, Puran Chand v.
v. Md. Latif 20
(1951) AIR 1951 Cal 236 (V 38) =
54 Cal WN 572, Manicklal Dutt
v. S. Dabiruddin Ahmed 19
(1941) AIR 1941 FC 16 (V 28) =
1940 FCR 110, United Provinces
v. Atiqua Begum 18, 23
(1936) AIR 1936 Cal 334 (V 23) =
39 Cal WN 1213, Brojendra v.
Sushil 17
(1936) AIR 1936 Cal 593 (V 23) =
64 Cal LJ 212, Kumar Punyendra
Narain v. Kumar Jogendra 17
(1936) 64 Cal LJ 58, Jajuddin Sheikh
v. Umedali Meah 9
(1931) AIR 1931 Cal 25 (V 18) =
ILR 57 Cal 796, Jnanendra v.
Sarada 17
(1915) AIR 1915 Cal 242 (V 2) =
ILR 42 Cal 172 (FB), Dayamoyi
v. Ananda Mohan 9
(1904) 8 Cal WN 454, Babu Ram
Roy v. Mahendra Nath 8

S. C. Mitter, for Appellants; Monomohan Mukherjee and Mohini Mohan Mukherjee, for Respondents

JUDGMENT:— This is an appeal by the plaintiffs against the appellate judgment and decree of affirmance dismissing their suit for khas possession and injunction.

2. The material facts alleged by the plaintiffs are as follows:

(a) The suit land with an area of .06 decimal is comprised in Dag No. 2062 of Khatian No. 1114 under Khatian No. 1113 in Mouja Santragachi, Police Station-Jogacha, in the district of Howrah.

(b) One Subodh Chandra Kundu had an occupancy raiyati jama of Rs. 15 appertaining to the said Khatian No. 1113, Mouja Santragachi under Bemangini Dasi. One Harimati Dasi took a bemiadi settlement from Subodh Chandra Kundu by a bemiadi kabuliyat dated January 5, 1937 (Exhibit 3) of 2 cottahs of Bastui land at a jama of Rs. 4 only and had been in possession by constructing kutchha structures thereon.

(c) Due to the illness since 1937, Subodh could not attend the district settlement operations and in his absence Barimati and her son Habul Chandra Malik (Defendant No. 2) caused incorrect recordings to be made in the record-of-rights in respect

of her said jama, which was recorded in Khatian No. 1114 Dag No. 2062 as korfa under Section 48-C (c) and (d) of the Bengal Tenancy Act, 1885 with non-ejectable right. The record-of-right of Khatian No. 1114 is Exhibit 2 and the area was incorrectly recorded as .06 decimals in place of 2 cottahs.

(d) After Harimati's death, the defendant No. 2 as her son and heir inherited the jama under the said kabuliyat, but though he had no transferable interest, he sold his interest in the said land to defendant No. 1. Such illegal sale without arrangement for payment of rent tantamounted to abandonment and relinquishment of the holding.

(e) The plaintiffs are the executors to the will of late Subodh Chandra Kundu who died prior to 1938 and they along with pro forma defendants Nos. 3 and 4 are the legatees under the will.

(f) The plaintiffs on the above allegations instituted Title Suit No. 281 of 1959 in the First Court of the Munsif at Howrah, claiming khas possession of the .06 decimals land comprised in Dag No. 2062 Khatian No. 1114, on declaration of abandonment and relinquishment of the tenancy of Harimati and on eviction of the defendants Nos. 1 and 2 therefrom, and on further declaration that title of the plaintiffs had not been affected by the West Bengal Estates Acquisition Act, 1954 Temporary injunction restraining the said defendants from building any pucca structure on the suit land and mandatory injunction directing removal of all the structures therefrom were also prayed for.

3. The suit was contested by the defendant No. 1 who denied the material allegations in the plaint. She contended that Harimati was a non-ejectable tenant, that the lands of .06 decimals would be near about 2 cottahs in local measurement, and also that the record-of-right in respect of Khatian No. 1114 was correct. It was further contended that the plaintiffs' title had vested in the State under the Estates Acquisition Act, 1953, and the suit was not maintainable by the plaintiffs. More, the defendant No. 2 has transferable interest which was duly acquired by the defendant No. 1 by a registered conveyance dated June 15, 1959 and she was not liable to eviction.

4. At the hearing of the suit, the parties adduced evidence, oral and documentary. Apart from the exhibits referred to above, the plaintiffs filed a certified copy of Form 'B' (Exhibit 1) showing the area to be retained by them, and the suit land was included in the said return, which, it appears, was filed on August 31, 1959, while the suit was filed on August 8, 1959. The Dakhilas, one for 1360 B. S. issued by Hemangini, Exhibit 5 (a), and the other issued by the State of West

Bengal for Khatian No. 1113 for year 1366 B. S., Exhibit 5, as also the probate to the will of Subodh Chandra Kundu (Exhibit 4) were exhibited on behalf of the plaintiffs. On behalf of the defendant No. 1, the following documents were exhibited—his kabala from the defendant No. 2 dated June 15, 1959 (Exht. B), Rent Receipts issued by the State of West Bengal for Khatian No. 1114 for years 1363, 1364, 1365 and 1366 B. S. Exhibits A, A (1), A (2) and A (3) respectively.

5. The learned Munsif by his judgment dated August 29, 1960, dismissed the suit on contest with costs against the defendant No. 1 and without costs against the defendant No. 2.

6. Against the said judgment and decree the plaintiffs preferred an appeal being Title Appeal No. 390 of 1960. The appeal was heard by the learned Subordinate Judge, Third Court, Howrah, who by his judgment and decree dated March 24, 1961, dismissed the appeal with costs.

7. The plaintiffs have preferred this second appeal against the said decision.

8. At the hearing, Mr. Manomohan Mukherjee appearing for the respondent conceded that the suit land is governed by the provisions of the Bengal Tenancy Act, 1885, as contended by Mr. Syama Charan Mitter, the learned Advocate for the appellants, relying on the decision in Babu Ram Roy v. Mahendra Nath, (1904) 8 Cal WN 454, and followed in Kinuram Sadhukhan v. Hazi Md. Yusuf, (1959) 63 Cal WN 939, the head lessee being an occupancy raiyat.

9. Mr. Mitter, at the time of hearing again, did not raise any dispute as to the area of the tenancy, which he conceded, comprised of .06 decimals of land. His contention, however, is that under the provisions of the Bengal Tenancy Act, 1885, the holding of the under-raiyat is heritable but is not transferable except with the consent of the landlord. The holding of Harimati on her death devolved on her heir the defendant No. 2 who became the under-raiyat with the same incidents of the tenancy. His sale of the holding to the defendant No. 1 without the consent of his landlords, was in contravention of the provisions of Sec. 48-F of the Bengal Tenancy Act, 1885. Accordingly the defendant No. 1 did not acquire any title to the suit land, while by the sale by the under raiyat defendant No. 2, without making any provisions for payment of rent, he must be deemed to have voluntarily abandoned the holding, as provided in Sec. 87 of the Bengal Tenancy Act, 1885, and the landlords are accordingly entitled to khas possession of the suit lands. In support Mr. Mitter relied on the principles in decisions in Dayamoyi v. Ananda Mohan, ILR 42 Cal

172—(AIR 1915 Cal 242) (FB), and Iajuddin Sheikh v. Umedali Meah, (1936) 64 Cal LJ 58. In view of the said decisions, Mr. Mitter contended that his clients are entitled to possession of the suit land on eviction of the defendants therefrom.

10. This brings us to the crux of the question at issue between the parties. Mr. Mukherjee has, with great emphasis, contended that the plaintiff's interest in the suit land as a riyat vested in the State of West Bengal with effect from April 10, 1956, when provisions of Chapter VI came in force on the basis of Department of Land and Land Revenue Notification No. 6804 L. Ref. dated April 9, 1956. The plaintiffs having ceased to have any further interest in the suit land with effect from that date, in absence of any right on their part to retain such land in terms of the provisions of Section 6(1) (b) as amended by West Bengal Act IX of 1961, it was contended that the plaintiffs had, at the material time, no right to institute the suit, which accordingly must be held as not maintainable.

11. Mr. Mitter has contended that by the West Bengal Estates Acquisition (Amendment) Act, 1961, (West Bengal Act IX of 1961) (hereinafter referred to as Act IX of 1961), the vested right which is sought to be enforced in a pending litigation, in absence of express provision or clear intentment, can never be deemed to have been taken away. Accordingly his clients' vested rights in respect of the suit land which were retained by them (vide Ext. 1), were unaffected by the Act IX of 1961.

12. It is necessary, for a proper appreciation of the position, to look into relevant provisions of the Act. Sec. 6(1) of the West Bengal Estates Acquisition Act, 1953 provides as follows:

x x x x x

"Section 6. Right of intermediary to retain certain lands.—

(1) Notwithstanding anything contained in Secs. 4 and 5, an intermediary shall, except in the cases mentioned in the proviso to sub-sec. (2) but subject to the other provisions of that sub-section, be entitled to retain with effect from the date of vesting—

(a)
(b) lands comprised in or appertaining to buildings and structures whether erected by the intermediary or not."

13. By Act IX of 1961, which came in force on 24th April, 1961, it was provided in Sec. 4 as follows:—

"Sec. 4. In Section 6 of the said Act, (i.e. West Bengal Estates Acquisition Act, 1953.)

(1) in sub-section (1)
(2) in clause (b), for the words "whether erected by the intermediary or not", the words "owned by the intermediary

or by any person, not being a tenant holding under him by leave or license" shall be, and shall be deemed always to have been, substituted."

14. It has not been disputed that if the above provisions of the Act IX of 1961 applied with retrospective effect thus taking away the vested right of the plaintiffs to retain the suit land under the amended provisions of Sec. 6(1) (b) of the West Bengal Estates Acquisition Act, 1953, (West Bengal Act 1 of 1954), (hereinafter referred to as Act I of 1954), the plaintiffs' would not have any right to khas possession of the suit land, and the suit must accordingly be held as not maintainable. The contention of the defendant No. 1 has been that the plaintiffs having no right to retain the suit land wherein admittedly there are structures on the basis of the lease, the landlords' interest without right of retention of the suit land vested in the State on April 10, 1956 and as a consequence she became a riyat under the State of West Bengal at the same jama and has been paying rent as such riyat to the State (vide Exhibits A to A(3)).

15. The relevant dates are as follows:
June 15, 1959 — Kobala by Defendant No. 2 to Defendant No. 1.

August 8, 1959 — Suit instituted.

August 31, 1959 — 'B' form filed.

August 29, 1960 — Decision of the Trial Court.

March 24, 1961 — Decision of the lower appellate Court.

April 24, 1961 — Act IX of 1961 promulgated.

July 14, 1961 — Second Appeal filed.

16. Elaborating his arguments Mr. Mitter contended that at the time the suit was instituted, the plaintiffs had the right to retain the suit land and the same was, in effect, legally retained by the plaintiffs by filing the 'B' form shortly after institution of the suit. By amendment of a statute which came in force much later, *even after the judgment of the lower appellate Court*, his clients' right in a pending action could not be affected. Mr. Mitter in support relied on Maxwell on the Interpretation of Statutes (11th Edition) at page 212 where it is stated in respect of pending actions as follows:

"In general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights".

At page 213 *ibid*, the eminent author adds that whenever the intention is clear that the Act should have a retrospective operation, it must unquestionably be so construed, even though the consequences may appear unjust and hard.

17. Mr. Mitter referred to the decision in *Kumar Punyendra Narain v. Kumar Jogendra Narain*, 64 Cal LJ 212 = (AIR 1936 Cal 593) where it was held that retrospectivity is never presumed and a law is regarded as retrospective only where it is so by express enactment or it is a necessary implication from the language employed by the Legislature, the presumption always being against taking of vested rights. It was further held that where the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun unless the new Act shows a clear intention to vary such rights, vide *Jnanendra v. Sarada*, AIR 1931 Cal 25, *Brojendra v. Sushil*, 39 Cal WN 1213 = (AIR 1936 Cal 334).

18. Mr. Mitter also strongly relied on the following observations of Sulaiman J. in the decision in *United Provinces v. Atiqua Begum*, AIR 1941 FC 16 (37):

"Undoubtedly, an Act may in its operation be retrospective, and yet the extent of its retrospective character need not extend so far as to affect pending suits. Courts have undoubtedly leaned very strongly against applying a new Act to a pending action, when the language of the statute does not compel them to do so. It is a well recognized rule that statutes should, as far as possible, be so interpreted, as not to affect vested rights adversely, particularly when they are being litigated. When a statute deprives a person of his right to sue or affects the power or jurisdiction of a Court in enforcing the law as it stands, its retrospective character must be clearly expressed. Ambiguities in it should not be removed by Courts; nor gaps filled up in order to widen its applicability. It is a well established principle that such statutes must be construed strictly, and not given a liberal interpretation."

19. Mr. Mitter further relied on *Manicklal Dutt v. S. Dabiruddin Ahmed*, AIR 1951 Cal 236, where P. B. Mukharji, J. held that whenever a statute affects pending proceedings, a strict construction is to be adopted bearing in mind the principle of presumption that a pending proceeding is not ordinarily to be affected, as a pending action relates to vested rights which will not ordinarily be allowed to be affected except by clear words or by the most necessary implication. When, again, it is affected by a statute, the statute must be confined to the limits that it has itself laid down and the pending proceeding will only be affected to the precise extent and precise limits prescribed by the statute and no more.

20. In the case of *Puran Chand v. Md. Latif*, AIR 1953 Cal 566, Bose J. (as his Lordship then was) restated the well-

settled principle of construction of statutes that very clear language should be used to make the retrospective effect applicable to proceedings commenced before the passing of a statute. Further, if the legislation purports to affect rights of action, then it would only apply to actions commenced before the passing of the Act, if any intention to that effect can be gathered from the language of the Act itself.

21. Relying on the aforesaid decisions, Mr. Mitter contended that the pending proceedings in absence of express provisions were not affected by Act IX of 1961 and his clients are entitled to possession of the suit land on eviction of the defendant No. 1 therefrom.

22. Mr. Manomohan Mukherjee relied on the decision in *Haji Sk. Subhan v. Madhorao*, AIR 1962 SC 1230, where a decree for possession obtained by the landlord in Nagpur High Court was found inexecutable on the coming in force of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1954 (M.P. Act 1 of 1954), between the closure of arguments in the appeal in High Court and the delivery of judgment but not however brought to the notice of the High Court.

23. The ratio decidendi of all the decisions on the issue is that the language of the statute must be such as to compel the Court by express provisions or necessary implication to apply the new Act, affecting vested rights in pending suits as was held in AIR 1941 FC 16 (supra). In *Mt. Rafiquennessa v. Lal Bahadur*, AIR 1964 SC 1511, it was held that the legislature is undoubtedly competent to take away vested rights by means of retrospective legislation. Unless a clear and unambiguous intention, however, is indicated by the legislature by suitable express words in that behalf, no provision of a statute should be given retrospective operation if by such operation vested rights are likely to be affected. Further, retrospective operation of a statutory provision can be inferred even in cases where such retrospective operation appears to be clearly implicit in the provision construed in the context it occurs. In this case the appellant obtained a decree for possession against lessee and while the appeal was pending in the lower appellate Court the Assam Non-Agricultural Urban Areas Tenancy Act 1955 came into force, providing protection for tenants where permanent structures were built within 5 years of tenancy. It was held that the very scheme of S. 5 (1) (a) of the said Act prohibiting eviction of tenant, postulates the extension of its protection to constructions already made and inevitably the section comes into play at the appellate stage, provided that the appeal which is a con-

tinuation of the suit, is pending when the Act came into force.

24. Following the above principle in *Sree Bank Ltd. v. Sarkar Dutt Roy & Co.*, AIR 1966 SC 1953, it was held that Section 45-O of the Banking Companies Act 1949, inserted by the Banking Companies (Amendment) Act 1953 (Act 52 of 1953), had a retrospective operation. Accordingly its provisions are applicable to suits or applications by a banking company in respect of causes of action of the suit or an application about which suits could be instituted or applications made on the date of the presentation of the winding up petitions before the commencement of the Amendment Act of 1953, even though the specified period of limitation for such action had expired before the enforcement of the Amendment Act. It was further held that: "it is not necessary for the retrospective operation of the provisions of the Act that it must be stated that its provisions would be deemed to have always existed. That is one mode and may be an effective mode of providing that the provisions would have retrospective effect. Retrospective effect of an enactment can also be gathered from its language and the object and intent of the legislature in enacting it."

25. The Amendment Act 9 of 1961 in its Section 4(1) (a) provides that provisions therein "shall be, and shall be deemed always to have been, substituted" in Sec. 6(1) of the West Bengal Act I of 1954. This is a clear expression without any ambiguity of the retrospective character of the amending statute by incorporation of the words "owned by the intermediary or by any person not being a tenant, holding under him by leave or license" in substitution of the words "whether erected by the intermediary or not" in the said section. Relying on the aforesaid decisions, it must be held that such substitution is to be deemed to exist in the Act always, thus, on the date the relevant provisions came into force, that is, on April 10, 1956. When on August 8, 1959, the suit is filed and on August 31, 1959, the land is purported to be retained, the plaintiffs had no right to retain the suit land and thus had no subsisting interest in the suit land in absence of any scope for retention thereof by them.

26. In view of the clearest expression about the retrospective application of relevant provision in the Act IX of 1961 and of the provisions of retention in Section 6(1) (b) of the West Bengal Act I of 1954 as amended by Act IX of 1961, the plaintiffs clearly were not entitled to retain the suit land and their right, title and interest therein irrevocably stood vested in the State on April 10, 1956, notwithstanding the pendency of the suit which is also to be deemed as pending though at the appellate stage. It may be

kept in mind that the plaintiffs or their predecessor-in-interest Subodh had not been in khas possession of the suit land since January 5, 1937.

27. The West Bengal Act I of 1954 was promulgated for effecting far-reaching reforms in land law and for protecting the raiyats and under raiyats in possession of lands. It may as well be contended that retrospective effect of an enactment can also be gathered from its language and the object and intent of the legislature in enacting it. The statutes amending the provisions of said Act and furthering its cause as also the interest of such raiyats and under raiyats should, even in absence of express provision, on the principle enunciated in AIR 1964 SC 1511 (supra), be allowed to operate retrospectively although by such operation it will deprive some person or persons of a vested right. This question however does not call for further determination in this appeal, as, as already indicated, there are express provisions in the Act IX of 1961 making its application in respect of Sec. 6(1) (b) of Act I of 1954, retrospective without any ambiguity.

28. I am, therefore, of opinion that the plaintiffs, in absence of any right of retention of the suit land, had no subsisting interest in the suit land when the suit was instituted, the interest in the suit land having irrevocably vested on April 10, 1956. Accordingly the suit filed by the plaintiffs is not maintainable in law and the courts below committed no error in dismissing the suit.

29. As the contentions on behalf of the appellants fail, it is ordered that the appeal be and the same is hereby dismissed, parties however bearing their own costs in this Court.

30. Leave under clause 15 of the Letters Patent is asked for and is granted.

Appeal dismissed.

AIR 1970 CALCUTTA 290 (V 57 C 57)

K. K. MITRA, J.

B. M. Chatterjee, Accused-Petitioner v. The State of West Bengal and another, Opposite Parties.

Criminal Revn. Case No. 259 of 1963, D/- 28-3-1969.

(A) *Employees' State Insurance Act* (1948), Ss. 85 and 2(17) — Director of a limited company is a 'owner' and therefore the 'principal employer' within meaning of S. 2(17) — If there be several persons in the position of Directors, all are liable for contravention of provisions of Act and *Employees' State Insurance (General) Regulations* (1950). (Para 7)

(B) *Employees' State Insurance (General) Regulations* (1950), Reg. 26 (c) —

HM/JM/D392/69/AKJ/D

Return in respect of termination of contribution period — Even if there is no termination of contribution in respect of any workman, return must be submitted to indicate clearly whether there has been any termination of contribution or not — In appropriate cases there may be a nil return — For not submitting such return on the ground that there has been no termination of contribution an offence is committed in technical sense — (Employees' State Insurance Act (1948), S. 85(a)). (Para 8)

Biren Mitra and Narayan Ranjan Mukherjee, for Petitioner; Mrs. Uma Banerjee, for the State; P. K. Ghose, for the Complainant.

ORDER:— This is a Rule directed against the order passed by a Presidency Magistrate convicting the petitioner under Sec. 85(a) read with Sec. 73-A of the Employees' State Insurance Act (Act 34 of 1948) and also under Sec. 85(g) read with Sec. 73-E of the said Act and also under Sec. 85(g) read with Regulation 26 of the Employees' State Insurance (General) Regulation, 1950. The petitioner is sentenced to pay a fine of Rs. 30/- on each of the three counts of charge and in default to suffer a simple imprisonment for one week.

2. The prosecution case is that the petitioner is a Director of M/s. Bengal Steam Laundry Private Ltd. having its factory at 42C, Richi Road, Calcutta bearing a Code No. 41/3882. The principal employer of a factory is required to make special contribution in terms of the provision of Section 73-A of the Employees' State Insurance Act read with a Government Notification No. SS 121(60) dated 6-2-52 within 30 days of the expiry of a quarter and also to submit return in form (SC 2) under Sec. 73-E of the said Act read with notification No. RS-9/52B dated 16-2-52 within 45 days of the expiry of each quarter and further required to submit contribution cards within 42 days of the expiry of each contribution period under regulation 26 of the E.S.I. (General) Regulation, 1950. A complaint had been filed under Sec. 86 of the State Insurance Act and the petitioner was punished in the Court of the Presidency Magistrate under Secs. 85(a) and 85(g) of the Act.

3. It is not challenged that the petitioner is one of the Directors of M/s. Bengal Steam Laundry. But the contention of the petitioner is that Sri B. Roy Choudhury, another Director, used to look after the management of the concern and, therefore, he is not liable for contravention of the provisions of the State Insurance Act.

4. The complaint had been filed against the petitioner as well as against Sri B. Roy Choudhury, the Director-in-

charge and both of them had been convicted as being the principal employer.

5. Sec. 85 of the Act renders any person punishable for contravention of the provisions of the Act. The prosecution in this case had been started against two Directors.

6. The word "principal employer" is defined in Sec. 2 (17) of the Act which runs as follows:

"In a factory, the owner or occupier of the factory and includes the Managing Agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the Manager of the factory under the Factories Act (1948) (LXIII of 1948), the person so named."

7. Apparently, therefore, in a factory the owner, including the Managing Agent of such owner and also the Manager of the factory are included within the meaning of the word "principal employer". The petitioner as a Director of the limited Company is the owner. Obviously, if there be several persons in the position of Directors all are liable for contravention of the provisions of the Act and Regulation. From the side of the defence a photostat copy of the registration of resolution and agreement of the M/s. Bengal Steam Laundry Private Ltd. were filed which clearly indicates that the petitioner was one of the Directors described as a Technical Director though Sri Bhupati Roy Choudhury, another Director, who also had been convicted was placed in charge of the management of the affairs of the Company subject to the control and supervision of the Board of Directors. P.W. 4, the Manager of E.S.I. Corporation, visited the factory on 19-8-1965 and found the petitioner present there. He carried on inspection in his presence and submitted the Inspection Report (Ext. 5). The Inspection Report indicates that the petitioner was interviewed on the date of the inspection. On a plain meaning of the provisions of Section 2(17) of the Act, the petitioner, as a Director, is liable to be penalized for contraventions of the Act in the same way as any other Director and the nature of his duty in the concern is quite immaterial.

8. Under Sec. 73-A of the Act every principal employer is liable to make special contribution and the rate of special contribution is to be notified in the Official Gazette and such contribution shall be made in the case of a factory in which the provision of chapters IV and V are in force in lieu of the employers' contribution payable under Chapter IV. Under notification No. SS-121(60) dated 6-2-1952 the employers' special contribution is payable in four quarters ending on 31st March, 30th June, 30th September and 31st December. It is contended by the

learned Lawyer for the petitioner that such special contribution is to be made in lieu of the contribution made under Chapter IV and not over and above that contribution. But, then there is nothing to show that any contribution had been made by this factory under Sec. 39 of the Act. The petitioner raised no such contention in the court below and no importance is to be given to the contention now raised in the scope of this revisional application. No doubt the principal employer of this factory did not pay the special contribution within 30 days from 30th June, 1966 and as such he is liable to be punished. It is also proved that no information and return in form No. SC 2 as prescribed under notification No. RS/9/52/A dated the 16th February, 1952 had been furnished within the prescribed time limit for 45 days from the end of the quarter. Under Section 73-E of the Act the Corporation is authorised to require any principal employer to submit returns and informations in the prescribed form within a time limit. In the instant case, the time limit was fixed at 45 days of the end of the quarter. For such failure to submit the return as required by the regulation the principal employer became punishable under Sec. 85(e) of the Act. The petitioner is also convicted for contraventions of the provisions in Rule No. 26(e) of the Employees' State Insurance Regulations. The provision in Rule 26 relates to submission of a return in duplicate in form No. 6 in respect to a contribution card of any person within 42 days of the termination of contribution period. Obviously, therefore, such return in form No. 6 is to be submitted only in the event of termination of contribution period in respect to any person for which the employer is in possession of a contribution card. It is contended by the learned lawyer for the petitioner that there was no necessity for submitting this return when there was no termination of contribution in respect to any workman. But such return must be submitted in the prescribed form to indicate clearly whether there had been any termination of contribution or not. In an appropriate case there may be a nil return. But, for not submitting such return in such circumstances an offence was committed in a technical sense.

9. The petitioner has been convicted under all these three counts of charge and he has been fined Rs. 30/- on each count of charge. In the facts and circumstances of this case, I find no reason to interfere with the conviction on any of the three counts of charge. As for sentence I maintain the sentence under Sec. 85(a)/73(A) of the Act and also under Sec. 85(g)/73(A) of the Act. But no separate sentence is passed under Sec. 85 (g) of the Act read with Regula-

tion 26 of the E.S.I. Regulation. Subject to this reduction of sentence the Rule is discharged.

Ordered accordingly.

'AIR 1970 CALCUTTA 292 (V 57 C 58)
BIJAYESH MUKHERJI, J.

Dalim Kumar Sain and others, Plaintiffs v. Smt. Nandarani Dassi and another, Defendants.

Suit No. 863 of 1959, D/- 20-8-1969.

(A) Civil P. C. (1908), O. 18, R. 15 and O. 49, R. 3(4) — Evidence Act (1872), S. 33 — Suit on ordinary original side of Calcutta H. C. — Trial remaining incomplete by death of Judge — Trial cannot be continued from that stage by another Judge — Both parties inviting judge in second trial to use evidence taken before the late Judge — Such evidence becomes admissible — (Evidence Act (1872), S. 115 — Waiver of procedural rules).

A Judge, on the original side of the High Court of Calcutta, cannot continue a suit at the stage left by another Judge of the High Court, who was prevented by death from concluding the trial, as O. 18, R. 15 of the Civil P. C. does not apply, by virtue of O. 49, R. 3(4) in the exercise of the High Court's ordinary original civil jurisdiction. However, when both the contesting parties through their counsel invite the Judge at the second trial to treat the evidence at the first trial between them as the evidence at the second trial too, such consent makes the evidence given at the first trial admissible as evidence at the second trial though the conditions prescribed by S. 33 of the Evidence Act do not exist and O. 18, R. 15 of the Civil P. C. in terms does not apply. (1949) 53 Cal WN 569, Disting. AIR 1920 Mad 547 (FB). Foll. (Para 11)

The principle is that the rules of procedure are not rules of public policy, and, therefore, not so very important, precluding the parties from waiving the benefit of such provisions. Indeed, it is always open to parties to waive a matter of mere procedure. To hold the contrary will come to saying that the court can compel the parties to examine afresh witnesses whom they do not want to examine so, and with whose existing evidence on record of the previous trial between them they are content — a clear *reductio ad absurdum*. (Para 11)

(B) Evidence Act (1872), Ss. 35 and 77 — Birth certificate — Certified copy — Certified copy signed by Chief Executive Officer of Municipal Corporation — It is automatic evidence as public document

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under conjoint effect of Ss. 35 and 77 — It is conclusive evidence unless disproved. AIR 1935 Pat 474 & (1965) 69 Cal WN 593, Rel. on. (Para 27)

(C) Civil P. C. (1908), Preamble — Precedents — A case cannot be an authority on a question of fact. AIR 1963 SC 499, Foll. (Para 37)

(D) Evidence Act (1872), S. 47, Explanation — Even the opinion evidence of a non-expert, becomes good evidence to go by, if the acquaintance of such witness with the signature of the executor is well proved within the meaning of S. 47, Explanation. (Para 53)

(E) Trusts Act (1882), Ss. 36, 34 — S. 34 is only enabling section — Trust property requiring repairs — Trustee need not go to Court for direction but can himself carry out repairs.

The power of the trustee to keep the trust-property in repair is beyond question. Such power is conferred by S. 36 of the Act. Section 34 is no doubt there enabling a trustee to apply for direction of the Court on the simple questions touching the management or administration of the trust property. But it is only an enabling section and it is not binding in every case to do so. Therefore, S. 34 cannot in any manner take away the power conferred on a trustee by an instrument of trust and Sec. 36, to expend money. (Para 57)

(F) Evidence Act (1872), S. 60 — Trust property mortgaged with Life Insurance Corporation and loan raised for repairs of the property — Evidence of inspector who inspected the condition of the property — His evidence is primary evidence within S. 60 in so far as it refers to a fact which could be seen, and he says that he saw it but it is hearsay evidence in so far as he says that the object of the loan was to meet the expenses for repairs and additional constructions. (Para 59)

(G) Trusts Act (1882), S. 36 — Mortgage of trust property — Proof of necessity — Onus.

Where trust property is mortgaged for raising a loan required for making repairs and adding constructions to the trust property, the onus of proof of necessity is on the mortgagee. However, when the relevant facts are before the Court, all that remains for decision is what inference should be drawn from them and the question of onus is rendered academic. (Para 63)

(H) Civil P. C. (1908), O. 6, R. 2 and O. 14, R. 3 — Pleadings — Party cannot travel beyond pleadings so as to make a new case — Rule however is not inflexible — Issues can be drawn from pleadings and documents produced.

The case pleaded has to be proved and found. Thus the parties cannot be allowed to travel beyond pleadings, so as to make out a new case wholly inconsistent

therewith. But this is not an inflexible rule. To do justice between the parties the pleadings are sometimes departed from. Case law discussed. (Paras 65, 66)

Further, under O. 14, R. 3 which by virtue of O. 49, R. 3 is not excluded from the Calcutta High Court in the exercise of its ordinary original civil jurisdiction, the Court is not confined to pleadings only in framing issues. It may draw upon the contents of documents produced by either party. AIR 1964 Cal 209, Rel. on. (Para 68)

(I) Evidence Act (1872), S. 73 — Court is entitled to compare for itself the questioned signature of party with that of the admitted signature. (Para 72)

(J) Limitation Act (1908), Arts. 91 and 120 — Suit for declaration that trust-deed is void — Incidental prayer for cancellation of instrument — Art. 120 applies.

Art. 91 of the Act prescribing limitation for cancellation of an instrument, is not for a suit which is in substance a suit for a declaration that an instrument is void, even though an otiose prayer for cancellation is there in the plaint. Once the Court voids an instrument, it is in law a nullity, and little remains in it for the Court to cancel or set aside. (Para 77)

Article 120 would govern such a suit. But when out of five plaintiffs, at the date of the suit, two are minors represented by their next friend, and two became of age shortly before that, the suit so far as they are concerned is much earlier than the prescribed terminus ad quem, the first two being entitled to do so, without coming on the edge of the law of limitation, and time having commenced to run against the last two when they ceased to be non-age. (Para 79)

(K) Evidence Act (1872), S. 3 — Appreciation of evidence — Civil case — Court has right to disbelieve part of a witness's evidence and to believe part thereof. AIR 1956 SC 513 & AIR 1958 SC 813, Foll. (Para 85)

(L) Limitation Act (1908), Art. 120 — Plea that suit is time-barred — Party unable to specify firm date for terminus a quo — Plea cannot be upheld.

If a party who wants the suit to be struck down as time barred cannot specify a firm date for terminus a quo, it cannot ask the Court to find the issue on limitation in its favour. (Para 95)

(M) Trusts Act (1882), S. 78 — Creation of trust by deed — Trustee given powers to mortgage property "for such purpose" — Expression "for such purpose" unmeaning and not practicable — Settlor revoking that Clause with the consent of trustee — Revocation is valid. (Paras 12, 43)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 735 (V 53) = 1966-2 SCR 286, Bhagwati Prasad v. Chandanmaul 65

(1965) 69 Cal WN 593, Anil Krishna Basak v. Sailendra Nath Paul	27	(1930) AIR 1930 PC 270 (V 17)=57 Ind App 325, Bolo v. Koklan	96
(1964) AIR 1964 SC 24 (V 51) = 1964 (2) SCR 885, S. N. Ranade v. Union of India	65	(1926) AIR 1926 PC 16 (V 13)=53 Ind App 36, Jawahir Singb v. Udai Parkash	82
(1964) AIR 1964 Cal 209 (V 51), Snow White Food Product, Ltd. v. Sohan Lal Bagla	68	(1927) 1927 AC 515=96 LJPC 84, Robins v. National Trust Co. Ltd.	64
(1963) AIR 1963 SC 499 (V 50)=1962 Supp (2) SCR 623, Neta Ram v. Jiwan Lal	37	(1922) AIR 1922 PC 292 (V 9)=49 Ind App 286=27 Cal WN 245=ILR 45 Mad 586, Chidambara Sivaprakasa Pandara Sunnadhigal v. Veerama Reddy	63
(1961) AIR 1961 Cal 411 (V 48), Sanat Kumar Mitra v. Hemachandra De	78	(1920) AIR 1920 PC 67 (V 7)=47 Ind App 76=25 Cal WN 485=ILR 43 Mad 567, Seturatnam Aiyar v. Venkatachala Gounden	63
(1961) 1961-3 All ER 1169=1962 AC 152, Macfoy v. United Africa Co. Ltd.	77	(1920) AIR 1920 Mad 547 (V 7)=ILR 43 Mad 609 (FB), Jainab Bibi Saheba v. Hyderally Saheb	11
(1960) AIR 1960 SC 335 (V 47)=1960-2 SCR 253, Mst. Rukhmabai v. Lala Laxminarayan	28	(1909) 14 Cal WN 128=11 Cal LJ 34, Gangadhar Sarkar v. Khaja Abdul Aji Nawab Salimulla Bahadur	82
(1959) AIR 1959 SC 31 (V 46)=ILR (1958) Ker 1340, Moran Mar Baselious Catholics v. Thukalan Paulo Avira	55	(1909) 10 Cal LJ 263=3 Ind Cas 178, Brindaban Chandra Shaha v. Sureshwar Shaha Paramanik	11
(1958) AIR 1958 SC 813 (V 45)=1958 Cri LJ 1352, Gallu Sah v. State of Bihar	85	(1907) 34 Ind App 27=ILR 29 All 184, Rani Chandra Kunwar v. Narpat Singh	65
(1957) AIR 1957 SC 388 (V 44)=1957 SCA 312, Nisar Ali v. State of U.P.	85	(1898) 25 Ind App 183=ILR 21 All 71, Sham Sunder Lal v. Achhan Kunwar	58, 83
(1956) AIR 1958 SC 513 (V 43)=1956 Cri LJ 923, Sukha v. State of Rajasthan	85	(1895) I Ch 743, Bonhote v. Henderson	36 to 38, 42, 43
(1956) AIR 1956 SC 593 (V 43)=1956 SCR 451, Nagubai Ammal v. B. Shama Rao	65	(1895) 2 Ch 202=72 LT 814, Bonhote v. Henderson	38
(1956) 1956-1 WLR 965=100 SJ 566, Subramaniam v. Public Prosecutor	90	(1892) 20 Ind App 1=ILR 15 Bom 155, Rahimbhoy Hubibhoy v. Turner	99
(1953) AIR 1953 SC 235 (V 40)=1953 SCR 789, Trojan & Co. v. Rm. N. N. Nagappa Chettiar	65	(1887) 38 Ch D 1=57 LJCh 607, Tucker v. Bennett	33, 34, 38
(1951) AIR 1951 SC 177 (V 38)=1952 SCA 116, Firm Srinivas Ramkumar v. Mahabir Prasad	65	(1880) 5 AC 685=50 LJQB 49, Wollington v. Mutual Society	99
(1951) AIR 1951 SC 280 (V 38)=1951 SCR 548 Bishundeo v. Seogeni Rai	65	(1869) 9 Eg 44=21 LT 449, Wollaston v. Tribe	38
(1950) AIR 1950 PC 68 (V 37)=77 Ind App 15, Kanda v. Waghu	69	(1856) 8 De G M & G 531, Walker v. Armstrong	39, 41, 42, 45
(1949) 53 Cal WN 569, Sarba Ranjan Bysack v. Sm. Hari Priya Dassi	65	(1757) 97 ER 22, Wilm 58, Bridgeman v. Green	26
(1941) AIR 1941 PC 95 (V 28)=1941 All LJ 668, Bhowanipore Banking Corp. v. Smt. Durgesh Nandini Dassi	11	R. L. Sinha, for Plaintiffs; M. M. Sen and R. M. Datta, for Defendant No. 2	
(1935) AIR 1935 Pat 474 (V 22)=16 Pat LT 629, Nanhak Lall v. Baijnath Agarwala	85	JUDGMENT:— This is a suit raised on July 3, 1959, by three sons and two daughters of Moti Lal Sain, who died on November 4, 1955, principally for a declaration that a deed of mortgage bearing date November 29, 1946, for Rs. 25,000, and a deed of further charge bearing date January 19, 1949, for Rs. 5,000, executed by the first defendant, Sm. Nandarani Dassi, their mother and necessarily the widow of Moti Lal Saine, in favour of India Provident Co., Ltd., are void.	
(1933) AIR 1933 Cal 253 (V 20)=36 Cal WN 758, Sm. Swarnamoyee Dassi v. Probodh Chandra Sarkar	27	2. The Life Insurance Corporation of India (for short, LIC hereafter) is the statutory successor in interest of India Provident Co., Ltd. This is why LIC	
(1933) AIR 1933 Lah 270 (V 20) = 34 Pun LR 598, Mohammad Umar v. Mohammad Ibrahim	99		
(1931) AIR 1931 PC 9 (V 18)=58 Ind App 1, Annamalai Chettiar v. A. M. K. C. T. Muthukaruppan Chettiar	97		

figures in this litigation as the second defendant.

3. In the wake of the declaration the plaintiffs pray the Court for, two other reliefs sought, the ancillary ones, follow as a matter of course. First: the afore-said two instruments be cancelled and delivered up. Second: LIC be restrained by an injunction from enforcing the two instruments of mortgage and further charge by suit No. 136 of 1958 raised in this Court on January 28, 1958, for just that: for enforcement thereof.

4. The date of institution of this suit: July 3, 1959: is, therefore, one year five months and six days after the date of institution of the suit by LIC: January 28, 1958. Both the suits have been heard one after another: the later suit (No. 863 of 1959) first and the earlier suit (No. 136 of 1958) thereafter; not immediately

thereafter, but after an interval of some twenty-five days. And so soon I have finished delivering judgment in this suit (No. 863 of 1959), I shall deliver judgment in the other one (No. 136 of 1958) too.

5. The case, the plaintiffs come to court with, may best be stated by inserting a pedigree they set out in the first paragraph of their plaint — a pedigree which is not disputed at and during the trial, even though LIC, the second defendant and the only contesting defendant at that, pleads, presumably by way of abundant caution, in the first paragraph of its written statement:

"1. This defendant has no knowledge (of) and does not admit the allegations made in paragraph 1 of the plaint." Here is that pedigree not in the realm of any dispute;

Modhoo Sooden Sain

Moti Lal=Wife Nandarani
(defendant No. 1)

Dalim
Kumar,
(plaintiff
No. 1).

Sm. Lakshmi
Sona,
(plaintiff
No. 2).

Dinendra
Kumar,
(plaintiff
No. 3).

Sm. Binapani
(plaintiff
No. 4).

Krishna
Kumar,
(plaintiff
No. 5).

6. Of the five plaintiffs, those numbering 1, 3 and 5 — Dalim Kumar, Dinendra Kumar and Krishna Kumar, Sains all (the padded way of writing 'Sen') — are the sons of Moti Lal, since deceased. Of these three again, Dalim Kumar and Dinendra Kumar are majors at the date the suit is instituted, Krishna Kumar is not. He is a minor under the age of eighteen years, as the cause title of the plaint describes him to be. The remaining two, Lakshmi Sona and Binapani, are the daughters of late Moti Lal. Of these two again, Lakshmi Sona is a major at the date of the institution of the suit; Binapani is not. She is a minor under the age of eighteen years, as the cause title of the plaint describes her to be as well. In this suit, both these minors, Binapani, plaintiff No. 4, and Krishna Kumar, plaintiff No. 5, are represented by Dalim Kumar, plaintiff No. 1, their brother and next friend. If LIC has no knowledge of, and does not admit, the pedigree just set out, as noticed in the preceding paragraph, it has equally no knowledge of, and does not admit either, such purported description given in the cause title of the plaint. The averment in paragraph 1 of its written statement, reproduced with a little excision, is just so. The portion excised traverses this: LIC's lack of knowledge of what the cause title of the plaint bears, and, therefore, no admission thereof on its part.

7. The history of the facts which have led up to this litigation divides itself into four stages:

(i) that between January 20, 1932, when Madhoo Sooden Sain created a trust by a voluntary deed of that date, exhibit C*, as respects, amongst others, his undivided 4/21st share in 116 Cotton Street, Calcutta, (shortened hereafter into "116"), for the benefit of all — Moti Lal, Nandarani, sons and daughters, as also grandsons and grand-daughters, of Moti Lal and Nandarani, and himself too, and June 15, 1936, when Modhoo Sooden, the settlor, executed a deed of rectification, exhibit D**, "purporting to remove the limitation and restriction put upon the power of the trustee to sell and mortgage the trust property irrespective of purposes mentioned in the deed of settlement, subject of course to the consent,

* Gone into evidence and thereby admitted to the record by consent: vide the note just above question No. 178, on cross-examination, to Dalim Kumar Sain, the first plaintiff and the only witness of the plaintiffs. A common document too of the contesting parties: P.D. 1 & D.D. 1 at pp. 1-16 of the brief of documents, exhibit E.

** Admitted to the record as exhibit C is admitted by consent: a common document too — P.D. 2 & D.D. 2 — at pp. 17-21 of the brief of documents, exhibit E

sanction and approval of the settlor and his son Moti Lal Sain", as the averment in paragraph 5 of the plaint puts it;

(ii) that between December 21, 1939, when Moti Lal Sain retired from trusteeship and appointed his wife Nandarani as the sole trustee in his place, by an apposite deed, exhibit B(1), and June 19, 1944, and thereabouts when in a partition suit in this Court, — suit No. 1152 of 1909 —, in lieu of undivided 4/21st share of "116", Nandarani was allotted, on the foot of the return of the commissioner of partition, lot A delineated in the map attached to the commissioner's return(2);

(iii) that between November 29, 1946, when Nandarani, qua sole trustee to the estate of Modhoo Sooden Sain, with the consent in writing dated May 12, 1946, exhibit 3 and D.D. 6, of her husband Moti Lal, raised a loan of Rs. 25,000, on a mortgage of 4/21st share (since divided) of "116", to India Provident Co., Ltd., the deed of mortgage being exhibit 1 and a common document too: P.D. 4 and D.D. 4 and January 19, 1949, when Nandarani raised a further loan of Rs. 5,000 from the same company on execution of a deed of further charge, exhibit 2, and a common document again: P.D. 5 and D.D. 5; and

(iv) that between January 23, 1958, when LIC, the statutory successor in interest of India Provident Co., Ltd., raised the action (suit No. 136 of 1958) in this Court for enforcement of Nandarani's mortgage and further charge as above, and March 5, 1959, or thereabouts, when the plaintiffs, as they aver in paragraph 11 of their plaint, "came to know for the first time about the said deed of mortgage and deed of charge."

8. Hence this suit on July 3, 1959, the burden of the suit being:

A. The plaintiffs, who are the sons and daughters of Moti Lal Sain, are the only beneficiaries along with Nandarani herself under the deed of trust bearing date January 20, 1932, exhibit C; paragraph 4 of the plaint.

B. The settlor, Modhoo Sooden Sain, having reserved no power to alter any term of the original deed of trust, had no power either, to remove the restriction imposed on the trustees. But this is exactly what he did by the deed of rectification bearing date June 15, 1936, exhibit D, which is, therefore, "void, illegal and ineffective" and cannot do what it purports to have done; paragraph 5 *ibid*.

C. Ergo, neither the deed of mortgage bearing date November 29, 1946, exhibit 1, nor the deed of further charge bearing date January 19, 1949, exhibit 2,

1. Admitted to the record by consent as exhibits C and D are: a common document too — P.D. 3 & D.D. 3 — at pp. 22-31 of the brief of documents, exhibit E.

2. Paragraph 7 of the plaint.

can receive effect, in breach of trust and in derogation of the rights of the plaintiffs qua beneficiaries as they have been; the more so, because of absence of legal necessity, of which the Indian Provident Co., Ltd. had notice. In any event, no mortgage by Nandarani there could be without Moti Lal's consent; paragraphs 8-10 *ibid*.

9. Such then is the theme and thread of the suit which LIC, the second defendant, resists, but Nandarani, the first defendant and the mother of the plaintiffs, does not, as is so natural. The pleas LIC resists the suit with are, to notice only the gist thereof:

One, the allegation that Modhoo Sooden Sain, the settlor, had no power to remove the restriction, if that, in the original deed of trust is denied; is denied too, the deed of rectification dated June 15, 1936, being void, illegal or ineffective; paragraph 3 of the written statement.

Two, contravention of the original deed of trust, lack of power on the part of Nandarani, and absence of legal necessity, vitiating the deeds of mortgage and further charge, are denied. Moti Lal Sain's consent by writing dated May 12, 1946, to the execution of the mortgage is asserted; paragraphs 7 and 8 *ibid*.

Three, the suit is barred by limitation, the plaintiffs' knowledge for the first time on or about March 5, 1959, of the mortgage and the further charge being not admitted; paragraphs 20 and 9 *ibid*.

10. In view of such pleadings, six issues have been raised at the trial. They fall into three parts. The first part consists of issues, numbering 1 to 3, on the questions of Modhoo Sooden's power to execute the deed of rectification, as also the consequential power of Nandarani to execute the two instruments of mortgage and further charge she did, and that too whether with or without the consent of her husband Moti Lal. The second part consists of two issues, numbering 4 and 5, on the question of limitation. And the third part consists of a single issue, issue No. 6, the general one, on reliefs. With this introduction, I reproduce below the issues struck at the trial:

1. (a) Had the settlor Modhoo Sooden Sain any power to execute the deed of rectification dated June 15, 1936?

(b) If so, what is the effect of the aforesaid deed?

2. (a) Did Nandarani Dassi have any power to execute the deed of mortgage dated November 29, 1946?

(b) Were the aforesaid mortgage and the deed of further charge dated January 19, 1949, executed by Nandarani Dassi with the consent of her husband Moti Lal Sain?

3. Was the execution of the mortgage dated November 29, 1946, and of the deed of further charge dated January 19, 1949,

by Nandarani Dasi made in contravention of the deed of trust dated January 20, 1932, as alleged in paragraphs 8 and 10 of the plaint?

4. Did the plaintiffs come to know of the aforesaid mortgage dated November 29, 1946, and of the aforesaid deed of further charge dated January 19, 1949, on or about March 5, 1959, as alleged in paragraph 11 of the plaint?

5. Is the plaintiffs' claim barred by limitation?

6. What reliefs, if any, are the plaintiffs entitled to?

11. Before I proceed to determine the issues, it is as well I place on record that the trial of this suit commenced before late Mr. Justice Law on April 21, 1965. It continued, with a break for three days on April 24, 25 and 26, 1965, until April 28, 1965, when the hearing was concluded. Dalim Kumar Sain, the first plaintiff and the only witness of the plaintiffs, was examined in full on April 21, 22 and 23, 1965. Naresh Chandra Majumdar, the solitary witness of the contesting defendant LIC, was examined in full on April 23, 1965, as well. Most unfortunately, however, Mr. Justice Law died before he could deliver the judgment. Ultimately, the suit appeared in my list and I took it up for hearing on January 3, 1967. Order 18, Rule 15, of the Procedure Code (5 of 1908), which enables a judge to continue the suit at the stage left by another who was prevented by death from concluding the trial, does not apply, by virtue of Order 49, Rule 3, Cl. 4, *ibid.*, in the exercise of this Court's ordinary original civil jurisdiction: just the jurisdiction I am seized of in hearing this suit. Such statute law apart, a division of this Court, presided over by Harries, C. J. and Chakravarti, J. (as he then was) held as much in Sarba Ranjan Bysack v. Sm. Hari Priya Dassi, (1949) 53 Cal WN 569. So, it was for me to hear the whole suit afresh and to enter into evidence over again. And certainly I would have done just that, but for the joint submission made by Mr. Sinha and Mr. Sen, the learned counsel for the plaintiffs and the contesting defendant respectively, that I should treat the evidence had before late Mr. Justice Law as evidence in the trial before me. Such submission over, the case was opened at length and I was taken, in the course of such opening, through the whole of the evidence given in the previous trial between the same parties. And the arguments on merits followed. This is a feature which is conspicuous by its absence in the Sarba Ranjan case, (1949) 53 Cal WN 569. There, far from both parties having consented through their counsel to treat the evidence before Khundkar, J., who unfortunately died and could not, therefore,

complete the trial, as evidence in the second trial before Ormond, J., the defendant insisted on a trial *de novo* on the ground that neither Order 18, Rule 15, of the Code, expressly excluded, by Order 49, Rule 3, Cl. 4, from the original side of this Court, nor Section 33 of the Evidence Act (1 of 1872), could be called in aid. But Ormond J. overruled such prayer and was in turn overruled by the Court of appeal. In the case before me, however, nothing of the kind happens. On the contrary, I am invited by counsel, for both parties to treat the evidence before Law J. as evidence before me too. And still I shall say: "No; you must have a *de novo* trial and examine your witnesses over again." A point as this did not fall to be considered in the Sarba Ranjan case, 1949-53 Cal WN 569. And a case is an authority for the proposition it actually decides: Brindaban Chandra Shaha v. Sureswar Shaha Paramanik, (1909) 10 Cal LJ 263. So, the Sarba Ranjan case, 1949-53 Cal WN 569 can neither rule nor govern here. What really rules and governs here is another class of case, the leading amongst which is the Full Bench decision of the Madras High Court in Jainab Bibi Saheba v. Hyderally Saheb, ILR 43 Mad 609 = (AIR 1920 Mad 547); the law laid down therein may be put thus:

The consent of parties may make admissible the evidence given in a previous judicial proceeding between them in a case in which the conditions prescribed by section 33 (the benefit of which can be waived) do not exist.

In the Sarba Ranjan case, 1949-53 Cal WN 569 lack of consent of parties, indeed vehement opposition by the defendant, made the evidence given before Khundkar J. inadmissible as evidence before Ormond J. Here consent of parties makes the evidence given before Law J. admissible as evidence before me, no matter that, the conditions Section 33 of the Evidence Act prescribes, do not exist; no matter that Order 18, Rule 15, of the Procedure Code cannot touch this litigation. The principle appears to be that these rules of procedure are not rules of public policy, and, therefore, not that important, precluding the parties from waiving the benefit of such provisions. Indeed, it is always open to parties to waive a matter of mere procedure. To hold the contrary, in the context of what has happened before me, will come to saying that the Court can compel the parties to examine afresh witnesses whom they do not want to examine so, and with whose existing evidence on record of the previous trial between them they are content—a clear *reductio ad absurdum*, to my mind.

12. Now to merits, for a proper appraisal of which, what is needed first and foremost is a clear understanding of the

original deed of trust bearing date January 20, 1932, exhibit C, in so far as it is necessary for the point at issue: the point of the trustees' power to make a mortgage, in the litigation on hand. Here is an analysis of its terms with that end in view, and under suitable headings too;

A. By and between whom.

Modhoo Sooden Sain is of the one part, the first part. The said Modhoo Sooden Sain and his son Moti Lall Sain, the two trustees, are of the other part, the second part. There is the usual interpretation clause for the expression "trustees"—an expression which includes the survivor of them, executors, administrators, etc.

B. What the trust deed conveys "irrevocably" by way of settlement, in so far as it is material for the purposes of the case on hand.

"All that undivided four equal twenty-one part or share of "116", with a building, brick-built, "partly four partly three partly two and partly one storied" and land "containing an area of" 11 cottahs 8 chittacks and 34 square-feet, more or less; property which the settlor Modhoo Sooden Sain is "absolutely seised and possessed of or otherwise well and sufficiently entitled to", as is to be gleaned from the introductory recitals, the testament or witnessing clause, and the habendum, in the trust-deed, read with the first schedule thereto.

C. Condition of "116" in the sense what it is subject to at the date of the deed.

An agreement dated April 20, 1931, is there for sale of the settlor's 4/21st part or share in "116" to Sreelal Chamaria for Rs. 45,000, out of which the settlor was paid Rs. 1001 by way of earnest. It is hardly necessary to notice all that is set out in the deed about this agreement of sale between the settlor Modhoo Sooden Sain, on one hand, and Sreelal Chamaria, on the other. Suffice it to notice the following:

(a) Suit No. 1152 of 1909 again (referred to in paragraph 7 ante). The settlor is the plaintiff in the aforesaid suit—a suit for partition of "116", Sreelal Chamaria and one Durga Prosad Chamaria are the defendants.

(b) The settlor would not be liable to pay any portion of the costs of the said two defendants. On the contrary, if it comes to paying costs by him, Sreelal Chamaria would pay Durga Prosad Chamaria such costs as would be payable by the settlor.

(c) In pursuance of the agreement dated April 20, 1931, for sale, Sreelal Chamaria was to complete the sale by a certain date, namely, November 30, 1931, but he could not. On Sreelal Chamaria having applied for time to complete the sale, he got what he had applied for, but on payment of—

(i) interest at the rate of Rs. 330 a month on the balance of the purchase money: Rs. 45,000 minus Rs. 1,001.

and

(ii) a net monthly rent of Rs. 160 for the settlor's share in "116", exclusive of all rents, outgoings and taxes, until the sale was completed: vide the further introductory recitals in the deed of trust.

D. Powers of the trustees.

Immediately after the habendum are recited the powers of trustees. Such powers are—

1. "..... the trustees shall be at liberty either to rescind or to specifically enforce the agreement dated the 20th day of April, 1931, "for sale of the (settlor's) 4/21st part or share" of "116".

2. "..... in the event of the said sale to Sreelal Chamaria being completed, the trustees shall invest the proceeds of sale, either in the purchase or mortgage of such moveable or immovable properties, including Government securities, in Calcutta or in its suburbs, and at such price as the settlor, during his lifetime, and after his death, his son, the said Moti Lall Sain, may select or direct, with powers to vary such investments from time to time, with the approval of the settlor during his lifetime, and after his death, with the approval and sanction of his son, the said Moti Lall Sain, and thereafter as they shall think fit and proper"

3. Such investment apart, and that too in the event of the sale to Sreelal Chamaria being completed, "the trustees shall invest the surplus income, if any, in any of the investments hereby authorised in augmentation of the capital of the trust-estate", as also the sale-proceeds of other properties purchased with the trust-money and compensation-money for acquisition under the Land Acquisition Act and allied statutes of any such trust-property.

E. Limitation upon such powers.

After setting out what the trustees "shall stand and be possessed of", namely, (i) the properties purchased or mortgaged as the result of investment of sale-proceeds of the settlor's 4/21st share in "116", "as also" (ii) "the said messuages, lands, hereditaments and premises mentioned in the first schedule," that is, "116"—and that can only be in the event of sale of "116" to Sreelal Chamaria not taking place, or so long as it does not take place, for once the sale is completed, the trustees can never stand and be possessed of "116"—, and after listing too the very various duties assigned to the trustees, such as (i) payment of municipal and other taxes, (ii) costs of necessary repairs, if any (iii) maintenance and residence of the settlor, his son Moti Lall, and Moti Lall's second wife Nandarani, (iv) maintenance, resi-

dence and education of Moti Lall's and Nandarani's sons and grandsons, (v) maintenance and marriage of each of their daughters and grand-daughters, a sum not exceeding Rs. 3,000 being earmarked for such marriage, (vi) the expenses for the upkeep of a motor-car or of a carriage and a carriage-horse, so long as Moti Lall is unable to fend for himself, etc. etc., the trust-deed, by a proviso, curtails the power of the trustees in the manner following:

"Provided further and it is hereby further agreed and declared that the trustees shall have power, during the lifetime of the settlor, with his consent, and thereafter only with the consent of his son, the said Moti Lall Sain, to vary from time to time the investments herein referred to and for such purpose to sell or to mortgage, or to charge or to lease, or to dispose of the lands, hereditaments and premises hereby settled and also the premises and investments that might be purchased or made out of the monies belonging to the trust hereby created, or any of them at such price or prices as the settlor or his said son Moti Lall Sain (as the case may be) approve or sanction"

No more of the terms of the trust-deed bearing date January 20, 1932, need be noticed in order to understand the power of the trustees to make a mortgage, with which alone this litigation is concerned, and that too in the light of the deed of rectification, exhibit D, executed by the settlor, "with the consent and concurrence" of the "trustees" and "beneficiaries," as the rectification deed itself recites, some four years and five months later, to wit, on June 15, 1936. The position boils down to this:

A. On January 20, 1932, the date of the trust-deed, the agreement bearing date April 20, 1931, for sale of the settlor Modhoo Sooden's univided 4/21st part or share in "116", part of the trust-estate, to Sreelal Chamaria, stood.

B. The trustees were given, by the trust-deed, the liberty either to rescind or to enforce the said agreement.

C. Either of the two things could therefore, come to pass: completion of sale in pursuance and enforcement of the agreement for sale or no sale because of rescission of the agreement, the trustees having been given the power to do the one or the other.

D. What if the sale fails? "116", the settlor was absolutely seised and possessed of, the trustees would be absolutely seised and possessed of.

E. What if the sale is completed? The mandate of the trust-deed upon the trustees is:

(i) Invest the sale-proceeds in the purchase or mortgage of moveables or immoveables in and around Calcutta.

(ii) Settlor, Modhoo Sooden Sain, you do select the investments to be made so, and do settle the price thereof, too.

(iii) Moti Lall Sain, you do just that when your father, the settlor Modhoo Sooden, is no more.

(iv) Do make periodic variations of such investments if you think fit. But get the approval of the settlor during his lifetime, and after his death, the approval of Moti Lall.

(v) For such purpose, that is to say, for periodic variations of such investments, subject to the fetters of approval (just noticed), mortgage you may—

I. the lands, hereditaments and premises settled by this trust-deed, that is, "116" and also

II. the properties you purchase out of the monies belonging to the trust-estate.

F. About the other class of investments, the trustees are called upon to make out of the surplus income, if any, etc., the mandate of the deed upon them is just so:

(i) Do make periodic variations of such investments, if you think fit. You have the power to do so. But get the approval of the settlor during his lifetime, and thereafter the approval of Moti Lall.

(ii) For such purpose, that is to say, for periodic variations of such investments also, subject to the fetters of approval (just noticed), mortgage you may—

(a) "116", and also

(b) the properties which might be purchased out of the monies belonging to the trust-estate.

It goes without saying that money obtained by way of compensation as the result of acquisition of the trust-estate or part thereof under the Land Acquisition Act and the like is money belonging to the trust-estate, and that is provided for likewise too, as just noticed.

13. Such then is the trust-deed of January 20, 1932, with its limited mandate upon the trustees to execute a mortgage. And the question of a mortgage bulks so large in the litigation depending before me.

14. Now to the deed of rectification bearing date June 15, 1936, some four years and five months after the trust-deed of January 20, 1932. A deed of rectification as this is by the same person Modhoo Sooden Sain. So, one who makes the deed of trust is the very one who rectifies it by the deed of rectification. What does such a one say as the reasons for rectification? The reasons he puts forward in the rectification deed itself are—

One, for the purpose of carrying out the directions (which included directions for payment of certain expenses out of the corpus of the trust-estate), and in particular, in the event of the agreement for sale to Sreelal Chamaria being "rescinded and cancelled", he considered it expedient and necessary, indeed he intended,

(a) that the trustees should be invested with powers to deal with the corpus of the trust-estate,

(b) that they should have full and unrestricted powers to vary from time to time the investments mentioned in the trust-deed, and

(c) that they should have full and unrestricted powers as well, to sell, mortgage, charge, lease or dispose of the trust-estate or any portion thereof, subject to the approval of himself, during his lifetime, and after his death, the approval of his son, Moti Lall.

Two, he has just discovered that contrary to his intention and to the tenor of the trust-settlement, the words "for such purpose" were through inadvertence inserted in the aforesaid deed of trust, though his real intention was not to use such words.

Three, the effect of such insertion is to put a limitation on the power of the trustees granted by the trust-settlement, but that was and is contrary to his intention and is calculated to hamper seriously the execution of the trust he made.

Four, he, therefore, desires to rectify the said mistake so as to remove all doubts as to the full and unrestricted powers of the trustees to deal with the corpus of the trust-estate and to make it clear that their powers in this respect are full and unrestricted and unfettered, subject only to the requisite approval (which has already been noticed more than once and need not, therefore, be repeated).

15. In the premises, what does the maker of the trust-deed, Modhoo Sooden Sain, do in his new deed: the deed of rectification? "With the consent and concurrence" of the trustees (that is, his own and his son Moti Lall's) and of the beneficiaries (that is, his own, Moti Lall's and Nandaranī's), "by their joining in and executing these presents" (that is, the rectification deed), Modhoo Sooden, the settlor, "doth declare, admit, and acknowledge that the words 'for such purpose' shall be deemed to have been, by mistake and inadvertence, erroneously inserted and used between the word 'and' and the words 'to sell or to mortgage or to charge or to lease or to dispose of' in the proviso (1) and the same (the words 'for such purpose') should be and are hereby omitted, and/or deleted, or expunged from the within indenture of Trust Settlement, and the said indenture should

"In line 6 at page 4 of the original deed, exhibit C, after the words "and" in line 5, and before the words "to sell or to mortgage" in line 6. See paragraph 12 ante under the caption: E. Limitation upon such powers.

(1) Reproduced verbatim in paragraph 12 ante under the caption: E. Limitation upon such powers.

be read and construed as if the said words 'for such purpose' were never incorporated between the word 'and' and the words 'to sell or to mortgage or to charge or to lease or to dispose of' in the said proviso"

16. What goes before appears to be clear enough. Excise the words "for such purpose" from the trust-deed of January 20, 1932. Proceed on the footing that the words were never there. But the common maker of both the documents—the deed of trust and the deed of rectification—does not stop there. He goes a little more:

"To the intent that the powers of the Trustees to deal with the corpus of the Trust estate are full and not restricted to the purpose of varying the within mentioned investment nor otherwise fettered in any way but are subject only to the consent, approval and sanction mentioned in the said proviso" and This Indenture Further Witnesseth and it is hereby with like consent and concurrence expressly agreed and declared that the terms and provisions of these presents shall be deemed to be and are hereby incorporated in the within indenture of trust settlement."

And they are so incorporated physically and so remain to this day, the deed of trust bearing date January 20, 1932, and the deed of rectification bearing date June 15, 1936, having been stitched together and thereby making one document to that extent.

17. This then is the deed of rectification which bulks so large in this litigation. What a deed as this is out to rectify cannot be clearer. The words "for such purpose" are words inserted in the parent deed through mistake. More, the words are words contrary to the intention of the settlor and to the tenor of the deed as well. Expunge them, and read the parent deed as if the words were never there. So, the deed of rectification is clarity itself. That is not in dispute. What is in dispute is the power of the settlor to rectify the trust-settlement in the manner he has done. That has been debated before me.

18. In order to follow such a debate, what exactly the proviso, where the controversial words "for such purpose" occur, provides for, must be grasped. It consists of two parts. The first part clothes the trustees with the power to vary from time to time, with the consent of Modhoo Sooden, the settlor, during his lifetime, and thereafter only with the consent of his son, Moti Lall, the investments herein referred to. Now, what are the investments herein referred to, that is referred

**Paragraph 12 under the heading: E. Limitation upon such powers.

to in the deed of trust? Two types of investments are there to be seen. The first type is investment of sale-proceeds of "116" in moveables and immovables in and around Calcutta, in the event of sale thereof, namely, "116", to Sreelal Chamaria being completed. [See paragraph 12 ante under the caption: D. Powers of trustees.] The second type is investment.

(i) of "the surplus income, if any, in any of the investments hereby authorised in augmentation of the capital of the trust-estate,"

(ii) by the purchase of premises and by the making of investments out of monies belonging to the trust, and

(iii) by the investment of the sale-proceeds etc. of such premises and investments, as also of compensation-money received for acquisition, under the Land Acquisition Act and allied statutes, of "116", or of the properties purchased with the trust-money, or of any part or parts thereof.

19. I place the second type of investments in the same category, because, in the ultimate analysis, it is the trust-money that the settlor proposes to be pressed into service. Be it the surplus income of any of the investments or the compensation-money as the result of acquisition, it is the trust-money all the same. No doubt, so viewed, in this category, comes also the investment of the sale-proceeds of "116" in the event of the sale thereof to Sreelal Chamaria. Because it is trust-money too. But for convenience of treatment of the subject, I keep it separate.

20. Such then are the investments "herein referred to." And such are the investments the trustees may vary from time to time with the requisite approval: that of Modhoo Sooden so long as he is alive and thereafter of his son Moti Lall. Here ends the first part of the proviso under discussion.

21. Now to the second part of the proviso with the controversial expression "for such purpose" in it. For such purpose, that is, for periodic variation of the investments just noticed, the trustees shall have power to sell, mortgage, charge, lease or dispose of—

(a) the lands, hereditaments and premises hereby settled, that is, "116", and also

(b) the premises purchased and investments made out of monies belonging to the trust.

Here ends the second part of the proviso under discussion, leaving aside that part which makes provision for investment, dealt with already in paragraph 18 ante.

22. Now, do I see any mistake in the insertion and use of the words "for such purpose" in a proviso as this? Mr. Sinha, appearing for the plaintiffs, sees no mis-

take here nor any evidence, far less "clear and distinct evidence", of any manner of a mistake. He comments on the absence of the written instructions, on the foot of which the deed of trust, exhibit C, was drafted and drawn up, and non-examination of the solicitors, whose would have been the best evidence on the point as to what the original intention of the settlor Modhoo Sooden was. Mr. Sen, appearing for LIC the second defendant, sees in the use of the words "for such purpose" a mistake, "patent and palpable", (to quote his very words),—a mistake which proves itself and needs no evidence.

23. Let such rival contentions be examined in the light of variation of each of the two types of investment. Because, only for such purpose, that is to say, for periodic variation of each type of investment, the trustees have the power to enter into a mortgage of "116" and the property purchased with the trust-money. [I am confining myself now to mortgage with which alone this litigation is concerned.]

24. Take first the investment of sale-proceeds of "116" in properties in and around Calcutta, in the event of the sale of "116" to Sreelal Chamaria being completed. The trustees have the power to vary, from time to time, such investment of the sale-proceeds of "116", in properties in and around Calcutta. For such purpose, that is, for such periodic variation, sure enough, "116" cannot be mortgaged by the trustees in whom "116" does not vest, so soon as the sale of "116" to Sreelal Chamaria is completed. "116" then vests in Sreelal Chamaria. The trustees can mortgage their property, not the property of another, the purchaser Chamaria. In this context, the words "for such purpose" appear to be unmeaning. It is, as Mr. Sen contends, a mistake, "patent and palpable", proving itself and needing no evidence.

25. Take now the other type of investment: investment of the surplus income of the existing investments, investment by the purchase of premises, etc. listed in paragraph 18 ante. The trustees may vary such investment too from time to time. For such purpose, that is, for such periodic variation, they may mortgage "116". I would not call it unmeaning. Because "116" then vests in the trustees, the sale thereof, that is, of "116", to Sreelal Chamaria, having failed. Indeed, on that assumption only I can proceed so. Thus, the trustees can well mortgage that, namely, "116", which then vests in them. In this context, therefore, a provision as this does not defy meaning in the way it does in the other context.

26. But it looks so unusual, if not unreal, in that in providing so, the settlor is attaching far greater importance to the branch of a tree than to the tree itself.

The main corpus, "116", is the tree. And the investments of the surplus income, if any, and all that are so many branches of the tree. Compulsory acquisition of "116"—the whole of it—presents no problem. Then, the tree itself vanishes. Be that as it may, "116" is the settlor's property, neither yours nor mine. And if his true intention is that, it has been his pleasure to provide so; to mortgage even "116" for the purpose of periodic variation of investments made, (i) of the surplus income, if any, (ii) by purchase of property with the trust-money, and all that—all arising out of the trust-estate in some form or other. The Court has little to do with it. Certainly the Court will not substitute its judgment for that of the settlor, the owner of "116." How large is the power of the owner and how small is that of the Court, in relation to what the owner does with his property, may best be illustrated by that well-known passage from Lord Commissioner Wilmut's judgment in the old case of *Bridgeman v. Green*, (1757) 97 ER 22:

"..... our laws, very unfortunately for the owners, leave them at liberty to dissipate their fortunes as they please, to the ruin of themselves and their families. The Roman laws drew a line between liberality and profusion; they very wisely for the public, and very kindly for the parties, considered immoderate extravagance—'inconsulta largitio'—as a distemper of the mind, and treated a 'prodigus' as a mad man They thought it safer for the public, as well as kinder to individuals, to lay by their estates whilst they were under the tyranny of their passions, and reserve them for their use, when under the direction of their reason. But our laws strike no such boundary; 'stat pro ratione voluntas' is the law with us; every man may give a part or all of his fortune to the most worthless object in the creation; and this Court never did, nor ever will, rescind or annul donations merely because they are improvident, and such as a wise man would not have made; this Court disclaims any such jurisdiction"

So do I, governing myself by the principle to be deduced from the above passage, even though the facts of that case are completely otherwise: the case of an overbearing footman and a moron of a master, who was prevailed upon, aided and abetted by an unscrupulous attorney, to execute conveyances of various forms, to his utter ruin. Hence, if the true intention of the settlor here, Modhoo Sooden Sain, is that: mortgage the main corpus, "116", for the purpose of periodic variation of such investments, his intention shall prevail over what the court considers to be right or wrong in a matter as this.

27. But is his true intention so, at the relevant time, at the inception of the trust? That is the point for determination. By the trust-deed, the trustees are saddled with so many duties to be performed. Here are the more important of them:

(i) payment of municipal and other taxes and outgoings payable for the time being as respects "116",

(ii) costs of necessary repairs, if any, (no house, it may be taken for granted, being above repairs),

(iii) expenses for the maintenance and residence of the settlor Modhoo Sooden himself, as also for the maintenance and residence in a suitable manner of his son Moti Lall and his daughter-in-law Nandarani during the natural life of each,

(iv) expenses for the maintenance, residence and education of the sons (including adopted son) and grandsons of Moti Lall, until they respectively attain the age of eighteen years,

(v) expenses for the maintenance of the daughters and grand-daughters of Moti Lall, until they are respectively married, a sum not exceeding Rs. 3,000 being earmarked for the marriage of each in a suitable manner,

(vi) expenses for the upkeep of a motor-car or of a carriage and a carriage-horse, so long as Moti Lall is not in a position, by his own earnings, to meet the same, or in case Moti Lall, by his own earnings, is capable of defraying any portion of such expenses, the expenses by the trustees for payment of the deficit amount, and

(vii) expenses for the funeral and "shrad" ceremonies of the settlor Modhoo Sooden, at a sum not exceeding Rs. 1,500, of his son Moti Lall, at a sum not exceeding Rs. 1,000, and of his daughter-in-law Nandarani, at a sum not exceeding Rs. 500.

A formidable list of duties, by any standard, imposed upon the trustees by the maker of the trust—duties which mean expenses on quite a large scale to be met out of the corpus of the trust-estate. And what is the corpus? "116" is one, and much the most important too. And what is the other, the only other, going by the trust-deed? Eighteen types of ornaments—gold, pearl and diamond—and sixteen types of furniture listed in the second schedule to the trust-deed. "116" is listed in the first schedule. This then is the whole of the corpus of the trust-estate. Ornaments and furniture do not yield any running income. Do they? You may sell them outright; but that is another matter. The house, which is "116" does. But how much such running income comes from "116" in the shape of rent comes to? About Rs. 1100 or Rs. 1200 as Dalim Kumar says in his evidence (q. 69). I take it, though he does no

say so, the rent is so: Rs. 1100 or Rs. 1200 a month. Not that Dalim Kumar's evidence has anything to merit commendation. It has little. Fencing is indeed writ large upon the whole of his evidence. Born in September 1932, as the entry in the birth register, exhibit A, goes to show, he is thirty-three years of age at the time he gives evidence in court. So he admits too (q. 15). Incidentally, there has been cross-examination yet about the birth certificate, the certified copy of which — exhibit A is just that over the signature of the Chief Executive Officer, Municipal Corporation, Chandernagore, — is automatic evidence as a public document under the conjoint effect of Sections 35 and 77 of the Evidence Act (1 of 1872). More, it "is evidence and conclusive evidence unless disproved": *Nanhak Lall v. Baijnath Agarwalla*, AIR 1935 Pat 474, and if I may refer to my decision without any impropriety, *Anil Krishna Basak v. Sailendra Nath Paul*, (1965) 69 Cal WN 593 at p. 602:

28. xx xx xx
 xx xx xx

Even on December 21, 1939, when Moti Lall retired as a trustee and nominated Nandarani as the sole trustee, by a deed of appointment, exhibit B, in the schedule thereto, the rent in his share of "116" was put as Rs. 160 a month since July 1937. If that is taken as the yardstick, the true intention on the part of the settlor not to put a clog on the powers of the trustees proves itself. Sure enough, with Rs. 160 a month, none of the imposing array of duties imposed upon the trustees can ever be performed, unless they know how to wield a magic wand. Yet let me stretch in favour of the plaintiffs to the breaking point and assume that the income from "116" was Rs. 1100 or Rs. 1200 a month.

29. Is that even reasonably enough for so many financial obligations cast upon the trustees, of whom the settlor Modhoo Sooden is one, by the trust-deed, and for so many years to come? Let it be remembered too that the settlor is none too solvent then. "116" itself is at the relevant time under an agreement for sale to Sreelal Chamararia for Rs. 45,000, out of which Modhoo Sooden has received Rs. 1,000. More, it has been stipulated that, until completion of the sale to Chamararia, Modhoo Sooden will get from him Rs. 490 a month. See paragraph 12; C ante. With the agreement for sale rescinded, as indeed it was rescinded, that income goes. Placed so, and with so many financial obligations to be discharged over the years in future, will such a one intend to tie up "116" in the manner it is tied up, because of the words "for such purpose"? And how crippled the trustees will be, because of these

words, is plain to be seen. I am now looking a little beyond mortgage, to realize the full impact of the limitation caused by the words "for such purpose". For such purpose, that is, for the purpose of periodic variation in investments of the second type (paragraph 18), if they come into existence ever, because the liabilities the trustees have to wrestle with look much more than the assets they have on their hands, they have the power to sell, mortgage, charge, lease or dispose of "116". Now, let not the milieu of "116" be forgotten for a moment. It is in Cotton Street. Cotton Street is Cotton Street in Burrabazar area of the town of Calcutta, the very hub of trade and commerce, — a notorious fact I take judicial notice of. Suppose, the trustees have a proposal for a lease with a fat rent and fatter premium within the bounds of law. But no investments of the second type there are. Upon all I see, there appears to be little chance of such investment having been there. Or even if they are there, no variation thereof can be done. In such a contingency, the trustees cannot enter into such a lease. By the "for such purpose" clause, to enter into a lease is subject to taboo upon the trustees: "No variation of investment, (assuming it to exist, its very existence ever being open to the gravest doubt), no lease, no matter how fat the rent and how fatter the premium": Thus, the source of so huge an extra income remains dried up, with no possibility of the augmentation of the capital, even though the financial liabilities go on mounting over the years, — and all because of the "for such purpose" clause. And this is only illustrative, not exhaustive. It will be, indeed, an exercise in futility trying to demonstrate that a house property in Cotton Street may prove a veritable gold mine, if properly handled, free of shackles. Can a prudent man, therefore, bring himself to believe that such restriction imposed by the "for such purpose" clause is the true intention, at the time of the creation of the trust, of the settlor, a prudent man too and the owner of "116" in a covetable part as this of the town of Calcutta? Or will not a prudent man take it for granted that that is a mistake which does not reflect the true intention of the settlor? The latter view appears to be far more probable. No wonder, the settlor goes for a deed of rectification and says as much, so soon as he discovers such a mistake contrary to his intention and contrary to the tenor of the trust-deed, as noticed in paragraph 14 ante.

30. Contrary to the tenor, because, calling upon the trustees to do so many things with expenses galore for long years to come, extending even up to the fourth generation of the settlor, and to

tie up "116", full of potentiality for a considerable additional income, in dead-hand for ever — and the "for such purpose" clause comes to that, in the ultimate analysis, — go ill together. The burden then imposed upon the trustees becomes grossly unequal to the where-withal to discharge such burden with. Sure enough, the eighteen types of ornaments, — gold, pearl and diamond, — and the sixteen types of furniture, listed in the second schedule to the trust-deed and constituting the residue of the corpus of the trust-estate, cannot throw in their weight with a view to tilting the scales and making the unequals equal.

31. Upon the whole, therefore, I find as a fact that, at the time the settlor creates the trust, his true intention is — and such is the tenor of the trust-deed too — that the trustees' power to deal with "116", the main corpus of the trust, are to be free and full, and not to be restricted by the "for such purpose" clause. Only through inadvertence a clause as this is there in the trust-deed. And there is little to be surprised at such inadvertence, once what the trust-deed is like be remembered. Schedules apart, it runs into four pages, closely written — a specimen indeed of fine penmanship. These four pages in turn contain between themselves two hundred twenty-three lines. If, in this background, the settlor cannot see the wood for trees, what is there to cause surprise? I do not see any. A mistake is a mistake. Even with the best care in the world, people do make mistakes from time to time. The settlor Modhoo Sooden does no more.

32. In having come to this conclusion, I have endeavoured never to lose sight of the fact that, at the time Modhoo Sooden founds this trust, his son Moti Lal is an undischarged insolvent, as Mr. Sinha rightly reminds me. Modhoo Sooden says just so in the deed itself, exhibit C, when speaking about his three sons.

"... and the youngest Moti Lal Sain is at present an undischarged bankrupt." vide the bottom of the first page of the original deed of trust, exhibit C.

More, Modhoo Sooden is not enthusiastic either, about the future of Moti Lal, the pleader, practising in the Small Causes Court, Calcutta, as he himself records immediately after the extract reproduced above:

"And whereas the settlor is desirous of making a provision for the maintenance of his son, the said Moti Lal Sain, about whose success in his profession, the settlor is not certain, and of his family other than his first wife, Srimati Radha Rani Dassi, who is living separately." It is, therefore, clear, as Mr. Sinha submits, and rightly, in my judgment, that

Modhoo Sooden, by the trust-deed, is making provisions for his son Moti Lal, Moti Lal's second wife Nandarani, their children and their children's children. Be it so. From this, the inference by no means follows that his true intention at the time is to tie up "116" by the "for such purpose" clause. A consideration as this cannot outweigh the considerations which lead me to hold that the true intention of the settlor, at the time he creates the trust, is to leave the power of the trustees to deal with "116" unfettered and unrestricted. That apart, solvent or insolvent, discharged bankrupt or undischarged bankrupt, Moti Lal is practically his only son at the relevant time. As he himself says in the trust-deed, of the three sons of his, the eldest Nandalal died unmarried in or about 1909, the second Kanailal has become a sanniyasi whom he has, therefore, disinherited, and the third is Moti Lal. And to this practically lone son of his, he gives pride of place, only next to him, in all matters of importance, throughout the trust-deed. Sale-proceeds have to be invested? Investments have to be varied? Well, the approval of the settlor is a precondition, during his lifetime; and after his death, the approval of Moti Lal. The settlor is not discarding Moti Lal, even though he is an undischarged insolvent. And that Moti Lal is made a co-trustee with the settlor himself has been noticed. This manner of confidence in the son Moti Lal continues right up to the death of the settlor Modhoo Sooden, when he leaves behind him a will by which this very son of his, Moti Lal, is appointed executor. The date of Modhoo Sooden's death is April 8, 1939 — more than seven years after execution of the trust-deed on January 20, 1932. The will has duly been probated too, the date thereof being August 10, 1939 or thereabouts. All this is to be found in Moti Lal's own document, the deed of appointment of a new trustee, exhibit B, by which he retires from the office of trustee, temporarily though, and nominates, just in keeping with the deed of trust, exhibit C, his wife Nandarani as the sole trustee. The date of a deed as this, exhibit B, is December 21, 1939. So, Moti Lal having been an undischarged insolvent can hardly be regarded as a mirror reflecting the settlor's true intention to tie up "116" by the "for such purpose" clause. On top of that, that consideration of all considerations remains (paragraph 29) and may be stated at the risk of repetition. With Rs. 160 as the monthly income from "116", the performance by the trustees of so many duties, involving expenses and expenses over the years, brings the trust-deed on the verge of ridicule and absurdity. Surely, the settlor's intention is not to rush in for a sham trust-deed, with a view

to bluffing himself, his son and daughter-in-law, their children and their children's children. With Rs. 1100 or Rs. 1200 as the monthly income from "116", the settlor does not land himself in such an absurdity. Even then, if the income remains stagnant, though "116", because it is "116", is full of possibility for earning more and more, it becomes impossible for the trustees to do what they are called upon to, up to the fourth generation of the settlor, in terms of the trust-deed. So, I reiterate my conclusion that the intention of the settlor, from the very beginning, is to leave unfettered the powers of the trustees to deal with "116", and not fettered by the "for such purpose" clause: just what the settlor himself affirms in the rectification deed.

33. The authorities Mr. Sinha refers me to do not reach the contentions he advances. *Tucker v. Bennett*, decided on December 17, 1887, but come into the reports in 1888, (1887) 38 Ch D 1, is not a case of a voluntary deed which the settlor is out to set aside or rectify, just as is the case before me. It is a case of a marriage settlement, no doubt of a voluntary character, — a settlement which the plaintiff, Mrs. Mary Tucker, for whose marriage the settlement was made by her father, wants to be modified in a manner so as not to prevent her having the power to dispose of her after-acquired property, even in the event of there being no children of the marriage. Up to the date of the litigation, she has none. And, by the very terms of the settlement, in default of children, she has no power of appointment over her after-acquired property. Certainly, a case as this requires strong evidence to justify rectification; the more so, as the instrument is a marriage settlement, and "it is impossible to recall the marriage, or to remit the parties to the same position in which they were before the marriage", as observes Lopes, L. J.: page 16 of the report. Can this be said of the case on hand? By his deed of rectification, Modhoo Sooden remits the parties (including himself) to the same position in which they were before the deed of trust on January 20, 1932.

34. That apart, in the case under review, rectification is sought not by the settlor, but by his daughter, and that too through court. In the case on hand, rectification is sought and made by the settlor himself, without the intervention of the court, and with the concurrence of all concerned. Again, what counts is the evidence of the settlor's intention. If the evidence shows that the settlor had an intention different from what the deed reveals, Court do alter the settlement. The *Tucker* case, (1887) 38 Ch D 1 is conspicuous by the absence of evidence of such

intention. As Cotton, L.J. observes at page 14 of the report:

"Now no one for a moment doubts that where it is shewn that the actual contract and intention of the contracting parties was different from that which is expressed in the deed, the Court has jurisdiction to alter it. But there is an enormous difference between altering a settlement under these circumstances, and altering a settlement when there is no evidence whatever that there was a different intention at the time when the deed was executed, as is the case here." The enormous difference between the *Tucker* case, 1887-38 Ch D 1 and the case on hand lies just here. No evidence of a different intention in the one, but ample evidence in the other of an intention not to be fettered by the "for such purpose" clause; such evidence being in the shape of the very contents of the trust-deed, as analysed above, and the rectification-deed, which is nothing but a solemn declaration by the settlor himself as to what his true intention was, at the time the trust-deed was executed."

35. More, in the passage just quoted from Cotton, L.J.'s judgment, lies the answer to another contention of Mr. Sinha:

"Take a hypothetical case. Say, Modhoo Sooden, the settlor, raises an action himself for rectification of the deed of trust by deletion of the 'for such purpose' clause. Will you grant him a decree without insisting on other evidence?" By "other evidence" is meant the evidence of the solicitors entrusted with the drawing up of the deed of trust, surely on the foot of Modhoo Sooden's instructions, and that again in the light of the change of solicitors when the deed of rectification comes to be made. To a hypothetical question as this, I shall give a hypothetical answer:

"Yes; I shall grant him a decree if I can bring myself to believe what he says in the witness-box, the test in a court of law being qualitative, not quantitative (Section 134 of the Evidence Act), it being so futile to expect evidence in the ideal sense, and the tenor of the deed as a whole going ill with the fetters imposed by the 'for such purpose' clause; so much so, that it makes the deed a sham document. And yet the deed will be clothed with sacrosanctity beyond repair." In sum, the test is that laid down by Cotton, L.J.: Actual intention different from that which is expressed in the deed? By that test, all I see and have referred to in the foregoing lines completely satisfies me that the intention of Modhoo Sooden, at the relevant time, is different from that the "for such purpose" clause expresses.

36. At first sight it may look that the way I have been proceeding in reading

the intention of Modhoo Sooden, at the time he executes the trust-deed, as also in answering the hypothetical question posed by Mr. Sinha is not the way in which Kekewich J. proceeded in *Bonhotte v. Henderson*, (1895) 1 Ch 743, another case Mr. Sinha refers me to. But if the matter is looked into a little closely, it will be found that that is not so. On the contrary, there are observations there supporting the view I have been going by. In August 1894, the plaintiffs issued the writ in the action to rectify the voluntary settlement they had made on July 15, 1880. So they did, because they had recently discovered that the deed did not carry out their real intention which was that each of their two unmarried nieces should, in default of her having children, have the right to dispose of the capital of her fund as she pleased by will, and not that the power of disposition, on the death of one niece without children, would go over to the surviving niece. Upon such facts, I cull and indeed quote from the report, Kekewich, J. first heard it as a non-witness action on affidavit evidence and thereafter postponed it to be heard as a witness-action. The incapacity of the plaintiffs, in very infirm health then,—one was over seventy-four, and the other over eighty years of age—rendered it impossible to cross-examine them, or to obtain from them information on the points which their affidavit left at large. So handicapped, upon the whole of the affidavit evidence and such oral evidence as was possible to be led, Kekewich J. held, to put it in the form of propositions,—

A. "It is possible, and indeed probable, that they (the plaintiffs) did not thoroughly understand how the provisions of the settlement would or might work out, and even careful explanation might have failed to make them grasp the possible results."

B. "What I think most likely is, that they were content to adopt and act on Mr. Henderson's advice (Mr. Henderson being an equity counsel, a nephew, and a trusted friend of theirs), and to believe that the settlement was best in the form into which he had altered it."

C. "At any rate, I do not see my way to reforming a deed on these the only available materials, notwithstanding that now it operates otherwise than is wished, even though, as was strongly urged, the proposed rectification would bring the settlement more into harmony with recognised precedents, and the reasonable views of ladies desiring to make provision for unmarried nieces."

37. Now, how do these propositions work out in the context of facts before me?

Proposition A is just in consonance with what I have held in paragraph 31

ante, going by the contents of the trust-deed — the best evidence in the circumstances. The more so, as the mother-tongue of the plaintiffs in the *Bonhotte* case, 1895-1 Ch 743 was English; but the mother-tongue of Modhoo Sooden was not; and the deed of trust, exhibit C, is couched throughout in what purists call 'legal' English or "legal language", and bracket it with "esoteric jargon," — sure enough, much too much for one like Modhoo Sooden.

Proposition B is nothing but a finding of fact come to by Kekewich J. upon the whole of materials he had had put before him, the finding being that the plaintiffs believed the settlement altered by Mr. Henderson to be the best. Here upon the whole of the materials it is impossible to find so. It need hardly be emphasized that a case cannot be an authority on a question of fact: *Neta Ram v. Jivan Lal*, AIR 1963 SC 499.

Proposition C follows, as a matter of course, from the fact found, upon evidence, in proposition B. Once it is found as a fact that the true intention of the settlor, at the time he makes the settlement, is, say, X, it is futile to say that X plus 1 or X minus 1 brings the settlement more in harmony with the reasonable views of ladies desiring to make provision for unmarried nieces. When the settlor's intention is X, found as a fact, upon evidence, what does it matter that reforming the deed this way or that way brings the settlement more in harmony with this view or that, however reasonable it may be? It is not the court's settlement, according to what it considers to be reasonable. It is the settlement of the settlor. And his intention is clear. So, his intention will prevail over everything else.

Proposition C cannot, therefore, be attracted here. It cannot be, because the very internal evidence furnished by the trust-deed itself, containing amongst others a mistake, "patent and palpable", and evincing an impossibility or a near-impossibility of carrying out the mandate of the trust, leads me to find as a fact that the true intention of the settlor was to remain untrammelled by the "for such purpose" clause. See paragraphs 22-32 ante.

38. There is a little more yet about the *Bonhotte* case, 1895-1 Ch 743. The decision of Kekewich J., refusing to reform the deed and dismissing the action, was carried on appeal: *Bonhotte v. Henderson*, (1895) 2 Ch 202. The court of appeal (Lindley, Lopes and Kay L. JJ.) examined the evidence and found it wholly insufficient to shew that the intention, at the time the settlement was made, was different from that carried into effect by the settlement. Their Lord-

ships, therefore, dismissed the appeal, but laid down no principle beyond referring to the observations of Cotton L.J. at the close of his judgment in the Tucker case, (1887) 38 Ch D 1. Those observations are:

"It requires very clear and distinct evidence to shew that there was some different intention at the time when the settlement was executed, and, with the exception of this, *Wollaston v. Tribe*, (1869) 9 Eq 44, there is hardly a single case when many years after the settlement was executed, on mere parol evidence, uncontradicted, because there was none to contradict it, the Court has altered a deed because one of the parties afterwards desired that it should not stand as it was executed."

Here what I have before me is much more than mere parol evidence: the internal evidence of the trust-deed itself which, in the light of all surrounding circumstances, demotes the trust created to a farce and shows the settlor to be a consummate hypocrite, if the "for such purpose" clause is regarded as his true intention. And delay? Only a little less than four years and a half in the case on hand; whereas in the Tucker case, (1887) 38 Ch D 1, the delay was fourteen years from 1871, the year of the settlement, to 1885, the year in which the action was brought, and in the *Bonhotte* case, 1895-1 Ch 743, the delay was as much, from July 15, 1880, the date of the voluntary settlement, to August 1894, when the plaintiffs issued the writ in their action.

39. Then, delay is not the answer; evidence is, delay or no delay. The authority Mr. Sen cites: *Walker v. Armstrong*, (1856) De G M & G 531, illustrates the point. A list of dates, about the facts of this case is apt to assist one's convenience:

1. June 1824.

A settlement made on the marriage of the plaintiff Captain Walker and his late wife Anne Walker gave a joint power of appointment to them over the whole, and also a power of testamentary appointment (notwithstanding coverture) over some of the real estates in contest in this litigation.

2. May 17, 1825.

On the discovery, sometime after the execution of the marriage settlement, that, according to the limitations put in there, contrary to the wishes of the settlors, the daughters of a son of the marriage would not in any event take, and that Mrs. Walker would not be able to dispose of the estate not derived from her brother. Accordingly, these errors were rectified by a deed on this date (May 17,

1825), Captain Walker and his wife being of one part and the trustees of the other part thereto. (Cf. the deed of rectification in the case on hand.)

3. February 28, 1827.

Mrs. Walker made her will, reciting the power contained in the original settlement, and also every other power enabling her so to do.

4. October 24, 1840.

On this date again, contrary to the intention of the settlors, they appointed all the estates to such uses as they (Captain and Mrs. Walker) should by deed appoint, and in default thereof, during the joint lives of Captain and Mrs. Walker, as to one half in trust for Captain Walker and as to the other half, in trust for the separate use of Mrs. Walker, and after the decease of either to the use of the survivor for life, and after the decease of the survivor, to such uses as Mrs. Walker should by deed or will appoint etc.

5. December 1854.

Mrs. Walker died without issue.

41. Upon these facts, could the will Mrs. Walker had made on February 28, 1827 stand? It is a will she had neither altered nor revoked until her death in December 1854. Still it could not stand if the deed of October 24, 1840, operated as a revocation, as indeed it did *ex facie*. But upon evidence it stood proved manifestly that in order to cure the defect in the instrument of May 17, 1825, the instrument of October 24, 1840, was prepared and framed, materially beyond instructions and authority, and executed too in error. So, the will stood. Hence I say, evidence is the answer, not delay, which in the Walker case, 1856 De G M & G 531 is plain to be seen: sixteen years from 1824 to 1840, without the intervention of the court, and more than thirty years, 1824 to beyond 1854 when Mrs. Walker died, giving rise to the litigation and intervention of the court thereafter.

42. Because of mistakes, not once but thrice, in 1824, 1825 and 1840, and that too by those whom law holds out to laymen to be competent in such matters, it will not be perhaps out of place to notice how Knight Bruce L.J. opens his judgment in the Walker case, 1856 De G M & G 531 — an opening Kekewich J. describes in the *Bonhotte* case, 1895-1 Ch 743 as "famous for an example of Lord Justice Knight Bruce's humour":

"This litigation owes its origin to the manner in which a series of professional gentlemen in the north of England permitted themselves to transact, or in more accurate phrase to entangle and perplex, some legal business intrusted to their

care. These licenced pilots undertook to steer a post-captain through certain not very narrow straits of the law, and with abundance of sea room ran him aground on every shoal they could make. First in 1824, then in 1825, and again some years afterwards, was the gallant officer encumbered with help of a description for which he could perhaps supply a better term than I can."

In the case on hand, "the licenced pilots" ran Modhoo Sooden aground only on one shoal: the shoal of the "for such purpose" clause, which is self-defeating, not only because of the mistake, "patent and palpable", pointed out above (paragraphs 22-24 ante), but also because of a solemn trust being brought on the verge of ridicule and absurdity for reasons stated in the foregoing lines (paragraphs 25-32 ante). But soon enough, — not even before the expiry of five years —, by when things remained as they were, with no vested rights to be defeated, Modhoo Sooden detected the mistake and cured it, luckily not running into a fresh mistake like the Walkers, and that too with "the consent and concurrence" of all concerned, as testified to by the signatures of all to the rectification deed. In the Walker case, 1858 De G M & G 531, the mistakes were proved manifestly by evidence. Here also the solitary mistake is proved to demonstration, so to say, by the internal evidence of the original trust-deed itself and the surrounding circumstances, strengthened so much the more by the rectification deed, the author thereof and of the trust-deed being one and the same person Modhoo Sooden who takes the precaution of having the consent and signatures of all concerned.

43. I have also been referred to the law summarised in Halsbury's Laws of England. Mr. Sinha cites article 1684 at page 908, 3rd edition, in support of his contention that mere parol evidence, in absence of instructions for preparing the conveyance and the like, cannot vary a settlement already made. But parol evidence on oath is not valueless either. To notice the observations of Kekewich J. in the Bonhotte case, 1895-1 Ch 743—observations which lend support to the view I have taken, as stated in paragraph 36 ante:

"It may be too much to say that no effect is to be given to a statement on oath that if the settlor had known the deed to be what it is he or she would not have executed it."

Here also it is too much to say that no effect is to be given to the solemn declaration of Modhoo Sooden in the deed of rectification. Parol evidence of the settlor, coupled with evidence in the shape of instructions for preparation of the deed,

is not the only way to reach rectification either. As I have made it clear, I am not going that way at all. I am going instead by the internal evidence furnished by the deed. And in support thereof, I find the following in this very article: article 1684, Mr. Sinha quotes—

"... notwithstanding the absence of any evidence from sources outside the settlement, or from any recital contained within it, that a mistake has been made, the deed itself may afford sufficient evidence of the intention to enable the Court to rectify the mistake."

What enables the Court to rectify the mistake enables Modhoo Sooden so to do. I have held no more. And in so far as this article summarises the law laid down in the Tucker (1887) 38 Ch D 1 and Bonhotte case, 1895-1 Ch 743 I have little to add what goes before. The other article Mr. Sinha refers me to: Art. 1707 at page 919 *ibid*: merits like treatment.

44. Mr. Sen, on the other hand, takes me to Art. 1409, at page 839 of Halsbury's Laws of England, 3rd edn., volume 38, which bears:

"Where by mistake an Instrument creating trust of property does not express the intention of the disposer, it will be cancelled or rectified according as the true intention of the disposer requires." Modhoo Sooden did no more.

45. Mr. Sen refers me also to page 117 of Underhill's Law of Trusts and Trustees, 10th edn., where I come across a succinct summary of the law laid down in the Walker case, (1856) 8 De G M & G 531 I have governed myself by.

46. In sum, what counts is the true intention of the settlor. Once that is satisfactorily established, as it is here, the mere fact that the trust-deed conveys by way of settlement the trust-property irrevocably* does not mean that the deed cannot be reformed. True it is, as Mr. Sinha points out, that the words "irrevocably" and "irrevocable" have been used in the original deed more than once. So what? A clear mistake being there, the intention of the settlor being not manifestly what the deed expresses it to be, irrevocability can be no bar to the deed's rectification, as Mr. Sen contends, and rightly, in my judgment.

47. This concludes all I have been addressed upon, on the first issue, which I reproduce below, so that one may not have to put his thumb across the previous pages in order to find out what it is, noting at the same time, my answers alongside, in the light of all that goes before from paragraph 12 ante:

*See paragraph 12: B ante.

Issues.

II. (a) Had the settlor Modhoo Sooden Sain any power to execute the deed of rectification dated June 15, 1936?

(b) If so, what is the effect of the aforesaid deed?

Answers.

II. (a) : Yes.

(b) : The trustee or trustees may mortgage "116", having been conferred by the trust-deed the requisite power so to do.

48. I now take up the next two issues, issues numbering 2 and 3, which raise the questions of Nandarani's power to execute the mortgage-deed of November 29, 1946, and the validity thereof, as also of the deed of further charge dated January 19, 1949.

49. Nandarani is, at the relevant time, the sole trustee to the estate of Modhoo Sooden Sain. She is appointed as such by her husband Moti Lall Sain who retires from trustee-ship. This is in conformity with the provisions of the trust-deed and is not in the realm of controversy. The deed of appointment by Moti Lall is dated December 21, 1939, exhibit B, which is not in the realm of controversy either. (1)

50. Almost seven years after her appointment as the sole trustee to the estate of her father-in-law Modhoo Sooden, she executes the mortgage, now impugned, for Rs. 25,000, not as respects the undivided 4/21st share of her father-in-law in 116 Cotton Street, the whole of which admeasures 11 cottahs 8 chittaks and 34 square feet(2), but as respects what is allotted in partition suit No. 1152 of 1909, namely, lot A(3).—and it was so allotted on June 19, 1944, or thereabouts—, admeasuring 1 cottah 14 chittaks and 3 square feet, as mentioned in the schedule to the mortgage-deed, exhibit 1. What are the grounds on which a mortgage as this is impugned? The grounds are three. One, Nandarani had no power to execute the mortgage she did. Two, she executed the mortgage without the consent of her husband Moti Lall(4). Three, a mortgage as this contravenes the provisions of the trust-deed. The first two grounds cover issue No. 2. And the third covers issue No. 3.

51. None of the grounds can receive effect. Here are the answers thereto seriatim:

52. One, by virtue of the original deed of trust as reformed by the deed of rectification, with the "for such purpose" excised and deemed to have there never, the power of Nandarani, the sole trustee to the estate of Modhoo Sooden Sain, to execute the mortgage she did, does not appear to be arguable even. And it has not

been argued either. What has been argued instead is lack of Nandarani's power because of the "for such purpose" clause. But it has not been possible for me to accept such argument, resting on a clause which, because of the rectification deed, must be deemed to have never existed in the trust-deed.

53. Two, the consent of Moti Lall to such mortgage is evidenced by Moti Lall's letter dated May 12, 1946*, exhibit 3, to the address of Nandarani, whom he addressed as "Madam" and to whom he communicated, by this letter, his "approval and consent" to her proposal "to raise a loan of Rs. 25,000 on a mortgage of the divided 4/21 shares of premises No. 116 Cotton Street" at a specified interest, and that too, in accordance with "the directions contained in the Deed of Trust Settlement executed by my late father Modhoo Sooden Sain on 20-1-32." And Nandarani did mortgage just that on November 29, following. Dalim Kumar Sain, the first plaintiff and the only witness of the plaintiffs, seeks to escape from such an inconvenient position, by trying not to admit his father Moti Lall's signature on this letter dated May 12, 1946. But ultimately he gives in and admits that the signature "seems" to be his father's. And he is one who saw his father sign on many an occasion. Upon such evidence, Moti Lall's signature on this letter is tendered and marked exhibit 3-A, and very rightly too, because, by such evidence, Dalim Kumar's acquaintance with the signature of his father, within the meaning of the Explanation to Section 47 of the Evidence Act, is well proved. That being so, even the opinion evidence of a non-expert, which Dalim Kumar is, becomes good evidence to go by. No doubt, Dalim Kumar persists in 'fencing' after having been good enough to admit the little that goes before. But that cannot pay. What a type he is can best be judged by this: confronted with the signature of Moti Lall in the deed of trust, exhibit C, about which there is not even a breath of a controversy, first he will say no more than—

"It appears to be the signature of my father.": (q. 491).

Pressed to give a firm answer, he condescends to say:

*Paragraph 7(iii) ante.

(1) Paragraph 7 ante.

(2) Paragraph 12 : B ante.

(3) Paragraph 7 ante.

(4) Paragraph 8 : C ante.

"It is my father's signature,"; q. 492(a). Such is Dalim Kumar who attempts, hut in vain, to evade the obvious. In vain, because his untrustworthiness apart, there is the evidence of the second defendant L. I. C.'s employee Naresh Chandra Majumdar in whose presence Moti Lal signed the letter of May 12, 1946, in his then office (qq. 23-26). And upon such evidence, the whole of that letter gets into evidence, and very rightly too. If I may say so, as exhibit 3. First and last, the non-controversial signatures of Moti Lal in the trust-deed, exhibit C, and the rectification-deed, exhibit D, have only to be compared with his signature on this letter of May 12, 1946, exhibit 3, in order to be convinced that the signatories are one and the same person: Moti Lal Sain. It is, therefore, impossible to say that Nandarani executed the mortgage without the consent of Moti Lal.

53-A. Three, it is a mere rehash of what goes under "one" above (paragraph 52). No provisions of the trust-deed, as it stands after the deed of rectification, are contravened by Nandarani's mortgage.

54. What holds good about the mortgage of November 29, 1946, holds equally good about the deed of further charge dated January 19, 1949. One is indeed in continuation of the other—a small loan of Rs. 5,000 following as a matter of course a big loan of Rs. 25,000, taken with the prior written consent of Moti Lal, so necessary in terms of the deed of trust. Not that Moti Lal strains at a gnat and swallows a camel.

55. The ground I have covered so far from paragraph 48 is enough to answer the issues I am on now, namely, issues 2 and 3, in favour of L. I. C., the second defendant. But the matter, concerning Nandarani's power to mortgage "116", the undivided 4/21st share of Modhoo Sooden Sain, converted in 1944 or thereabouts in partition suit No. 1152 of 1909 into a divided share pro tanto, namely, lot A, may be examined from another point of view. For such examination, let it be assumed that the deed of rectification fails in effect, and that necessarily, therefore, with the "for such purpose" clause in the original deed of trust, no express power has been conferred upon Nandarani qua trustee to convey "116" by mortgage. What follows then? Is Nandarani as trustee in that case destitute of any power whatever to enter into a mortgage? To consider the matter in this aspect I now proceed.

56. To the original trust-deed again. It provides that the trust-estate shall be for the use, benefit and enjoyment of the settlor, his son Moti Lal, Moti Lal's family, other than his first wife Radharani,

during the natural lives of the settlor, Moti Lal and Moti Lal's second wife Nandarani,

"subject however, to the payment of the costs of necessary repairs, if any, that the trustees may in their absolute discretion may think fit and proper"

The trust-deed, therefore, preserves, in the clearest possible terms, the implied discretionary power which vests, as a matter of course, in every trustee—the power to do all necessary acts for protecting the trust-property, in which is included the power to take necessary steps for keeping the property in repair. Section 36 of the Trusts Act, 2 of 1882, provides as much too:

"In addition to the power expressly conferred by the instrument of trust, a trustee may do all acts which are reasonable and proper for the protection or benefit of the trust-property"

I have quoted from Section 36 only the portion material for the point I am on now. So, the power of the trustee to keep the trust-property here in repair appears to be beyond question. The instrument of trust confers such power. So does the statute by Section 36.

57. S. 34. Mr. Sinha refers me to is no doubt there, enabling a trustee to apply for direction of the Court on the simple questions touching the management or administration of the trust-property. But it is an enabling section, and no more. All it says is: "Any trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction" Not that any trustee must. So, Section 34 cannot in any manner take away the power, conferred on Nandarani qua trustee, by the instrument of trust and Section 36, to expend money for repair.

58. That is not the big question before me. The big question is: What was the repair like, if at all, for which Nandarani, the sole trustee, mortgage "116", the divided 4/21st share of Modhoo Sooden therein, to raise two loans from India Provident Co., Ltd.—one for Rs. 25,000 on November 29, 1946, and another for Rs. 5,000 on January 29, 1949? One answer to the question is in the mortgage-deed itself of November 29, 1946, exhibit 1, and in the following terms:

"And whereas by the Return filed in the records of the said suit" and dated the 19th day of June 1944 made by Mr. S. N. Bhattacharjee, Barrister-at-law, the Commissioner of partition, appointed

*Pages 9 & 10 of the mortgage-deed, exhibit 1, and page 41 of the brief of documents, exhibit E.

**Suit No. 1152 of 1909. See paragraph 7: (ii) ante.

(a) For other questions, the answers to which have been dealt with here, see qq. 476-490.

in the said suit, allotted to the mortgagor, (1), for her 4/21 part or share in the said premises, lot A marked in the map or plan annexed thereto and coloured thereon in red, having an area of 1 cottah 14 chittacks and 3 square feet with buildings and structures to be held and enjoyed by her in severalty

And whereas by the said Return the Commissioner of Partition directed the Mortgagor to do certain things mentioned in the said Return in order to make her lot separate and independent.

And whereas pending the final confirmation of the said Return the said Mortgagor did by an order dated the 22nd day of June 1944 made in the said suit take possession of the 4/21 part or share of the said premises allotted to her

After these illuminating recitals, necessity proves itself. An undivided 4/21st part has to be divided, as directed by the Commissioner for partition, and has to be rendered viable, by making the lot allotted, separate and independent. More, Nandarani has entered into possession of that which is undivided, but has to be divided so. The plaint, by its averment in the 7th paragraph, admits the gist of all this. Such alteration and addition, to make the lot separate and independent, does need money, and not a little money at that. Thus, the note of urgency is plain to be seen. So, much more than necessity, urgent necessity, proves itself. And "the touchstone of the authority is necessity", to use the language of Pontifex J. quoted by Lord Davey in *Sham Sunder Lal v. Achhan Kunwar*, (1898) 25 Ind App 183 at p. 192.

59. Another answer is furnished by the evidence of Naresh Chandra Majumdar, the sole witness of L. I. C., an employee then of India Provident Co., Ltd. deputed by the secretary of the company, he inspects the particular house, that is, "116", —the house to be mortgaged —, sees its condition: whether it is falling down or not, whether it requires any repair or not: and reports verbally what he sees, both to the secretary and the accountant. So he does before the company sanctions the loan. Such are the facts elicited partly on cross-examination of this witness and partly in answer to Court (qq. 274-301 and 315). The application for loan is rested on the allegation, as Majumdar says, that the house is falling down. And he inspects the house to check it: whether or no it is really falling down; whether or no it does need repairs. In the course of his

inspection, he sees the condition of the house which is old and very bad, requiring repairs (qq. 315 & 316). In so far as such oral evidence refers to a fact which could be seen, it is the evidence of Majumdar, a witness, who says he saw it. It is therefore, primary evidence within the meaning of Section 60 of the Evidence Act 1 of 1872. But in so far as he says that the object of the loan was to meet the expenses for repairs and additional constructions, plainly it is hearsay, just what Mr. Sinha contends, and rightly too, because, as the witness admits, the secretary of the company, not a witness, had told him so (qq. 319 & 320 read with qq. 317 & 318).

60. Excise what is hearsay. Still what remain as admissible evidence, and good evidence at that, are—

A. The condition of the building, an old one, is very bad and does need repairs.

B. The 4/21st undivided share, converted into lot A, has to be made separate and independent.

61. Add to this a common-sense proposition that an old house, made the subject-matter of a trust-deed in 1932 in its undivided share, cannot but need repairs, alterations and additions, some fourteen years later, when it takes a new garb in the form of a divided share, to be partitioned, and in fact partitioned, by metes and bounds, as stated in paragraph 7 of the plaint. Not to do this little is not to preserve the trust-property, but to destroy it, or to put it on the path to a sure destruction.

62. The conclusion, therefore, follows that Nandarani, backed by the written approval of her husband Moti Lal, had the requisite authority, in terms of the original instrument of trust, unamended by the rectification-deed, no less in terms of Sec. 36 of the Trusts Act 2 of 1882, to enter into the two mortgages she did, unless, of course, there is anything to the contrary. Mr. Sinha contends that there is more than one thing to the contrary. What such things are may now be examined one by one.

63. The onus of proof of necessity, it is said, and rightly again, is on L. I. C., the statutory successor of the mortgage company, out to keep its security intact. That appears to be settled law now, though Mr. Sinha has been good enough to refer me to the *Sham Sunder Lal* case, 1898-25 Ind App 183 on the point, a case which rests on the restrictions on a Hindu widow's powers of alienation in olden days. But another law equally well settled is that when the relevant facts are before the Court, all that remains for decision is what inference should be drawn from them, and the debate on onus is rendered purely academical as held by Sir Lawrence Jenkins in *Seturatnam Aiyar v.*

(1) Nandarani is the mortgagor. Upon the death of Modhoo Sooden Sain on April 8, 1939, (paragraph 32 ante), by an order dated July 11, 1941, such death was recorded and Nandarani was substituted in his place as plaintiff, in partition suit No. 1152 of 1909: vide the earlier recitals in the mortgage deed, exhibit 1.

Venkatachala Gounden, 47 Ind App 76 = 25 Cal WN 485 = ILR 43 Mad 567 = (AIR 1920 PC 67) and by Mr. Ameer Ali in Chidambara Sivaprakasa Pandara Sanna-dhigal v. Veerama Reddi, (1922) 49 Ind App 286 = 27 Cal WN 245 = ILR 45 Mad 586 = (AIR 1922 PC 292). In the case on hand, the relevant facts are those tabulated in paragraphs 60 and 61 ante: (i) the very bad condition of the old building needing repairs after a long lapse of time and (ii) the inevitability of alterations and additions in making the divided 4/21st share into a separate and independent unit. And the only reasonable inference a prudent man can draw from these facts, indisputable, if not undisputed, is that the trustee Nandaranl's necessity of the money raised by loans, to preserve the trust-property and to make it viable, appears to be genuine. And the fact that India Provident Co., Ltd., whose mantle has fallen upon L. I. C., did make inquiries is amply borne out by Majumdar's evidence, no less, but much more, by the recitals in the mortgage-deed itself, traversing the entire history as to how Nandaranl came by what she was mortgaging, and what for: to make lot A an independent unit. Certainly, all this shows the result of proper and bona fide inquiry as to the existence of necessity in fact.

64. Indeed, upon all that goes before, the onus cannot show its head here. To use the language of Lord Dunedin in *Robins v. National Trust Co., Ltd.* 1927 AC 515:

"..... onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not further be considered."

No question of proving and conning the evidence arises here. The evidence is such that there can be one and only one conclusion: existence of necessity in fact of the trustee Nandaranl established by proper inquiry, but for which the mortgagor would not have recited all she did in the mortgage-deed. And it is a determinate conclusion. Why the debate then as to onus?

65. The contention then is that the question of repair is beyond pleadings, outside which I must not go. In support of a contention as this, reference has been made to *Kanda v. Waghul*, AIR 1950 PC 68, *M/s. Trojan and Co. v. Rm. N. N. Nagappa Chettiar*, 1953 SCR 789 = AIR 1953 SC 235, *Moran Mar Bassellos Catholikos v. Thukalan Paulo Avira*, AIR 1959 SC 31 and *S. N. Ranade v. Union of India*, AIR 1964 SC 24, emphasizing the importance of pleadings, beyond which the par-

ties cannot be allowed to travel, so as to make out a new case wholly inconsistent therewith. Nobody denies the salutary rule that the case pleaded has to be proved and found. But it is not an inflexible rule. To do justice between the parties, the pleadings are sometimes departed from. On a topic as this the case that at once comes to one's mind is *Firm Srinivas Ram Kumar v. Mahabir Prasad*, 1952 SCA 116 = AIR 1951 SC 177, where a suit for specific performance of a contract simpliciter was decreed for recovery of Rupees 30,000, on the admission of the defendants that they did take a loan of Rs. 30,000, though the case pleaded by the plaintiff was not a case of a loan at all. Or take the case of *Bhagawati Prasad v. Chandanmaul*, AIR 1966 SC 735, where distinguishing, amongst others, the *Trojan and Co.* case, 1953 SCR 789 = AIR 1953 SC 235 it is held that the formal requirement of pleadings can be relaxed. If two tests are satisfied. One, the plea is in substance in issue. Two, both parties have had opportunity to lead evidence thereon. There are other cases too to that end, such as *Rani Chandra Kunwar v. Narpal Singh*, (1907) 34 Ind App 27, where both parties go to trial on the plea that the plaintiff was given away in adoption, and, therefore, not entitled to inherit, though nothing like it is in the pleadings, and *Nagubai Ammal v. B. Sharma Rao*, AIR 1956 SC 593, where both parties go to trial with full knowledge that the sale being hit by his pendens is in fact in issue, though no specific plea to that end is in pleadings and necessarily, therefore, no specific issue is there too either.

66. Such then is the law laid down on pleadings and permissible variations therefrom. But are the pleadings here as bad as that? By paragraph 9 of the plaint, it is pleaded inter alia that India Provident Co., Ltd. took the mortgage with notice of absence of legal necessity and of contravention of the deed of trust. By paragraph 7 of the written statement, L. I. C. denies contravention of the deed of trust and absence of legal necessity. Repairs, alterations and additions do come under legal necessity. Matters of evidence, they have not to be pleaded: Order 6, Rule 2, of the Procedure Code (5 of 1908),

67. A word about Issues. In view of such pleadings, I fix a comprehensive issue, Issue No. 3, raising the question of execution of the two mortgages in contravention of the deed of trust. It may pertinently be asked why I fix Issues when Law J. completed hearing the evidence. Issues first, evidence next—is the mandate of Order 14, Rule 1, sub-rule (5), of the Procedure Code. Opening of the case over, before me, I search for the issues fixed by Law J. But I do not get any. Only then I am invited to strike the issues, which I

do. In the circumstances of the case, the order has been changed: evidence first, issues next, so far as the hearing before me is concerned.

68. Even taking a very strict view of the matter, non-mention of repairs etc. in the pleadings cannot lead the plaintiffs anywhere. Because, under Order 14, Rule 3, of the Procedure Code, which, by virtue of Order 49, Rule 3 *ibid.*, is not excluded from this Court, in the exercise of its ordinary original civil jurisdiction: just the jurisdiction I am exercising, the Court is not confined to pleadings only, in framing issues. It may draw upon the contents of documents produced by either party; Order 14, Rule 3, CL (c) and *Snow White Food Product, Ltd. v. Sohanlal Bagla*, AIR 1964 Cal 209, if I may, without impropriety, refer to my decision on the point. And there are documents, such as the mortgage-deed of November 29, 1946, exhibit 1, and the letter dated February 3, 1948, over the signature of Nandarani, soliciting a loan for a further sum of Rs. 5,000, for repairs etc., as the previous loan of Rs. 25,000 has been spent in payment of such liabilities and costs—a letter on the left hand corner of which Secretary I. B. Sen recorded on February 21, 1948, sanction of the loan solicited, exhibit 4-a. So a specific issue on repairs could have been there on the foot of such documents, even though the pleadings do not mention repairs. But it is not there in form. All the same it has been there in substance throughout the trial. More, both parties had opportunity to lead evidence on repairs, on which L. I. C.'s witness Majumdar is cross-examined at length. And certainly the case of repairs is not wholly inconsistent with the case of legal necessity made and denied in pleadings, but does form part of it, and is so consistent with it. So, the ratio of the latter class of cases, listed in paragraph 65, applies.

69. It is then contended that the "absolute discretion" conferred on the trustee for repairs is circumscribed by the source which consists of rents, issues and profits arising from the trust-estate. Where then, it is asked is the power of alienation by mortgage? The instrument of trust makes provisions in the following order:

First, payment of municipal taxes, other taxes and outgoings.

Second, costs of necessary repairs, if any.

Third, "subject as aforesaid, upon trust, to pay or defray out of the rents, issues and profits arising or derived therefrom all the expenses for the maintenance, residence" etc., catalogued in paragraph 27 ante.

70. Now, what rents, issues, and profits will arise from the 4/21st share of "116" if, after partition and allotment of lot A to Nandarani, it is not made viable

as an independent unit? Viability has, therefore, to be there as of necessity. That means money. Neither Rs. 160 a month (which appears to be the correct figure) nor Rs. 1100/1200 a month (which appears to be a figure inflated by Dalim Kumar who was a lad of fourteen years of age in 1946) can make lot A what it must be: a separate and independent unit. So, the implied discretionary power of the trustee to do what she has done is plainly there, reinforced by the absolute discretion (which, means nothing short of that: absolute discretion) conferred by the instrument. Let it be said at the risk of repetition* that not to do, in that situation after allotment of lot A, what the trustee does, is to make sure that such valuable trust-property goes to pieces.

71. The fact that the question of repairs has not been put to Dalim Kumar is a made a point of too. But as one of the plaintiffs he has had full notice beforehand of this topic of repairs revealed by the documents referred to above. It is, therefore, hardly necessary to waste time in putting questions to him upon it; the more so, as at or about that time he was no more than a lad of fourteen years of age, and can only know next to nothing on a matter as this.

72. Exhibit 4-a, evincing the sanction of a loan for a further sum of Rs. 5,000, on February 21, 1948, and that too for repairs etc., is stigmatised as a fact "after the event", that is, after the big loan of Rs. 25,000 on November 29, 1946, by a mortgage-deed of even date, exhibit 1, with the approval dated May 12, 1946, exhibit 3, of Moti Lal for such loan. That, in my judgment, is taking too narrow a view of the matter. Moti Lal Sain's letter bearing date May 12, 1946 exhibit 3, authorizing Nandarani to raise a loan of Rs. 25,000, by mortgage, the mortgage-deed bearing date November 29, 1946, exhibit 1, clearly showing the reason for such a loan (1), this letter of Nandarani bearing date February 3, 1948, the left-hand corner of which bears the sanction dated February 21, 1948, for the further loan of Rs. 5,000, for completion of repairs, and the deed of further charge bearing date January 19, 1949, exhibit 2, must be read together. Once that is done, —and to that is added the evidence of Majumdar, in so far as it is not struck by hearsay,—there can be no escape from the conclusion that both the loans were taken for repairs, additions and alterations, inevitable in the circumstances. The only thing that creates a little difficulty is that the letter of Nandarani bearing date February 3, 1942, upon which the sanction of another loan, exhibit 4-a, for Rs. 5,000 is recorded, is not formally proved. Confronted with this letter over his mother's signature, Dalim Kumar is de-

* Paragraph 61 ante.

terminated not to speak the truth (q. 497 et seq.) Majumdar proves the sanction order only, exhibit 4-a (qq. 27-35). But under Section 39 of the Evidence Act (1 of 1872) I am entitled to look into Nandaraní's letter, as I consider it necessary to the full understanding of the sanction of the loan, exhibit 4-a. That apart, I am entitled too to compare the signature of Nandaraní on this letter with her signatures in the two mortgage-deeds, which get into evidence by consent, the signature in the first mortgage having been proved too by Majumdar (qq. 10-22). Having done what I am entitled to do, under Section 73 of the Evidence Act, I am completely satisfied that the signature on this letter dated February 3, 1942, is the signature of the lady, who signed the

two mortgage-deeds. It only remains for me to put on record that I have considered this of my own. Not that I have been addressed on this either by Mr. Sinha or by Mr. Sen.

73. These are all the things, as Mr. Sinha contends, contrary to the conclusion I have indicated in paragraph 62. I am unable to accept any one of such contentions. I, therefore, reiterate my conclusion recorded there: that even under the original instrument of trust, unamended by the deed of rectification, Nandaraní, the sole trustee to the estate of Modhoo Sooden Sain, had the power to enter into the two impugned mortgages she did. And in view of the ground covered from paragraph 48 ante, I answer the second and the third issues as under:

Issues.

2. (a) Did Nandaraní Dassi have any power to execute the deed of mortgage dated November 29, 1946?

2. (b) Were the aforesaid mortgage and the deed of further charge dated January 19, 1949, executed by Nandaraní Dassi with the consent of her husband Moti Lal Sain?

3. Was the execution of the mortgage dated November 29, 1946, and of the deed of further charge dated January 19, 1949, by Nandaraní Dassi made in contravention of the deed of trust dated January 20, 1932, as alleged in paragraphs 8 and 10 of the plaint?

74. Now, barring the general issue on reliefs, the sixth one, remain two more issues, the fourth and the fifth ones, concerning limitation. The fourth is rested on what the plaintiffs allege in the eleventh paragraph of the plaint: that they came to know for the first time about the two mortgage-deeds on or about March 5, 1959. The fifth simply raises the question whether or no the suit is barred by limitation.

75. The suit I am seized of was instituted on July 3, 1959. It, therefore, did pend on January 1, 1964, — the date of commencement of the new Limitation Act 36 of 1963. By virtue of Section 31, Cl. (b), thereof, nothing in this Act (the new Limitation Act) shall affect any suit instituted before, and pending at, the commencement of the Act, that is, January 1, 1964. The new Limitation Act does not, therefore, govern this litigation. The old Limitation Act, 9 of 1908, does.

76. Now, the question is which article of the old Limitation Act rules the litigation on hand. Two articles have been pressed upon me: Articles 91 and 120. Article 91 prescribes three 'years' limitation for a suit to cancel or set aside an

Answers.

2. (a) : Yes.

2. (b) : Yes (paragraphs 53 and 54).

B. No.

Instrument, not otherwise provided for, terminus a quo being when the facts which entitled the plaintiff to have the instrument cancelled or set aside become known to him. Article 120 is the residuary article which prescribes six years' limitation for a suit for which no period of limitation is provided, terminus a quo being when the right to sue accrues.

77. Article 91 cannot be called in aid here. In substance, the suit on hand is a suit for a declaration that the two mortgage-deeds are void. So, Art 91 is not for such a suit. No doubt, there is a prayer too, so beloved of some of those who draft plaints, for an order that the two instruments be cancelled and delivered up. But it is a surplusage, which the plaintiffs do not need, once they get the declaration they pray the Court for. A Court is not a slave to the form of a plaint. It goes by substance. And, in substance, the suit is such that it repeals Art 91. If I may say so, this is plain common sense too. If the Court voids the instrument, what remains in it for the Court to cancel or set aside, and to deliver up, even though an otiose prayer to that end is there? If an instrument is void, it means that it is

"not only bad, but incurably bad"; it means that it is "in law a nullity", adapting in the context here the language used by Lord Denning in *Macfoy v. United Africa Co Ltd.* (1961) 3 All ER 1169. And still cancelling it?

78. On this consideration alone, I shall not invoke Art. 91, in spite of an additional point Mr. Sinha urges upon me, on the strength of *Sanat Kumar Mitra v. Hem Chandra De*, AIR 1961 Cal 411, that this article is restricted to suits between parties to an instrument. Not that this case does not take the view I have taken in the preceding paragraph. It does, adding however, that Art. 91 applies when the plaintiff is a party to an instrument. In the

end, the decision is rested on Art. 134-A. So, that, for which Mr. Sinha relies upon it, appears to be in the nature of an obiter. It is unnecessary to pursue the point further.

79. Article 120, I hold, rules the litigation. So, the suit as this must have to be instituted within six years from when the right to sue accrued. Now, when did the right to sue accrue here?

80. To answer the question just posed, one way is to remember the ages of the five plaintiffs, upon pleadings and evidence, at the date of the institution of the suit (July 3, 1959).

Here are they, with certain additional but ancillary points—

(1) Serial No.	(2) Names in short and numbers of plaintiffs.	(3) Date or year of birth.*	(4) Reference to		(5) Age on July 3, 1959.	(6) When minority ceased or ceases.
			(a) pleadings.	(b) evidence.		
1.	Dalim, No. 1.	26.9.1932.	Para. 11 of the plaint.	Birth Regr: Ext. A. QQ. 15-17 to Dalim.	26 years odd months.	26.9.1950.
2.	Lakshmi Sona, No. 2.	1939 or so.	"	Q. 37 <i>ibid.</i>	20 years.	1957 or so.
3.	Dinendra, No. 3.	1941 or so.	"	"	18 years.	1959 or so.
4.	Binapani, No. 4.	1947 or so.	"	Q. 10 <i>ibid.</i>	12 years.	1965 or so.
5.	Krishna Kumar, No. 5.	1949 or so.	"	Q. 11 <i>ibid.</i>	10 years.	1967 or so.

81. A glance at this chart goes to show that no question of limitation can arise in the case of plaintiffs 2-5, that is to say, in case of plaintiffs other than No. 1, Dalim Kumar, in any view of the matter. Binapani and Krishna Kumar, the plaintiffs numbering 4 and 5, are minors at the date of the suit which they have raised by their next friend and brother Dalim Kumar. And this they are entitled to do, without coming on the edge of the law of limitation. The disability of Lakshmi Sona and Dinendra Kumar, the plaintiffs numbering 2 and 3, ceased in 1957 and 1959 respectively, and each would get six years time from then, — when they became of age —, to file the suit. As it is, they filed it on July 3, 1959, much earlier than the prescribed terminus ad quem. In vain, therefore, has the issue of limitation been raised against them.

82. The way I am going appears to be plain enough, free from any doubt or difficulty, resting as it does on the clear language used in Section 6, sub-section (1) of the Limitation Act 9 of 1908. Still Mr. Sinha has been good enough to cite two authorities: *Gangadhar Sarkar v. Khaja*

Abdul Ajj Nawab Salimulla Bahadur, (1909) 14 Cal WN 128 and *Jawahir Singh v. Udai Parkash*, AIR 1926 PC 16, the ratio of each, shorn of facts, which it is hardly necessary to state, being: that time cannot commence to run against the plaintiffs who are of nonage, run though it may against the adult ones. That is just so here. Time may run against Dalim from September 26, 1950; not, however, against the rest from that date. Against them, time runs from when they come of age. That being so, limitation cannot hit them, as the dates depicted in the chart above go to show.

83. Dalim Kumar remains. Time commenced to run against him from September 26, 1950, when he had just come of age and shaken off the disability on account of minority. So, unless there be some other consideration, the suit by him appears to be barred, instituted as it has been on July 3, 1959, far more than six years after September 26, 1950.

84. It is said, however, that very various considerations stand in the way of a conclusion as this. Here are they, under suitable headings.

* Dalim Kumar speaks of the ages of his brothers and sisters on the date of his evidence (April 21, 1965). The years of their birth have been calculated on that basis.

I Knowledge of Dalim Kumar for the first time on or about March 5, 1959, of the two mortgages.

85. This is just what is pleaded in paragraph 11 of the plaint. But the less said about the evidence of Dalim Kumar about his first-ever knowledge of the mortgage-deeds on or about March 5, 1959, as pleaded, the better. The type Dalim Kumar's evidence is like has been noticed in part (paragraph 28). True it is, 'false in one thing, false in everything', is neither law nor common sense, there being a slender foundation, if at all, for conferring on the doctrine of *falsus in uno, falsus in omnibus* the status of anything higher than a rule of caution: Per Kapoor, J. in *Nisar Ali v. State of Uttar Pradesh*, 1957 SCA 312 = (AIR 1957 SC 366) which I notice on my own, and *Bhowanipore Banking Corporation v. Sreemati Durgesh Nandini Dass*, AIR 1941 PC 95, which Mr. Sinha cites, and where Lord Atkin emphasizes that the statement made by a witness of untruth on certain matters cannot be relied on, in other matters, unless supported by independent evidence. Equally true it is, as Mr. Sinha submits, relying on *Sukha v. State of Rajasthan*, AIR 1958 SC 513 (519-520), that, as a judge of facts, I have the right to disbelieve part of a witness's evidence and to believe part thereof. To the same effect is the other case Mr. Sinha relies upon, in support of his submission: the case of *Gallu Sah v. State of Bihar*, AIR 1958 SC 813 (815), where no violation of any rule of law nor even of prudence is seen in a judge of facts accepting the testimony of some of the witnesses against one and not accepting the same against another. I govern myself, as indeed I must, by these salutary principles. But the difficulty for Dalim Kumar is that this part of his evidence, claiming first-ever knowledge of the two impugned mortgages early in 1959, is so bad that it has only to be read in order to be rejected.

86-89. [The judgment deals with the evidence in detail, and proceeds.]

90. How Dalim Kumar tumbles in to his solicitor, Probir Chatterjee, son of P. C. Chatterjee, who is his mother's solicitor, appears to be an interesting study, though it is a futile exercise in all that falsehood can invent. Dalim Kumar, it will be recalled, gets into an altercation with Nandaran on receipt of that unseen (and perhaps unseeable) letter from Solicitor P. C. Chatterjee (Phulla Kumar Chatterjee). He sees the address of the solicitor of his mother in that letter. The address he sees is 6 Temple Chambers. The address of his solicitor, Probir Chatterjee, son of his mother's solicitor, is just that, a wooden partition intervening between the father's office and the son's.

To enter into either, one has to go through a common gate. Having come by the address (6 Temple Chambers) so, he makes a bee-line for Mr. Chatterjee, senior, with a view to getting to know what it is all about. He meets P. C. Chatterjee, not Phulla Chatterjee, as if they are different gentlemen, which they are not, and which Dalim Kumar admits too, a little late though. He asks Mr. Chatterjee, senior, if he can get him a solicitor. What Mr. Chatterjee, senior, says, asked so, is not evidence though it has gone down as evidence, if, of course, the truth of what he says is at issue. Or it may be treated as evidence too if the factum of the statement Mr. Chatterjee, senior, makes is only at issue, and not the truth thereof, as is the law laid down by the Judicial Committee of the Privy Council in *Subramaniam v. Public Prosecutor*, (1956) 1 WLR 965 (970). And what does Mr. Chatterjee, senior, say, as Dalim Kumar attributes to him? "Well", he says, "there are so many solicitors over here. Seek one for you". Dalim Kumar comes out of the senior's room, only to find on the board the name of Probir Chatterjee. In the end, he engages him, falling into an error, so natural for a witness of untruth that he is, about showing Solicitor Probir Chatterjee the instrument of trust and the deed of rectification, to which Dalim Kumar gives a new name: deed of new trust, gone down in evidence as "deed of new trust". Then, he corrects himself and says, he first visit to Mr. Chatterjee, junior, is without any documents which are shown to him during the second visit. See qq. 314-348.

91. To scan such evidence is to be convinced that it is self-defeating. The reason behind evidence of this sort is not far to seek. Nandaran belongs to a camp hostile to that of her children, the litigating brothers and sisters, lest it be said, as has indeed been said and is bound to be said, that she is in league with her children and at the back of this litigation with a view to depriving LIC of the money she owes on the foot of the two mortgage instruments of undoubted authenticity. And what does Dalim Kumar himself say about the role of Nandaran in this suit? He cannot say if his mother is defending the suit (q. 282) — a strange statement, because Nandaran goes undefended throughout, as Dalim Kumar himself admits (q. 283). Has this suit been brought with her consent? That is not so (q. 281). Is she supporting the claim of Dalim Kumar and his co-plaintiffs? Dalim Kumar answers: "I cannot say anything to that effect": (q. 285). Why not? She, "not a considerate lady", (q. 277), is on terms of enmity with Dalim Kumar and all. She is "very annoyed" too with each and every one of them, on the filing of this

suit (q. 274). So, what is the difficulty on the part of Dalim Kumar saying whether or no his mother supports their claim in this suit? I see none.

92. On top of all that, the touchstone of common sense and probability be applied to the facts I see before me. If this suit succeeds, it means Nandarani's children to be gainers by Rs. 30,000, the consideration of the two mortgages, which, because of interest at 7% compound, amounts up to a little more than Rs. 50,000, at the time of LIC's suit, after credit of sums received towards interest. It, therefore, needs no imagination to see on which side her sympathy lies, no matter what fantastic and unbelievable things Dalim Kumar attributes to her. In sum, I reject the evidence of Dalim Kumar on all the points that go before and hold that the suggestions on behalf of LIC to the contrary (qq. 286 & 663-668, for examples), such as falsity of the so-called quarrel between Dalim Kumar and Nandarani, of Nandarani leaving the flat at Chittaranjan Avenue, of her not being at the back of this litigation etc., have the merit of a great probability in them, upon the whole of the evidence.

93. The story of Dalim Kumar meeting the expenses of this litigation and his personal expenses too out of an imaginary sum of Rs. 6,000, supposed to have been given him by his father for the benefit of all, of which there is no evidence except his, stands self-condemned. Dalim Kumar is not a witness of the type whose uncorroborated evidence can be believed. And I need not dilate upon it.

94. In view of all that goes before, I cannot persuade myself to believe that Dalim Kumar came to know of the two mortgages for the first time on or about March 5, 1959.

II. Terminus a quo

95. What goes in the preceding paragraph is only a negative answer to Dalim Kumar's case on terminus a quo, the starting point of limitation. What is needed however is a positive finding as to when Dalim Kumar came to know for the first time about the two impugned mortgages. On that, evidence furnishes no answer. Suspicion there may be here and there; but suspicion is no proof. For example, when Moti Lal Sain died on November 4, 1955, Dalim Kumar was some twenty-three years of age. Would not such a one, a grown-up, be taken into confidence by Moti Lal from before his death and told all about such liabilities? I do not know. I cannot assume so. I insist on proof. There is none. If you, wanting the suit to be struck down

as time-barred, cannot specify a firm date for terminus a quo, you cannot ask the court to find the issue on limitation in your favour, unless it can be said: Why insist on Dalim Kumar's knowledge of the two impugned mortgages, when time starts running, not from the date of such knowledge (as in Article 91), but from the date when the right to sue accrues.

III. But when does the right to sue accrue?

96. A question as this is concluded by authorities Mr. Sinha cites — to which I shall add one, and that of the Supreme Court. The source of all such authorities is *Bolo v. Koklan*, 57 Ind App 325 = (AIR 1930 PC 270) where Sir Binod Mitter, delivering the judgment of the Board, lays down the law, in reference to Article 120, as under:

"There can be 'no right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted."

No doubt, the right Dalim Kumar asserts in this suit accrued on the execution of the mortgage on November 29, 1946, (subject to his disability), as "Mst. Koklan's right to the property arose on the death of Tarachand", her son, as provided for by the last will of her husband, Kanhaya Lal. But here, as there, there was no clear and unequivocal threat to the rights of the suing party, until the institution of the suit by the defendant: 1922 there and January 28, 1958, here. Dalim Kumar was living as a member of a joint family, as Koklan was, Dalim Kumar not having been any the wiser about the mortgages and Koklan having been just so about the adverse claim to the moveables, her right to which was sought to be defeated as barred by limitation. In the circumstances, accrual of the right asserted in Dalim Kumar on November 29, 1946, put off until September 26, 1950, when he came of age and the legal disability was removed, and even infringement of such right behind his back, without his knowing anything about it, "116" continuing in the same way after the mortgages as before them, cannot be reckoned against him, on the high authority of this Privy Council decision.

97. Two other authorities Mr. Sinha cites: *Anna Malai Chettiar v. A. M. K. C. T. Muthukaruppan Chettiar*, 58 Ind App 1 = (AIR 1931 PC 9) and *Mohammad Umar v. Mohammad Ibrahim*, AIR 1933 Lah 270, (a suit by worshippers for a dec-

laration that a decree, rested on a mortgage of wakf property by one, not the owner thereof, the worshippers knowing nothing about it until the mortgagee sought to enforce his rights by sale) do no more than follow the law laid down by Sir Binod Mitter.

98. And the case I have in view is *Mst. Rukhmabai v. Lala Laxminarayan*, AIR 1960 SC 335, where Subba Rao C. J. (then Subba Rao J.), speaking for the court, endorses Sir Binod Mitter's view of the law, and emphasizes that nothing short of a clear and unequivocal threat so as to compel the person so threatened to file a suit will do, and every threat cannot be so regarded. Do I, upon evidence, see any such threat to Dalim Kumar earlier than January 28, 1958, when LJC filed its suit (No. 126 of 1958) for enforcement of its security? I do not. It must, therefore, be found, as, indeed, it is found, that the suit, even by Dalim Kumar, is not barred by limitation.

99. The finding just come to, on limitation, makes it a profitless task to deal in detail with other points raised by Mr. Sinha on the same subject. But, in order to keep my record straight, the least I owe to Mr. Sinha is to record a summary of the points so urged, with such answers as commend themselves to me, so that it may not be said elsewhere that such points were not taken before me.

(i) No clear and definite knowledge of Dalim Kumar about the mortgages.

Some hints and clues reaching Dalim Kumar, and vigorously followed up by him, might have given him the knowledge of the two mortgages even more than six years before the institution of the present suit. But that is not the test. The test is that his clear and definite knowledge of the mortgages must be proved. But that has not been proved. Such is the contention I have dealt with in paragraph 95 et seq., to which I have little to add. But, comment is called for,

Issues.

4. Did the plaintiffs come to know of the aforesaid mortgage dated November 29, 1946, and of the aforesaid deed of further charge dated January 19, 1949, on or about March 5, 1959, as alleged in paragraph 11 of the plaint?

5. Is the plaintiffs' claim barred by limitation?

101. Only the general issue, the sixth one: "What reliefs, if any, are the plaintiffs entitled to?" — remains. My findings having been what they are, the plaintiffs are disentitled to any relief. I find so.

when in support of such contention, reliance is placed upon *Rohimbhoy Hubibhoy v. Turner*, (1892) 20 Ind App 1, and *Sm. Swarnamoyee Dasi v. Probodh Chandra Sarkar*, 36 Cal WN 758 = (AIR 1933 Cal 253), each being a case of fraud and of time beginning to run under Section 18 of the Limitation Act from the date of knowledge of such fraud. As Mr. Sen correctly points out, nothing like any fraud lurks here. More, fraud is not pleaded even. Necessarily, no particulars of fraud are here too. Any contention resting on fraud is, therefore, beneath my notice: *Wallingford v. Mutual Society*, (1880) 5 AC 685 and *Bisbunde v. Seogeni*, AIR 1951 SC 280.

(ii) Absence of informed consent on the part of Dalim Kumar.

Rested on Article 1824, page 1054, of *Halsbury's Laws of England*, volume 38, 3rd edition, the question of Dalim Kumar's consent, informed or uninformed, can hardly arise here, because, upon evidence, I do not find any firm date earlier than January 28, 1958, and thereafter, to which his knowledge of the two mortgages can be attributed.

(iii) Section 23 of the Limitation Act, 1908.

This section cannot do any duty here. It cannot, because I find no wrong, far less a continuing wrong, on the part of Nandaram in entering into the two mortgages she did. I have stated why: paragraphs 31, 32, 47, 52, 53, 54, 62 and 73, to mention only some of the important ones.

(iv) Section 68 of the Trusts Act.

I see no breach of trust. So this section, providing as it does for the liability of a beneficiary who joins in breach of trust, does no duty either.

100. This exhausts all I have been addressed on about limitation. And, in view of all that goes before from paragraph 74, I answer the fourth and the fifth issues as under:

Answers.

4. No (paragraphs 85-94).

5. No (paragraphs 75-83 & 95-98).

102. In the result, the suit fails and be dismissed with costs to the second defendant.

Suit dismissed.

AIR 1970 CALCUTTA 319 (V 57 C 59)

D. BASU, J.

Imperial Tobacco Co. of India Ltd.,
Petitioner v. Deputy Labour Commissioner and others, Respondents.

Civil Rule No. 1652 (W) of 1966, D/-4-8-1969.

Industrial Disputes Act (1947), S. 33(2) (b) — Application under — Requisites for jurisdiction to entertain — Jurisdiction not lost by settlement of dispute any time after application.

The requisites for the jurisdiction of a conciliation officer to entertain an application under Sec. 33(2) (b) are,

(a) That a conciliation proceeding in respect of an industrial dispute between an employer and his workman is pending before the conciliation officer.

(b) The employer seeks to dismiss the employee for any misconduct not connected with the industrial dispute which is pending before the conciliation officer.

(Para 6)

The conciliation officer does not cease to have jurisdiction to deal with an application under Sec. 33(2) (b) merely because the dispute has been settled at any time after the presentation of the application. AIR 1966 SC 380 & AIR 1968 SC 985, Rel on.

(Para 14)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 985 (V 55) =
1968 Lab IC 1223, P. D. Sharma
v. State Bank of India 14
(1966) AIR 1966 SC 380 (V 53) =
(1965) 3 SCR 411, Tata Iron &
Steel Co. v. Modak 14

Moni Coomar Chakraborty, Chunilal Ganguly, for Petitioner; Arun Kumar Dutt (Sr.), Arun Prokash Sarkar, for Union; Kishore Mukherjee, S. N. Mukherjee, for State.

ORDER:— The Petitioner, in this Rule is the Imperial Tobacco Co. (hereinafter referred to as 'the Company'). Respondents 2-3 are its workmen. Respondent 1 is the Deputy Labour Commissioner of West Bengal and Respondent 4 is the State.

2. The Company alleges that on the 12th June, 1965, the Company filed two applications under Secs. 33(3) and 33(2) (b), respectively, of the Industrial Disputes Act, 1947, (hereinafter referred to as 'the Act'), before Respondent 1, in respect of the dismissal of Respondents 2 and 3, which applications are still pending. The Company's case is that these two applications were filed by it under a mistake of law as to whether certain disputes between the Company and its workmen were still pending in conciliation proceedings, while, in fact, they had been concluded by settlement. Upon a discovery of this fact, the Company filed the

IM/IM/E159/69/DRR/P

application at Annexure C before Respondent 1 urging that he had no jurisdiction to determine the two applications under Sec. 33 of the Act. Respondent 1, by his letter at Annexure D of 4-7-1966 has held that even after the conclusion of conciliation proceedings, he had jurisdiction to dispose of such applications on their merits and has proposed to proceed with the hearing of the applications in question.

3. The Rule is opposed by an affidavit of Respondent 2, who claims to represent Respondent 3 as well. Respondents 1 and 4 have filed no affidavit-in-opposition.

4. At the outset of the hearing, the learned Advocate for Respondent 2 conceded that the Rule should be made absolute so far as Respondent 2 was concerned.

5. The hearing was thus confined in regard to the case against Respondent 3, in respect of whom the application before Respondent 1 was one under S. 33(2) (b) which says—

"(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders or where there are no such standing orders, in accordance with the terms of the contract, between him and the workman,.....

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

6. The requisites for the jurisdiction of a conciliation officer to entertain an application under Sec. 33(2) (b) are, therefore,

(a) That a conciliation proceeding in respect of an industrial dispute between an employer and his workman is pending before the conciliation officer;

(b) The employer seeks to dismiss the employee for any misconduct not connected with the industrial dispute which is pending before the conciliation officer.

If the foregoing two conditions are satisfied, the dismissal by the employer cannot take effect unless he has made an application for the approval of the conciliation officer before whom the industrial dispute between the two parties are pending for conciliation. The Conciliation Officer cannot, therefore, assume jurisdiction under Sec. 33(2) (b) unless the two conditions just mentioned are present.

7. In the instant case, the second condition was obviously present, as stated in para 6 of the petition, read with para 7 of the counter-affidavit, namely, that for

some alleged misconduct on 17-5-1965, a charge-sheet was issued against Respondent 3 and, after some inquiry on those charges, it was decided by the Company to dismiss him. It is not contended on behalf of the Respondent that this misconduct was in any way connected with the industrial dispute which, according to the Respondent, was pending in conciliation before Respondent 1.

8. The controversy at the hearing has, therefore, entered round the question—

Whether any conciliation proceeding was pending before Respondent 1 in respect to an industrial dispute between the Company and Respondent 3 at the time when the application under Sec. 33(2) (b) had been filed by the Company before Respondent 1?

9. In paras 4-5 of the Petition, two industrial disputes are stated to have existed between the Company and its workmen represented by their Union, namely, the Imperial Tobacco Co. Indian Employees' Union, relating to—

(i) Redundancy of employees of the Company;

(ii) Bonus for the year 1964.

10. As regards (i), the case of the Company is that there had never been any conciliation proceeding and as regards (ii) its case is that there was a conciliation proceeding but that it had been concluded by the settlement of 28-4-1965, which is at annexure B to the Petition.

11. I shall take up the case relating to bonus because as regards this it is admitted by the Company that there had been a conciliation proceeding before Respondent 1 and that is also recited on the face of Annexure B which is relied upon by the Company. The only question for my determination is whether that proceeding has been concluded, at law, by the settlement recorded at Annexure B, dated 28-4-1965. This 'memorandum of settlement' recites that the Conciliation Officer having suggested terms "for an interim settlement pending final settlement" of the dispute relating to the bonus for 1964, the parties (i.e., the Company and the Union, present at the tripartite conference held before the Conciliation Officer) agreed to accept those terms as an interim settlement:

"(1) The Company hereby agrees to pay two months' basic wages towards payment of bonus for the year 1964.....

(3) It is hereby agreed by the parties that this interim settlement is without prejudice to the legal rights of the parties concerned and in the event no final settlement on bonus for this year 1964 is reached it would be open for the parties to exercise their respective legal rights."

12. Patently, Ext. B of 28-4-1965 cannot be said to be a settlement of the dis-

pute, so as to terminate the conciliation proceedings. According to the Petition itself (para 11), the final settlement was arrived at only on 13-1-1966, by a memorandum of settlement, which has been produced before me. Clause 4 of this Memorandum settles the dispute relating to bonus for the year 1964, previous payments being adjusted by the terms of this clause. The averments in para 10 of the counter-affidavit are of course loose and misleading, but the legal proposition arising from Annexure B, read with the Memorandum, cannot be wiped off by such statements.

13. In my opinion, the dispute relating to bonus was still pending on 12-6-1965, when the application under Sec. 33(2) (b) was presented by the Company to Respondent 1.

14. The Company, however, contends that the Conciliation Officer loses jurisdiction to determine an application under Section 33(2) (b) even if the pending dispute is concluded by a settlement arrived at any time after the presentation of the application under Sec. 33(2) (b). The question, however, has been concluded, against the Petitioner, by two Supreme Court decisions, *Tata Iron & Steel Co. v. Modak*, AIR 1966 SC 380 and *P. D. Sharma v. State Bank of India*, AIR 1968 SC 985. The net result of these two decisions is that (a) a proceeding under Sec. 33(3) does terminate but (b) a proceeding under Sec. 33(2) (b) does not terminate automatically after the pending industrial dispute has been finally determined. In short, the Conciliation Officer does not cease to have jurisdiction to deal with an application under Sec. 33(2) (b) merely because the dispute has been settled at any time after the presentation of the application under Sec. 33(2) (b).

15. It follows, therefore, that a writ of prohibition cannot issue to restrain the Conciliation Officer (Respondent 1) from determining the application. What would be his decision in view of the fact that the dispute has already been settled is no concern of this Court, in the instant proceeding.

16. The Rule shall, therefore, be discharged as against Respondent No. 3.

17. In view of the above conclusion, it is not necessary to further inquire whether there was any conciliation proceeding pending on the issue of redundancy. On this point, the contention of the Company that there was no 'conciliation' proceeding within the meaning of Section 12(1) of the Act, but only certain exploratory talks through the agency of the Conciliation Officer, is supported by a judgment of B. C. Mitra, J. inter partes, in Matter No. 346 of 1966, from which the Union did not prefer any appeal. Nothing has been shown against that to me

with law to enable the petitioners to dispose of this stock.

23. Having regard to the fact that this stock has already been lying for a long time, we also direct that the respondents shall take the necessary steps and issue the proper directions latest within four weeks of this order.

24. This writ is, therefore, partly accepted in the above terms. In the circumstances of the case, however, parties are left to bear their own costs.

Writ partly allowed.

AIR 1970 DELHI 129 (V 57 C 30)

H. R. KHANNA AND
JAGJIT SINGH, JJ.

Ramesh Chandra, Petitioner v. Union of India and others, Respondents.

Civil Writ Petn. No. 75 of 1968, D/- 25-6-1969.

Constitution of India, Art. 309 — Conditions of Service of Union Territories Employees Rules, 1959, R. 2, Proviso 2 — "Competent" — Meaning — "Competent" means legally qualified or authorised — Himachal Pradesh Government not bound to accept Report of Kothari Commission.

The Government of Himachal Pradesh is not legally bound to accept and implement recommendations, contained in the Report of the Kothari Commission regarding payment of teachers. (Para 6)

The second proviso to R. 2 of the Conditions of Service of Union Territories Employees Rules 1959, merely contains an enabling provision with a view to authorize the Administrator, Himachal Pradesh to revise the pay scales of persons, appointed to services and posts under his administrative control, so as to bring them at par with the scales of pay which may be sanctioned by the Punjab Government from time to time for the corresponding categories of employees. There is nothing in the above proviso which makes it imperative or obligatory on the part of Administrator Himachal Pradesh to revise the pay scales of any particular category of employees so as to bring them at par with the scales of pay for such employees of the Punjab Government. The word used is "competent" which means legally qualified or authorised; it cannot be equated with or treated as a substitute for the words "imperative", "incumbent" or "obligatory". (Para 7)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 1427 (V 54) =

(1967) 2 SCR 703, S. G. Jaisinghani
v. Union of India 8

(1964) AIR 1964 Orissa 65 (V 51) =
ILR (1963) Cut 470, Durga Charan
Das v. State of Orissa 9

BN/CN/A824/70/VBB/A

1970 Delhi/9 VII G—23

M. G. Chitkara, for Petitioner; S. Malhotra, for Respondents.

H. R. KHANNA, J.:— Romesh Chander petitioner by means of this petition under Art. 226 of the Constitution of India has prayed for the issuance of a writ of Mandamus to revise the pay scale of the petitioner and bring it at par with the pay scale of teachers of the corresponding category in the Punjab. Prayer was also made in the petition for quashing the order contained in letter dated April 22, 1968, but the petition has not been pressed in that respect. The respondents named in the petition are, the Union of India, Ministry of Home Affairs, respondent No. 1, Himachal Pradesh Administration, respondent No. 2 and Secretary to the Government of Himachal Pradesh, Education Department, respondent No. 3.

2. The petitioner is serving as a Junior Basic Teacher at the Government High School Nagrota Surian, District Kangra. Till October 31, 1966 Kangra was a part of the Punjab and as such till that date the petitioner was serving under the Punjab Government. On the reorganization of the Punjab, Kangra became a part of Himachal Pradesh with effect from November 1, 1966. As the petitioner continued to serve in the above school, the petitioner's services were provisionally allocated to Himachal Pradesh by the Central Government.

3. In 1964 the Central Government appointed a Commission to study the various aspects of the education in the country including service conditions of the teachers. The Commission was headed by Dr. D. S. Kothari and is popularly known as Kothari Commission. The Commission submitted various recommendations in early part of 1966 including those relating to the revision of pay scales of teachers. Those recommendations were under the active consideration of Central and Punjab Governments before the reorganization of the State of Punjab. After the reorganization of the State of Punjab, the Punjab Government in pursuance of the recommendations of the Kothari Commission revised the scales of the Government teachers with effect from November 1, 1966. Letter dated July 29, 1967 was addressed by the Punjab Government in this connection. The scale of Junior Basic Teachers was fixed at Rs. 125-5-250/10-300. The petitioner, who claims to be the District President for Kangra District of the Primary Teachers Federation, asserts that as the pay scales of the teachers have been revised in the Punjab in accordance with the recommendations of the Kothari Commission, they should be similarly revised in Himachal Pradesh so that the pay scales may be at par with those prevailing in the Punjab. It is also alleged that similar revision of pay scales of teachers has taken place in Haryana. Re-

ference has also been made to assurances held out by the Education Minister of Himachal Pradesh, when the teachers threatened strike and dharna, that efforts would be made by the Pradesh Government to secure for teachers grades recommended by the Kothari Commission.

4. The petition has been resisted on behalf of the respondents and the affidavit of Miss K. Pasricha, Director of Education, Himachal Pradesh, has been filed in opposition to the petition. It is averred that the Himachal Pradesh Administration was not bound to accept and implement the recommendations of the Kothari Commission. Reference has also been made on behalf of the respondents to a message received from the Ministry of Home Affairs that the Himachal Government should not make any announcement or make any commitment to give effect to the recommendations of Kothari Commission unless and until the availability of funds is confirmed by the Government of India.

5. It may be stated that during the pendency of the writ petition the Lieutenant Governor of Himachal Pradesh with the prior approval of the Government of India, Ministry of Home Affairs, sanctioned the same scales of pay to the teachers working under the Himachal Pradesh Government as were applicable to the teachers working under the Delhi Administration. The revised scale of pay came into force with effect from December 21, 1967. As a result of this revision, the pay scale of Junior Trained Teachers other than those who have passed Higher Secondary Examination has been fixed at Rs. 118-4-150-5-160-8-200-EB-8-240-10-270.

6. We have heard Mr. Chitkara on behalf of the petitioner and Mr. Malhotra on behalf of the respondents, and are of the view that no case has been made for the issuance of a writ to the respondents for revision of pay scale of the petitioner. So far as the recommendations, contained in the Report of the Kothari Commission are concerned, it is not disputed that the Government of Himachal Pradesh is not legally bound to accept and implement them. It is, however, urged on behalf of the petitioner that as the Punjab Govt. has revised the pay scales of Junior Basic Teachers in accordance with the recommendations of the Kothari Commission, the Himachal Pradesh Government is likewise bound to revise the pay scales of Junior Basic Teachers so as to make them at par with those prevailing in the Punjab. Reference in this connection is made to Rule 2 of the Conditions of Service of Union Territories Employees Rules, 1959 which were issued by the President in pursuance of the powers conferred by Article 309 of the Constitution of India. Rule 2 reads as under:—

"Conditions of Service of persons appointed to the Central Civil Service and posts under the administrative control of certain administrators.

The conditions of service of persons appointed to the Central Civil Services and posts Class I, Class II, Class III and Class IV under the administrative control of the Administrators of the Union Territories of Delhi, Himachal Pradesh, Manipur and Tripura, shall, subject to any other provision made by the President, be the same as the Conditions of Services appointed to other corresponding Central Civil Services and Posts, and be governed by the same rules and orders as are for the time being applicable to the latter category of persons.

Provided that the scales of pay and dearness and other allowances granted to such employees shall, until any other provision is made in this behalf, continue to be governed by the orders in force immediately before the commencement of these rules.

Provided that in the case of persons appointed to services and posts under the administrative control of the Administrator, Himachal Pradesh, if they are drawing pay at the rates admissible to the corresponding categories of employees of the Punjab Government, it shall be competent for the Administrator to revise their scales from time to time so as to bring them at par with the scales of pay which may be sanctioned by the Punjab Government from time to time for the corresponding categories of employees."

According to the learned counsel for the petitioner, the second proviso of the above rule makes it incumbent upon the Administrator of Himachal Pradesh to revise the scales of teachers in Himachal Pradesh so as to make those scales to be at par with the scales of pay sanctioned by the Punjab Government from time to time.

7. There is, in our opinion, no merit in the above contention advanced on behalf of the petitioner. The second proviso merely contains an enabling provision with a view to authorize the Administrator Himachal Pradesh to revise the pay scales of persons, appointed to services and posts under his administrative control, so as to bring them at par with the scales of pay which may be sanctioned by the Punjab Government from time to time for the corresponding categories of employees. There is nothing in the above proviso which makes it imperative or obligatory on the part of Administrator Himachal Pradesh to revise the pay scales of any particular category of employees so as to bring them at par with the scales of pay for such employees of the Punjab Government. The word used is "competent" which means legally qualified or authorized; it cannot be equated with or treated as a substitute for the words "imperative",

"incumbent" or "obligatory". If the interpretation sought to be placed upon the proviso on behalf of the petitioner were to be accepted, we shall have to read the words "imperative", "incumbent" or "obligatory" instead of the word "competent" in the above rule. The proviso merely vests in the Administrator, the power to revise the pay grades; it does not compel him to exercise that power. The exercise of the power conferred by the proviso involves financial implications and it is manifest that before the exercise of such a power the overall budgetary position would have to be taken into account. In view of the plain language of the rule, it is, in our opinion difficult to hold that the Administrator of Himachal Pradesh is bound to revise the pay scales of the employees under his administrative control, whenever there is a revision of the scales of corresponding categories of employees in the Punjab Government.

8. It has been argued on behalf of the petitioner that on a number of occasions in the past the Administrator of Himachal Pradesh revised scales of pay of certain categories of employees whenever their pay scales were revised in the Punjab. Reference in this context has been made to Annexures B-1 to B-8 to the petition. These annexures relate to the revision of pay scales of overseers of Community Development Projects, Kanungos, Photographers, Ayurvedic Staff and Editors. In this respect we find that the affidavit filed on behalf of the respondents shows that before the above scales were revised, the budgetary position directed that the additional expenditure was to be met from within the sanctioned budget. So far as the revision of scales of teachers is concerned, the expenditure involved was on the high side and could not be met from within the sanctioned budget. As Himachal Pradesh was a Union Territory, prior concurrence of the Government of India for provisions of the funds for this purpose was sought by the Administrator. Reference was, accordingly, made to the Government of India in accordance with R. 56 of the Business of the Government of Himachal Pradesh Rules, 1963. The Government of India thereupon sent a message that no commitment should be given by the Himachal Pradesh Administration to give effect to the recommendations of the Kothari Commission unless and until the availability of funds was confirmed by the Government of India. In view of the above, the petitioner, in our opinion, cannot derive any assistance from the fact that earlier the Administrator had issued orders for bringing the pay scales of certain categories of Himachal Pradesh employees at par with those prevailing in the Punjab.

Reference on behalf of the petitioner has been made to the following observa-

tions in the case of S. G. Jaisinghani v. Union of India, AIR 1967 SC 1427:—

"In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of Law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law."

The above observations were made by their Lordships in the context of certain promotions made in breach of the prescribed quota. The said quota had been fixed in exercise of the powers given by Rule 4 of Income-tax Officers (Class I, Grade II) Service Recruitment Rules. The above observations can be of no avail to the petitioner in the present case because the material on the record does not show that the respondents had acted arbitrarily. On the contrary the material indicates that it was the financial limitations which stood in the way of the respondents bringing the pay scales of the Junior Basic Teachers at par with those prevailing in the Punjab.

9. Reference has also been made on behalf of the petitioner to the following observations in the case of Durga Charan Das v. State of Orissa, AIR 1964 Orissa 65:—

"It is true that this Court is not bound either by the opinion given by the Public Service Commission or that given by the Governor of Orissa as regards the construction of a statutory rule. But where an established practice appears to have grown up on the basis of interpretations given by higher authorities, that practice will be a useful guide in construing statutory provisions dealing with conditions of service of public servants."

The above observations were made while dealing with R. 6 of Rules issued for the protection of officers of the old Bihar and Orissa Service who were permanently transferred to Orissa. The learned Judges in that case found that the interpretation of R. 6 presented some difficulty. It was in that context that the observation reproduced above, was made. In the present case there is no difficulty so far as the interpretation of the second proviso to Rule 2 of the 1959 Rules is concerned because the language of that proviso is plain and unambiguous. There is also nothing to show that the second proviso to Rule 2 of 1959 Rules was the subject-matter of interpretation in the past and that the

Interpretation now sought to be placed on that proviso on behalf of the petitioner was taken to be the accepted interpretation. As such, the petitioner, in our opinion, cannot derive any material help from the above Orissa authority.

10. The petition consequently fails and is dismissed, but, in the circumstances, we leave the parties to bear their own costs.

Petition dismissed.

AIR 1970 DELHI 132 (V 57 C 31)

HARDAYAL HARDY AND

S. N. ANDLEY, JJ.

Rajendra Sareen, Petitioner v. The State of Haryana and others, Respondents.

Civil Writ No. 851 of 1968, D/- 18-9-1969.

(A) Constitution of India, Art. 309 Proviso — Rules under — Punjab Public Relations Department (Gazetted) Service Rules (1958), R. 10(1) — Expression "permanent vacancies" — Meaning of.

The words "appointed against permanent vacancies" in sub-rule (1) of Rule 10 cannot be interpreted so as to mean that "appointed not only against permanent posts but also against permanent posts which are permanently vacant." (Para 40)

If for the application of Rule 10(1) it is necessary that both the post and the vacancy should be of a permanent nature then the words "if there is a permanent vacancy against which such member can be confirmed" as embodied in the proviso to sub-rule (3) will become otiose. Applying the rule of harmonious construction to sub-rule (1) and the proviso to sub-rule (3), the only proper meaning to be given to the expression "permanent vacancies" in sub-rule (1) is vacancies in permanent posts, no matter how those vacancies may have occurred. The vacancies in the posts may be the result of incumbents of those posts having been appointed to other posts temporarily or in an officiating capacity. (Para 41)

(B) Constitution of India, Arts. 311 and 309 Proviso — Rules under Art. 309 Proviso — Punjab Public Relations Department (Gazetted) Service Rules (1958), R. 10(3) Proviso — Servant appointed on probation — Expiry of maximum period of probation — No express order of confirmation passed — Effect.

The service rules fix a certain period of time beyond which the probationary period cannot be extended. If an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a pro-

bationer by implication. The reason is that such an implication is negated by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication. AIR 1968 SC 1210, Rel. on.

(Paras 38 and 44)

(C) Constitution of India, Art. 311 — Substantive appointment to permanent post — Rights and status of such servant — Subsequent transfer to temporary post — Effect.

In the absence of any special contract the substantive appointment to a permanent post gives the servant so appointed a right to hold the post until under the rules, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years' service or the post is abolished and his service cannot be terminated except by way of punishment for misconduct, negligence, inefficiency or any other disqualification found against him on proper enquiry after due notice. AIR 1958 SC 36, Rel. on. (Para 46)

Once it is held that the servant has acquired the status of a permanent Government servant his subsequent transfer to a post whether that post is permanent or temporary would not derogate from his status and rights as such. (Para 46)

(D) Civil Services — Punjab Civil Services Rules, Volume II, R. 5.9(b) — Notice of discharge envisaged by the Rule is consequent upon "the reduction of an establishment" contemplated under R. 5.7 of the Rules — Discharge of petitioner from service not as result of any reduction of establishment — Order terminating his services by one month's notice held liable to be quashed. (Para 49)

(E) Constitution of India, Art. 311 — Appointment to temporary post for definite period — Termination before expiry of period by giving one month's notice — Validity.

When the appointment to a temporary post is for a definite period, the servant so appointed acquires a right to his tenure for that period which cannot be put an end to unless there is a special contract entitling the employer to do so on giving the requisite notice or the person so appointed is, on enquiry held on due notice to the servant and after giving him a reasonable opportunity, to defend himself, found guilty of misconduct, negligence, inefficiency or any other disqualification and is by way of punishment dismissed or removed from service or reduced in rank. AIR 1958 SC 36, Rel. on.

(Paras 50, 51 & 52)

Cases Referred: Chronological Paras
 (1968) AIR 1968 SC 1210 (V 55) =
 (1968) 3 SCR 1, State of Punjab v.
 Dharam Singh 38, 44
 (1968) L.P.C. No. 12 of 1968 (Punjab) 44
 (1967) Civil Writ No. 1623 of 1966,
 D/- 29-11-1967 (Punjab), Shri Anup
 Singh v. State of Punjab 44
 (1958) AIR 1958 SC 36 (V 45) =
 1958 SCR 828, Parshotam Lal
 Dhingra v. Union of India 46, 50
 S. N. Chopra and P. P. Rao, for Peti-
 tioner; C. D. Dewan and Rameshwar
 Dial, for Respondents.

JUDGMENT:— The petitioner's chal-
 lenge in this petition under Article 226
 of the Constitution is to an order dated
 31st October, 1968 whereby his services
 were terminated with effect from the
 date of receipt of the communication
 bearing the same date addressed to him
 by the Under Secretary Protocol and
 Publicity, Government of Haryana, on
 behalf of the Chief Secretary to the said
 Government. The communication further
 stated that one month's salary in lieu of
 the period of notice was being allowed to
 the petitioner.

2. The grounds on which the validity
 of the above order is challenged by the
 petitioner are (1) that he being a perma-
 nent Government servant, the order ter-
 minating his services amounts to dismis-
 sal and therefore contravenes the provi-
 sions of Article 311 of the Constitution,
 (2) that even if he is held to be a tempo-
 rary Government servant his appoint-
 ment being continuous with the post
 held by him, the termination of his ser-
 vice while the post is still in existence
 would contravene Article 311 of the Con-
 stitution and (3) that in any event the
 order terminating his services is vitiated
 by mala fides on the part of Shri Bansi
 Lal, Chief Minister Haryana State, who
 is impleaded in the petition as respondent
 No. 2 and Shri G. L. Bahlur, Director
 Public Relations, Govt. of Haryana, res-
 pondent No. 3, inasmuch as they were
 actuated by personal malice and ill-will
 against the petitioner.

3. The petitioner alleged that he joined
 the service of the composite State of
 Punjab on 22-6-1957 as State Press Liai-
 son Officer in Delhi on a starting salary
 of Rs. 600/- per mensem in the grade of
 Rs. 500-25-650/30-800 in the Public Rela-
 tions Department of the State. The
 creation of the post with the said scale of
 pay and the appointment of the petitioner
 thereto were both done simultaneously
 by one and the same order dated 28-6-
 1957. In July 1962 the post was includ-
 ed in the cadre of the Punjab Public
 Relations Service which was created at
 that time. In between the petitioner was
 granted extraordinary leave for a period
 of six months from 21st November 1959
 to 18th May 1960 with permission to

act as a Special Correspondent of the
 Hindustan Times, New Delhi in Pakistan,
 on a salary of Rs. 1500 per mensem. On
 return from leave the petitioner resumed
 his service in the department and worked
 in an equivalent post of Deputy Director
 till June 1966. In 1960 the petitioner
 crossed the efficiency bar and his pay
 was raised from Rs. 650/- to Rs. 680/- per
 mensem with effect from 24-12-1960.

4. On 20th June, 1966, the petitioner
 was re-posted to Delhi in his original post
 of State Press Liaison Officer. On the re-
 organisation of the composite State of
 Punjab and its bifurcation into two sepa-
 rate States of Punjab and Haryana the
 post held by the petitioner was allocated
 to the State of Haryana on 1-11-1966.
 Along with the post the services of the
 petitioner were also turned over by the
 Central Government under the Punjab
 Reorganisation Act, 1966, to the State of
 Haryana.

5. From 1-12-1966 to 24-3-1967 the
 services of the petitioner were lent on
 deputation by the State of Haryana to
 the State of Punjab for appointment as
 Officer on Special Duty (Public Affairs)
 with the Chief Minister of Punjab in the
 scale of Rs. 1000-50-50-1500.

On 25-3-1967 the petitioner reverted to
 his original post of State Press Liaison
 Officer at Delhi under the Government of
 Haryana and continued to work as such
 till the date of the impugned order dated
 31st October 1968.

6. The petitioner further alleged that
 the duties attached to his office were to
 maintain liaison between the State of
 Haryana and the Press in Delhi, to ex-
 plain the policies of the State Govern-
 ment to leading publicmen and to see
 that the various matters relating to the
 State of Haryana were handled in con-
 formity with the instructions received by
 him from the Government from time to
 time. His duty also was to arrange
 interview for the Chief Minister with the
 gentlemen of "the fourth estate" and
 with other authorities and agencies at
 Delhi. According to the petitioner, in
 the discharge of his aforesaid duties he
 had to work for the most part under the
 personal direction of the Chief Minister
 of the State.

7. The petitioner claimed that since
 his appointment in June 1957 no fault
 was ever found with his work by succes-
 sive Chief Ministers and other superior
 officers under whom he had to work.
 Things however took a different turn
 when on 19-5-1968 respondent No. 2 was
 elected leader of the Haryana Congress
 Legislature Party and was due to be
 sworn in as the Chief Minister of the State
 at New Delhi on 21-5-1968. The petition
 recites a series of events to which detailed
 reference will be made hereafter when I
 come to deal with the allegations of mala

fides. The petition also sets out certain incidents between the petitioner and respondent No. 3 from which he wanted an inference of collaboration between respondents 2 and 3 to bring about his dismissal from service to be drawn. A detailed reference to those will also be made hereafter.

8. According to the petitioner, the climax was reached when respondent No. 2 felt greatly upset over the failure of the petitioner to arrange for publication in the morning issues of leading newspapers of Delhi on 31st October, 1968 a declaration made by Shri Nijalingappa, President of the All India Congress Committee, in a speech delivered by him at a public meeting at Faridabad on the night of 30th October 1968 wherein Shri Nijalingappa had inter alia stated that the Government headed by Shri Bansi Lal (respondent No. 2) would not fall so long as he was the President of the Congress. The petitioner submitted that Shri Nijalingappa's speech had a great political significance and was calculated to strengthen the position of respondent No. 2 in the State of Haryana. Respondent No. 2 was therefore anxious to see that the said statement of Shri Nijalingappa was given the widest possible press coverage within the shortest possible time.

9. The petitioner alleged that he explained to respondent No. 2 that the newspaper and News Agency Correspondents whom he had taken to Faridabad for the press coverage of the meeting had returned to Delhi too late in the night to be able to submit their copy in time for insertion in the morning issues of the papers and had therefore decided to put out the news of the meeting and in particular, the above declaration made by Shri Nijalingappa on 1-11-1968. But respondent No. 2 who was already prejudiced against the petitioner was greatly worked up at the absence of the news in the Delhi Press on 31st October 1968 and threatened to take immediate action against him.

10. In the afternoon of 31st October 1968, respondent No. 2 left for Chandigarh and saw to it that an order purporting to terminate the petitioner's services with effect from the date of the receipt of the order by the petitioner was passed after office hours that very day and even arranged to have it served on the petitioner at 2-25 P.M. on 1-11-1968 which was a holiday, through a special messenger.

11. Two separate affidavits were filed by the respondents in opposition to the petition. One affidavit was by respondent No. 2 in which he controverted the petitioner's allegations of mala fides against him. The second affidavit was by respondent No. 3 in which besides meet-

ing the allegations of malice etc. made against him personally, he replied to other allegations of the petitioner on the basis of the information derived from official records.

12. As apart from the plea of mala fides the principal allegation made by the petitioner was that he was a permanent Government servant or at any rate, his appointment was continuous with the post of State Press Liaison Officer and the said post was not only in existence at the time he was served with the impugned order but was actually included by a Gazette Notification issued in July 1962 in the cadre of the Punjab Public Relations Service that had been created at that time, and the allegation was denied in the affidavit filed by respondent No. 3, the petitioner filed on 19th February 1969 a rejoinder affidavit. In that affidavit besides controverting the other allegations of respondents 2 and 3 in the affidavits filed by them, the petitioner specifically traversed the allegation that the post of State Press Liaison Officer was never made permanent and had throughout remained an ex-cadre post. The petitioner produced with his affidavit a copy of the relevant Government Notification which prima facie supported his claim and refuted the contrary allegation made in the affidavit of respondent No. 3. I shall advert to this aspect of the case at some length when I come to discuss the nature of the post held by the petitioner.

13. At this stage it will suffice to say that since the point was of some importance and in a way, went to the root of the petitioner's claim, by our order dated July 21, 1969 we gave opportunity to the respondents to file affidavits including an affidavit of Shri E. N. Mangat Rai, I.C.S., who was Chief Secretary to the Government of Punjab at the relevant time and had signed the Notification on behalf of the Governor and also to file necessary documents in support of their stand. A similar opportunity was also afforded to the petitioner.

14. After the necessary affidavits and documents were filed by both sides we proceeded to hear arguments. Meanwhile the petitioner filed one more application for summoning respondent No. 2 for cross-examination on some of the points arising out of his affidavit. On August 28, 1969 the counsel for the State of Haryana (respondent No. 1) sought leave to place on record an additional affidavit of Shri Ram S. Verma, Deputy Secretary to Government of Haryana, Public Relations Department a copy of which was supplied by him to the petitioner. The affidavit was allowed to be placed on record and was referred to by both sides although no formal order was made by us in that behalf.

15. Mr. Dewan who appeared for the respondents conceded that if the petitioner's plea of mala fides was accepted the impugned order would have to be quashed. I will therefore discuss the question of mala fides first.

16. According to the petitioner, he first incurred the displeasure of respondent No. 2 when soon after the latter's election as leader of the Haryana Congress Legislature Party he addressed a Press Conference at Delhi. In the course of that conference, respondent No. 2 made an imprudent statement that personally he was not at all convinced that Haryana interests demanded inclusion of Chandigarh in that State. The petitioner alleged that apprehending that the said statement of respondent No. 2 might give rise to a political controversy having serious repercussions sought his permission to request the Press Correspondents that the above statement should be treated as off the record. Respondent No. 2 resented the petitioner's request although he accepted and acted upon the suggestion. Respondent No. 2 denied the incident and stated in his affidavit that he did not recall having made any such statement. He also stated that personally he was all along in favour of inclusion of Chandigarh in Haryana State and in fact said so afterwards, as was evident from the report appearing in the Tribune dated the 26th June, 1968.

17. For my part, I am not impressed by the denial of this incident by respondent No. 2 and would rather prefer the petitioner's version of it. It is rather amazing that respondent No. 2 should remember what he said towards the end of June and plead loss of memory about something that had happened barely a month before that. The press conference of May 19, 1968 was the first of its kind addressed by respondent No. 2 and it is quite likely that he said away something in a moment of excitement under the stress of questions by Press Correspondents which probably did not represent his real views on the subject. If the petitioner therefore intervened to save the situation respondent No. 2 should rather be grateful to him than to resent his intervention. Anyway, the incident is too trivial to form the foundation of a charge of mala fides against respondent No. 2.

18. The petitioner next referred to certain statements made by respondent No. 2 wherein he was alleged to have alluded to Shri G. L. Nanda, former Home Minister in the Central Government as his "guru" and to have declared that he would function as Chief Minister according to Shri Nanda's advice. The petitioner further alleged that when respondent No. 2 became the Chief Minister, he was very close to Shri G. L. Nanda

and Shri Bhagwat Dayal Sharma former Chief Minister of Haryana. The petitioner's association with Shri G. L. Nanda was therefore in obedience to the express instructions of respondent No. 2. Towards the beginning of August 1968, however differences developed between respondent No. 2 and Shri G. L. Nanda which by the end of August 1968 became almost irreconcilable and in due course they actually fell out. As respondent No. 2 felt that the petitioner was closely associated with Shri G. L. Nanda he became suspicious of and indifferent to the petitioner and started avoiding him.

19. Respondent No. 2 denied these allegations. Here again it would appear that his denial of what he was alleged to have said about Shri G. L. Nanda in the early days of his office as Chief Minister, is to say the least, disingenuous. The petitioner has placed on record newspaper cuttings which clearly bear out the truth of his assertion although it may be said that there is nothing concrete on the file to contradict the further statement made by respondent No. 2 that his personal relations with Shri G. L. Nanda were by no means strained. The question however is whether the allegation is strong enough to lead to an inference that respondent No. 2 would make a scapegoat of the petitioner because there was cooling off of relations between him and Shri G. L. Nanda. It may be that sometime when politicians fall out their quarrels may have adverse repercussions on the fortunes of civil servants who may have aligned themselves with one side or the other. But that is precisely why the civil servants are expected to remain detached from politicians. Anyway, whatever may be the state of relationship between respondent No. 2 and Shri G. L. Nanda, I would need something more tangible than what the petitioner has been able to prove in this case to induce me to hold that the petitioner's loss of his job is due to estrangement between respondent No. 2 and Shri G. L. Nanda and to the petitioner's association with the latter.

20. The petitioner then stated that on or about the 23rd June 1968 respondent No. 2 had telephoned from Srinagar and asked him to fix an appointment for him with the editors of the Statesman and the Times of India New Delhi in order that he might complain to them against their Correspondents at Chandigarh who he said were not reporting his statements properly and had been critical about his functioning as Chief Minister. The petitioner alleged that he tried to dissuade respondent No. 2 from this course and advised him that his complaints against the Press Correspondents might make his position difficult. The petitioner further alleged that respondent No. 2 was very much irritated at this and ended the con-

versation abruptly with the words "do as you like."

21. The allegation was denied by respondent No. 2. The petitioner thereupon moved an application requesting that relevant records be sent for from the Telephones Department Srinagar and respondent No. 2 be also summoned for cross-examination. We however, did not consider it necessary to make any such order as in our opinion, the allegation, even if true was hardly enough either by itself or in conjunction with other facts to make out a case of mala fides against respondent No. 2.

22. The last incident which according to the petitioner led to the bursting of the simmering cauldron of prejudice in the mind of respondent No. 2 was the petitioner's failure to arrange for publication of the declaration made by Shri Nijalingappa in the public meeting held at Faridabad on the night of 30th October 1968. The broad facts of the incident have already been mentioned before and therefore, need not be repeated. It however appears to us that the very foundation of the petitioner's allegation in this behalf is wrong. His case is that respondent No. 2 was so greatly upset over the absence of news in the morning issues of Delhi newspapers on October 31, 1968 that he went post-haste to Chandigarh the same day and got the order of petitioner's removal from service passed after office-hours and saw to its despatch by a special messenger on the following day. As the allegation was denied by respondent No. 2 who had stated that he had taken the decision to terminate the services of the petitioner on the 29th October 1968 and that the file of the case did not come to him at any time between the 29th October 1968 and 31st October 1968 or later nor did he talk to the Chief Secretary that the order should be issued immediately and that arrangements should be made to serve the same upon the petitioner on the following day, we called for the original files and satisfied ourselves that the petitioner's allegations were not correct and that the decision to terminate the services of the petitioner had in fact been taken by respondent No. 2 on October 29, 1968.

23. I therefore, hold that there is no merit in the petitioner's allegation that the impugned order was made by respondent No. 2 because of any personal prejudice or malice against the petitioner or that respondent No. 2 abused his power in any manner to bring about the petitioner's removal from service.

24. This brings me to the petitioner's allegations of mala fides against respondent No. 3. The petitioner did not accuse respondent No. 3 of having any personal ill-will against him. His suggestion rather was that respondent No. 3 was more or

less reflecting the mood of respondent No. 2 against him and was taking his cue from him. The petitioner alleged that on 24-10-1968 he was called to Chandigarh for reconciliation of outstanding accounts. In the course of his discussions with respondent No. 3 he noticed that the latter was unusually terse and prone to find fault with the petitioner. Respondent No. 3 insisted that the vouchers on account of taxi-fare should indicate the distance covered as per mile-metre and the schedule of rates prescribed. The petitioner explained that in Delhi all taxi-cabs were not equipped with mile-metres which were in working order and only fare metres were fitted as per statutory requirements. Respondent No. 3 persisted that the petitioner should give the distances covered in respect of each voucher submitted by him. The petitioner thereupon said that in future he would try to comply with this requirement to the extent it was possible but so far as the vouchers in question were concerned, he requested that they be passed. Respondent No. 3 did not accept the suggestion and insisted on the petitioner furnishing the distance in respect of each voucher. This led the petitioner to remark that in that case he would have to run the distance all over again in order to measure the distances. On this respondent No. 3 got infuriated and said "Don't talk non-sense". The petitioner protested against this remark and said that he was not accustomed to such intemperate language. Respondent No. 3 then asked the petitioner to leave his room.

25. The broad details of the incident were not disputed by respondent No. 3 though he attempted to give a slant to the version by putting the blame on the petitioner for being rather flippant in his behaviour and made his own part look quite innocuous. Whatever be the truth and it may be that the petitioner's behaviour on that day left a substratum of prejudice in the mind of respondent No. 3 against the petitioner, the connection of the incident with the decision to terminate the services of the petitioner appears to me to be too remote, keeping in view the fact that the final order itself was passed by respondent No. 2 and not by respondent No. 3. The result is that the petitioner's plea of mala fides against respondent No. 3 also fails and is rejected.

26. I shall now take up the other two contentions of the petitioner regarding the nature of the post held by him and his right to hold the same.

27. The respondents placed on record the various posts held by the petitioner from the date of his appointment on 22-6-1957 to the date of termination of his services on 1-11-1968. The chronological order of the petitioner's postings is as follows:—

S. No.	Post Held	Period for which held
1.	State Liaison Officer	22-6-1957 to 18-7-1960
2.	Deputy Director (Field)	19-7-1960 to 19-9-1960
3.	Officer on Special Duty	20-9-1960 to 26-6-1962
4.	Deputy Director (Press)	27-6-1962 to 14-6-1966
5.	State Liaison Officer	15-6-1966 to 30-11-1966
6.	Remained on Deputation with Punjab Government	1-12-1966 to 24-3-1967
7.	State Press Liaison Officer	25-3-1967 to 1-11-1968

28. It is common ground that the only order relating to the petitioner's appointment is the one contained in the Memorandum dated 28-6-1957 addressed by Shri Nakul Sen I. C. S. Chief Secretary, Government Punjab to the Director of Public Relations Punjab which reads as under:—

"Sub: CREATION OF THE POST OF STATE PRESS LIAISON OFFICER AT DELHI:

The Governor of Punjab is pleased to create the post of State Press Liaison Officer at Delhi in the scale of Rupees 500-25-650/30-800 with effect from the 22nd June, 1957 till the 28th Feb. 1958 and the appointment of Shri Rajendra Sareen thereto.

2. The expenditure will be met from within the Budget grant under the head "57-Miscellaneous-D-Publicity Board-D-Publicity Board" for the year 1957-58."

29. It is also common ground that although the initial creation of the post of State Press Liaison Officer at Delhi and the petitioner's appointment thereto were for the duration of about 8 months from 22-6-57 to 28-2-1958, the post was renewed from year to year on the basis of annual sanctions granted by the government i.e., from the 1st day of March in one year till the 28th day of February in the following year and although no specific order continuing the petitioner's appointment to the post was made after 28-2-1958, he kept on holding the post till 18-7-1960. In between he was granted extraordinary leave from 21-11-1959 till 18-5-1960. Between 19-7-1960 and 26-6-1962 the petitioner held two other posts in the Department of Public Relations but it was not disputed that those two posts viz., Deputy Director (Field) and Officer on Special Duty were both of equivalent status and pay. From 27-6-1962 to 14-6-1966 the petitioner held the post of Deputy Director (Press) and then once again as State Press Liaison Officer from 16-6-1966 to 30-11-1966 and it is on the basis of that incumbency alone that the petitioner laid claim to being a permanent Government servant. The respondents admitted the petitioner's appointment to these posts. They also admitted that he held the posts for the periods mentioned above. The respondents further admitted that the post of Deputy Director (Press) was a permanent post. It was also a cadre post; but their

contention was that the petitioner's appointment thereto was on a temporary basis. As regards the post of State Press Liaison Officer their contention was that it was neither a cadre post nor a permanent post.

30. The petitioner however succeeded in establishing that the post of State Press Liaison Officer was included in the cadre in July 1962. In this connection the petitioner placed on record a Gazette Notification dated the 11th July 1962 which clearly showed that on and from that date at least there could be no doubt about the post of State Press Liaison Officer being a cadre post in Class II of the service.

31. The production of this notification which is to be found as Annexure X to the petitioner's rejoinder dated the 19th February, 1969 at page 125 of the file gave rise to fresh controversy between the parties which was only resolved by the affidavit of Shri E. N. Mangat Rai who was Chief Secretary to the Punjab Govt. at the relevant time and had signed the said notification on behalf of the Governor of Punjab. According to the notification, a new Service called the "Punjab Public Relations Service" was supposed to have been created by the Governor including therein the posts mentioned in the notification after classifying them into Class I and II.

32. The petitioner claimed that the posts of Deputy Director (Press) to which he was appointed on 27-6-1962 and the State Press Liaison Officer to which he reverted on 16-6-1966, being cadre posts in the newly created public Relations Service under the aforesaid notification, he should be held to have been appointed substantively to a permanent post and had therefore, the rights and privileges of a permanent Government Servant. After the filing of the said notification the respondents abandoned their initial stand and conceded that on and from 11-7-1962 the post of State Press Liaison Officer did become a cadre post. They however, strongly resisted the petitioner's plea that the notification created any new Service. They also vehemently asserted that the post of State Press Liaison Officer though included in the cadre and classified as Class II post was nevertheless a temporary post.

33. As regards creation of a new Service by the aforesaid notification, on a perusal of the affidavit filed by Shri E. N.

Mangat Rai on 7-8-1969. I am satisfied that it was not the intention of the Punjab Government at any time to create any new Service. All that had happened was that the Director, Public Relations and Tourism, Punjab had addressed a letter dated the 19th June 1961 to the Chief Secretary to Government of Punjab (Protocol and Publicity Branch) on the subject of classification of services in the Public Relations Department, Punjab. The proposal was examined at various levels and ultimately on the analogy of the practice followed by certain other departments of the Punjab State the Punjab Public Relations Department (Gazetted) Service was named as "Punjab Public Relations Service (P. P. R. S.) and the gazetted posts were classified into Class I and II.

34. The expression "creation of Service" as used in the Notification when considered in the background of the various letters and notings to which Shri Mangat Rai referred in his affidavit would thus appear to be an unhappy expression. In reality the Punjab Public Relations Service mentioned in the notification was merely a new name for the same old Service, namely, the Punjab Public Relations Department (Gazetted) Service with the difference that four new posts which were not mentioned in Appendix "A" to the Punjab Public Relations Department (Gazetted) Service Rules, 1958 viz (1) Officer on Special Duty, (2) State Press Liaison Officer, (3) Exhibition Officer and (4) Song and Drama Officer, were also included in the cadre.

35. Having failed in their attempt to prove that the post of State Press Liaison Officer was not a cadre post the respondents took the stand that in any event, it was not a permanent post. Mr. Dewan, learned counsel for the respondents, strenuously urged that it was not necessary that all posts in a cadre should be permanent. According to the learned counsel, a cadre could be wholly temporary or it may contain posts within it, both temporary and permanent. In support of his submission, Mr. Dewan drew our attention to the affidavit of Shri E. N. Mangat Rai and also to the fresh affidavit filed on 28-8-1969 by Shri Ram S. Verma Deputy Secretary to Government Haryana, Public Relations Department wherein it was stated that according to the relevant documents and files of the Department examined by him, all the posts mentioned in Appendix A to the 1958 Rules were not of permanent character. As an instance he referred to the post of Administrative Officer which was temporary and continued to be so until it was made permanent by the Government Order dated the 25th September, 1964. He further stated that the post of the State Press Liaison Officer had all along been temporary until the

creation of the post of Joint Director in June 1962. When the post of State Press Liaison officer was thrown in abeyance and it remained so till June 1966 likewise the post of Officer on Special Duty was a temporary post at the time of the notification dated the 11th July 1962 and it continued to be so even thereafter. Similarly the posts of Exhibition Officer and Song and Drama Officer were of temporary character and were made permanent by the order of Government dated the 1st September 1966. The deponent supported his averments by reference to certain documents of which copies were filed with the affidavit.

36. It is true that this affidavit was filed almost at the conclusion of the arguments but a copy of the affidavit was supplied to the petitioner and although he had ample opportunity to contradict the averments made therein he did not make any attempt to do so. In my opinion the respondents have placed sufficient material on record to establish that in spite of its inclusion in the cadre by the notification of July 11, 1962 the post of State Press Liaison Officer still continued to remain temporary and no orders were ever passed by Government to convert it into a permanent post. As the post itself was temporary and was being renewed by annual sanction every year the question of petitioner's appointment to that post in a permanent capacity could not possibly arise. Mr. Chopra learned counsel for the petitioner however, argued that the petitioner's claim to permanency was not founded merely on his appointment to the post of State Press Liaison Officer. It rested on a more solid foundation. Mr. Chopra urged that it had not been denied by the respondents that the recruitment and conditions of Service of persons appointed to the Punjab Public Relations Department (Gazetted) Service and its rechristened successor, the Punjab Public Relations service were regulated by the Punjab Public Relations Department (Gazetted) Service Rules, 1958. These rules were framed by the Governor of Punjab in exercise of his powers under the proviso to Art. 309 of the Constitution and had therefore statutory binding force.

37. Rule 9 of the said rules which relates to the method of recruitment to various posts in the Service provides in sub-rule (b) that in the case of Deputy Director, Public Relations, the recruitment shall be made—

(i) by selection from among the Public Relations Officer, Editors, District Public Relations Officers, and the Superintendents provided they have five years' experience in their respective posts, or

(ii) by transfer or deputation of a person already in the service of the Government of a State or of the Union, or

(iii) by direct appointment.

When the petitioner who was already in the service of the State was transferred on 26-6-1962 to the post of Deputy Director (Press) vice Shri Rajendra Nath who was transferred as State Press Liaison Officer and then Joint Director at Delhi, he should be held to have been recruited to that post by transfer in accordance with sub-rule (b) (ii) of R. 9 mentioned above.

38. Mr. Chopra next referred to R. 10 and submitted that after the petitioner was appointed to the post under R. 9 (b) (ii) he was to remain on probation for a period of one year but the total period of probation could in no case exceed three years. Thereafter the petitioner automatically became permanent if there was a permanent vacancy against which he could be confirmed. It could not be disputed that the petitioner continued to hold the post of Deputy Director (Press) from 27-6-1962 to 14-6-1966. This was more than the maximum period of probation prescribed under R. 10 which reads as under;—

"10. Probation— (1) Members of the service, who are appointed against permanent vacancies, shall on appointment to any post in the Service remain on probation for a period of two years in the case of members recruited by direct appointment, and one year in the case of members recruited otherwise.

Provided that the period of service spent on deputation or on a corresponding or a higher post may be allowed to count towards the period of probation fixed under this rule.

(2) If the work or conduct of any member during his period of probation is, in the opinion of appointing authority, not satisfactory, the appointing authority may dispense with his services or revert him to his former post if he has been recruited otherwise than by direct appointment.

(3) On the completion of the period of probation of any member, the appointing authority may confirm such member in his appointment or, if his work and conduct have, in the opinion of the appointing authority, not been satisfactory dispense with his services or revert him to his former post if he has been recruited otherwise than by direct appointment or extend the period of probation and thereafter pass such orders as it could have passed on the expiry of the original period of probation.

Provided that the total period of probation including extension, if any, shall not exceed three years if there is a permanent vacancy against which such members can be confirmed."

In this connection Mr. Chopra drew our attention to the judgment of the Supreme Court in *State of Punjab v. Dharam Singh*, AIR 1968 SC 1210 where it was held:—

"Where, as in the present case, the service rules fix a certain period of time

beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negatived by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication."

Mr. Chopra submitted that R. 6 (3) of the Punjab Educational Service which was under consideration before their Lordships in that case was in pari materia with Rule 10 (3) in the present case. Mr. Chopra further submitted that it was respondents' own case that the post of Deputy Director (Press) was a permanent post at the time of the appointment of the petitioner to it in June 1962. There were also two other posts of Deputy Directors—one of Deputy Director (Field) and the other Deputy Director (Publicity Material). According to the affidavit of Shri Ram S. Verma the post of Deputy Director (Field) was permanently held by Mrs. A. Mardhekar, while the other post was a temporary post and was made permanent with effect from 1-4-1964 only. It therefore followed that in the year 1964 at least, there were three permanent posts of Deputy Directors. As there was a permanent vacancy in respect of one of those posts, on the expiry of the period of two years or at the most three years probation, the petitioner became entitled to be confirmed in the vacancy. It is true that after 14-6-1966 the petitioner was transferred to the post of State Press Liaison Officer which was a temporary post but once he became a permanent Government servant, his subsequent appointment to a temporary post would not have the effect of impairing his status as a permanent servant.

39. There is a great deal of force in the argument of Mr. Chopra. It is true that the petitioner's appointment as Deputy Director (Press) was made with effect from 27-6-1962 by Punjab Government's notification No. 7940-I.P.P.-62/15997 dated the 30th July 1962 because the permanent incumbent of that post Shri Rajendra Nath, was transferred to Delhi with effect from 2-7-1962 as Joint Director, Public Relations Delhi. Shri Rajendra Nath's appointment to the post was a temporary appointment because sanction of the Governor to the creation of that post itself was upto the 28th February, 1963 (see Memo No. 4754-L.P.P.-

62/12966 dated the 21st June, 1962 addressed by Shri E. N. Mangat Rai Chief Secretary, Punjab Government to the Director Public Relations and Tourism, Punjab-Annexure XVI at page 287 of the file). Shri Rajendra Nath therefore, continued to retain his lien on the post of Deputy Director (Press) which he was holding substantively before his transfer to Delhi. The post of Joint Director was thereafter continued on the basis of annual sanctions till September 1968 when it was made permanent. The petitioner's appointment to the post of Deputy Director was therefore, in or against a permanent post although the vacancy at that time was not permanent in that some one else had a lien on the post.

40. Mr. Dewan contended that on a true construction of Rule 10 (1) the question of petitioner's appointment on probation will only arise if it is established that he was not only appointed against a post that was permanent but also against a vacancy which was of a permanent nature. According to Mr. Dewan, the words "appointed against permanent vacancies" in sub-rule (1) of Rule 10 are capable of only one meaning and that is "appointed not only against permanent posts but also against permanent posts which are permanently vacant." I cannot agree, as I find it extremely difficult to visualise a permanent post which is permanently vacant.

41. The Interpretation suggested by Mr. Dewan would also make non-sense of the proviso to sub-rule (3) of Rule 10. If for the application of Rule 10 (1) it is necessary that both the post and the vacancy should be of a permanent nature then the words "if there is a permanent vacancy against which such member can be confirmed" as embodied in the proviso to sub-r. (3) will become otiose. Applying the rule of harmonious construction to sub-rule (1) and the proviso to sub-rule (3), the only proper meaning to be given to the expression "permanent vacancies" in sub-rule (1) is vacancies in permanent posts, no matter how those vacancies may have occurred. The vacancies in the posts may be the result of incumbents of those posts having been appointed to other posts temporarily or an officiating capacity. Mr. Dewan next contended that the petitioner could not have been appointed against a permanent vacancy even if the meaning canvassed for by Mr. Chopra were given to that term. In this connection he invited our attention to two letters dated 16-1-1963 and 22-5-1963 addressed by the Secretary Punjab Public Service Commission Patiala to the Chief Secretary to Government Punjab wherein the Commission had declined to agree to the proposed appointment of the petitioner as Deputy Director (Press) in relaxation of the prescribed

qualifications. Both these letters were filed as Annexures R-3/8 and R-3/9 to the affidavit of Shri G. L. Bailur (respondent No. 3). Mr. Dewan also referred to the following passage in the affidavit of respondent No. 3:—

"It may be mentioned that the post of State Press Liaison Officer was held in abeyance for four years i.e., from June 1962 to June, 1966. During this period, the petitioner was appointed to occupy the post of Deputy Director, a cadre post in the Department of Public Relations. The Public Service Commission took exception to this appointment of the petitioner and after some correspondence between the Government and the Commission, the Commission did not agree to the appointment of the petitioner to the said cadre post. Accordingly the post of the State Press Liaison Officer was revived and the petitioner appointed thereto in June, 1966. At no time was the petitioner ever made permanent by an order of the Government."

The petitioner's reply to this part of the affidavit of respondent No. 3 was as under:—

"I do not admit for want of knowledge the allegations that the Public Service Commission did not agree or took exception to my appointment of Deputy Director. The very fact that I held the post for a period of four years prima facie indicates that my appointment to the post was not unlawful."

42. In the Commission's letter dated 16-1-1963 there is reference to the letter of the Chief Secretary to Government Punjab dated the 6th August 1962 addressed to the Secretary to the Commission. The qualifications for the post of Deputy Director which according to the Commission were not possessed by the petitioner, were contained in that letter. No such letter was produced on record by the respondents nor has any other material been placed on record as to what were the special qualifications for that post which the petitioner did not possess. In the absence of necessary material it is not possible to accept the ipse dixit of respondent No. 3 or the advice or opinion of the Public Service Commission which the Government itself declined to follow because the petitioner's appointment in that post was continued for over three years after the receipt of the last letter of the Commission dated 22-5-1963 wherein it was clearly stated that the Commission were unable to agree to the appointment of the petitioner as Deputy Director (Press) in relaxation of the qualifications.

43. In the circumstances, there is no escape from the conclusion that the Government had deliberately chosen to disregard the advice of the Commission and had decided to appoint the petitioner to the post of Deputy Director (Press) in op-

position to that advice. Once that appointment was made the provisions of Rule 10 were attracted giving rise to the consequences envisaged therein.

44. Mr. Dewan finally argued that the case of Dharam Singh, AIR 1968 SC 1210 decided by the Supreme Court was distinguishable on facts and that the case which was directly in point was Shri Anup Singh v. State of Punjab, Civil Writ No. 1623 of 1966 decided by Tek Chand J. of the Punjab and Haryana High Court on 29-11-1967 and confirmed by a Division Bench of that High Court in L. P. C. No. 42 of 1968 (Punj). What was held was that even in cases where the period of probation has been extended the question of confirmation arises only if a vacancy exists. In that case it was held that there was no such vacancy. Tek Chand J. had also held that there was a lacuna in the rules under discussion in that case because the rules no doubt provided that the total period of probation including extension shall not exceed three years but they were silent as to what was to follow where the period of three years had been completed and the probationer was otherwise, suitable from the point of his work and conduct. The learned Judges of the Division Bench (Mehtar Singh C. J. and Prem Chand Jain J.) do not appear to have dealt with this part of the reasoning of the learned Single Judge. Anyway, in the instant case the proviso to sub-rule (3) specifically lays down what is to happen on the expiry of the total period of probation. The case of Dharam Singh, AIR 1968 SC 1210 therefore, fully applies to this case.

45. The result is that the first contention raised by the petitioner prevails and it is held that his appointment as Deputy Director ripened into a permanent appointment on the expiry of the period of probation and he became entitled to be confirmed in that post for the simple reason that by 1-4-1964 there were three permanent posts of Deputy Directors in one of which there was a permanent vacancy against which he could be confirmed. Whether any order of confirmation was actually made by the Government or not appears to me to be wholly irrelevant as the petitioner's right to confirmation arose on the expiry of the period of probation and the existence of permanent vacancy against which he could be confirmed within the meaning of the proviso to sub-rule (3).

46. Once it is held that the petitioner acquired the status of a permanent government servant his subsequent transfer to the post of State Press Liaison Officer, no matter whether that post was permanent or temporary would not derogate from his status and rights as such. It was held by the Supreme Court in Parshotam Lal

Dhingra v. Union of India, AIR 1958 SC 36:

"In the absence of any special contract the substantive appointment to a permanent post gives the servant so appointed a right to hold the post until, under the rules, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years' service or the post is abolished and his service cannot be terminated except by way of punishment for misconduct, negligence, inefficiency or any other disqualification found against him on proper enquiry after due notice."

As the petitioner's services were terminated without proper enquiry after due notice to him, the order of termination of his services must be struck down as having been made in contravention of the constitutional guarantee under Art. 311 of the Constitution.

47. The alternative contention urged by the petitioner will arise for consideration only if my view in regard to the first contention of the petitioner is found to be wrong. The contention briefly is that even if it be held that his appointment to the post of State Press Liaison Officer, the post that he held first and last, was temporary his appointment was continuous with the post and therefore, so long as the post was in existence he could not be asked to quit. For his argument, the petitioner relied upon the order dated 28-6-1957 which provided for the creation of the post as well as for the appointment of the petitioner thereto. The petitioner admitted that the post as well as his appointment thereto was in the first instance for a period of eight months ending with 28th February 1958 and that thereafter the post was renewed from year to year on the basis of annual sanction granted by the Government. Although the petitioner continued to hold that post, he was unable to produce any fresh order regarding continuance of his appointment thereto or the terms and conditions on which such appointment was continued. In the absence of any specific order to that effect it is impossible to hold that because the petitioner was allowed to hold the post for several years when the post was being renewed, his appointment to the post must be treated as being continuous with the post. The only reasonable assumption to make is that the petitioner's tenure ended by the 28th of February each year and when the post was renewed for the ensuing year the petitioner's appointment was also carried forward till the corresponding date in that year. It therefore, follows that the utmost that could be said in favour of the petitioner is that he had a right to continue in the post till 28th February 1959.

48. The petitioner then contended that there was no provision in the rules by

which his services could be terminated with one month's notice. Even on the assumption that he had a right to continue in the post till 28th February, 1969 his discharge from service by one month's notice on 31st October, 1968 was illegal and amounted to imposition of a penalty of removal or dismissal within the meaning of those expressions as used in R. 4 (vi) and (vii) of the Punjab Civil Services (Punishment and Appeal) Rules, 1952. In this connection our attention was invited to Note (4) in Appendix 24 to the Punjab Civil Service Rules Volume I (First Edition 1959 Reprint) at page 175 where it is observed:

"The discharge of a person appointed to hold a temporary appointment before the expiration of the period of his appointment, not being within the scope of Cl. (b) of the Explanation to this rule, amounts to removal or dismissal within the meaning of R. 4, and is therefore, appealable under these rules."

The foot-note appears to be a decision of the Government on the interpretation of Cl. (b) of the Explanation to R. 4. The clause reads as under:—

"The termination of employment of a temporary Government servant appointed otherwise than under contract on the expiration of the period of the appointment, does not amount to removal or dismissal within the meaning of this rule or R. 7." and is in my opinion a correct interpretation of the rule.

49. In reply to the petitioner's argument, Mr. Dewan referred us to R. 5.9 (b) of the Punjab Civil Services Rules Volume II. The said rule reads as under:—

"When it is proposed to discharge a person holding a temporary post before the expiry of the term of his appointment or a person employed temporarily on monthly wages without specified limit of time or duty, a month's notice of discharge should be given to such a person, and his pay or wages must be paid for any period by which such notice falls short of a month."

In my opinion, no help can be derived by the learned counsel from the above rule. The rule forms part of a group of rules comprised in Section 1 of Chapter V which deal with different kinds of pensions and conditions for their grant. Sub-sec. B (i) of that section which consists of Rr. 5.7 and 5.8 deals with selection for discharge. Rule 5.7 reads:—

"The selection of Government servants to be discharged upon the reduction of an establishment should *prima facie* be so made that the least charge for compensation pension will be incurred."

Rules 5.7 and 5.8 are followed by Rr. 5.9 and 5.10 in sub-section B (ii) and deal with notice of discharge. It follows that the notice of discharge envisaged in R. 5.9 (b) is consequent upon "the reduction of an establishment" contemplated under

Rule 5.7. In the present case, it cannot be disputed that the petitioner's discharge from service was not the result of any reduction of establishment. The order terminating the petitioner's services by one month's notice is therefore, liable to be quashed on this ground as well.

50. Mr. Dewan finally contended that even in the absence of any rules the services of a temporary Government servant were liable to be terminated by one month's notice for the simple reason that such an employee had no right to hold the post. In this connection our attention was invited to the following passage in the judgment of the Supreme Court in Parshotam Lal Dhingra's case, AIR 1958 SC 36:

"Likewise an appointment to a temporary post in a Government service may be substantive or on probation or on an officiating basis. Here also, in the absence of any special stipulation or any specific service rules, the servant so appointed acquires no right to the post and his service can be terminated at any time except in one case, namely, when the appointment to a temporary post is for a definite period."

51. It appears to me that the passage cited above does not help Mr. Dewan's argument as the petitioner's appointment to the temporary post has been held by me to be for a definite period i.e. for the period ending on the 28th February of the year for which the post was being renewed from year to year. The position in such a case appears to have been made perfectly clear by the learned Chief Justice who spoke for the Court in that case in the passage immediately following the one cited by Mr. Dewan where it was observed:—

"In such a case the servant so appointed acquires a right to his tenure for that period which cannot be put an end to unless there is a special contract entitling the employer to do so on giving the requisite notice or the person so appointed is, on enquiry held on due notice to the servant and after giving him a reasonable opportunity, to defend himself, found guilty of misconduct, negligence, inefficiency or any other disqualification and is by way of punishment dismissed or removed from service or reduced in rank."

52. The result is that this contention of the petitioner also succeeds. The prayer clause in the petition shows that the only relief claimed by the petitioner is for a writ of certiorari or any other writ, order or direction quashing the order dated 31-10-1968. As the petitioner has succeeded in making good two out of three contentions raised by him he is entitled to the relief prayed for by him. The order dated 31-1-1968 terminating the peti-

tioner's services is accordingly quashed. The petitioner will also have his costs which are assessed at Rs. 500.

Petition allowed.

AIR 1970 DELHI 143 (V 57 C 32)

V. S. DESHPANDE J.

Wire Netting Stores, Petitioner v. Regional Provident Funds Commissioner and others, Respondents.

Civil Writ No. 1236 of 1967, D/- 19-2-1970.

(A) Employees' Provident Funds Act (1952), Sch. I (as amended by Act 37 of 1953) — Entries "industry engaged in the manufacture of electrical mechanical or general engineering products" and "industry engaged in the manufacture of textiles (made wholly or in part of cotton or wool or jute or silk whether natural or artificial)" — Metal textile industry is covered by 'general engineering products.'

The essence of "engineering" is to design or to construct. Engineering brings out a finished product out of raw material or gives a particular shape to the raw materials. A certain length of wire is only a raw material. It has no particular shape. By weaving the wire into a warp and woof, a person makes wires nets etc. The essence of this activity is a constructive activity and as such a general engineering activity. This activity cannot escape from being covered by the expression "general engineering" activity particularly because the Court has to construe the words 'general engineering industry' broadly and in their ordinary meaning and not in a technical or a narrow sense. What is excluded by the particular entry 'textiles' from the general entry 'general engineering products' is that only those textiles which are included in the particular entry are excluded from the general entry. The metal textiles are not included in the particular entry 'textiles.' Therefore, they are not excluded from the general entry "general engineering products." AIR 1965 SC 1076 & (1967) 1 WLR 691 & (1966) 1 WLR 287 & (1968) 3 WLR 110, Rel. on. (Paras 6, 7, 8)

(B) Constitution of India, Art. 14 — Employees' Provident Funds Act (1952), S. 7-A — Validity — Provision is valid — Article 14 not attracted because commissioner has no discretion to pick and choose any employer but is bound to act according to the provisions of the Act and the Scheme. (Para 14)

(C) Constitution of India, Art. 19 (1) (f) and (g) — Employees' Provident Funds Act (1952), S. 7-A — Validity — Section does not impose unreasonable restriction on fundamental rights of a person to hold property or to carry on business guaranteed

ed by Art. 19 (1) (f) and (g) — Provision is valid.

Quasi judicial powers may be exercised by two kinds of administrative authorities or tribunals, namely, (1) by those whose jurisdiction depends on facts and pre-conditions, the existence of which is to be decided by the Civil Courts and (2) those who are given the power to decide even the jurisdictional facts on the proof of which their jurisdiction depends. The possibility of arbitrary exercise of powers can exist with the latter but not with the former. The Commissioner acting under Section 7-A of the Employees' Provident Funds Act belongs to the former category. The question whether a particular factory or establishment is covered by the Act and the Scheme is not to be decided finally by the Commissioner but is open to decision by the Civil Courts as well as by the High Courts and the Supreme Court. Sub-section (4) of Section 7-A gives finality only to the determination of the amount due from the employer made by the Commissioner but not to the preliminary assessment of the coverage by the Commissioner. The hearing to be given to the employer before such preliminary assessment is implied. The fact that the requirement of such a hearing is not expressed in the statute does not, therefore, in any way, mean that the Commissioner is not to give a hearing to the employer before making such a preliminary assessment. Exhaustive guidelines are laid down in Schedule I of the Act to be followed by the Commissioner in determining whether a particular industry is covered by the Act or not. The Commissioner is not authorised to act arbitrarily in deciding whether an industry was covered by the Act and the Scheme or not. Further the decision of the Commissioner is liable to be reviewed by the Central Government under Section 19-A and also by the Civil Courts. The Act and the scheme completely confine the power of the Commissioner. Section 7-A does not impose any unreasonable restrictions on the rights of the employer guaranteed by Art. 19 (1) (f) and (g) of the Constitution and is valid. Case law discussed. (Paras 10, 11, 13, 14)

(D) Constitution of India, Art. 245 — Employees' Provident Funds Act (1952), S. 19-A — Validity — Nature of powers under S. 19-A — Section does not give excessive or uncannalised power to Central Government.

The nature of the power conferred on the Central Government by Section 19-A of the Employees' Provident Funds Act is twofold. In some cases, it is administrative power analogous to rule making or the power to make subordinate legislation. The directions and the provisions made in exercise of this power are, therefore, sometimes called administrative legislation. In other cases, it is a quasi-

judicial power to decide an existing controversy or dispute. The *audi alteram partem* rule of natural justice has to be observed before any such decision is given. The common characteristic of both these powers is that the orders made thereunder are declaratory only. The power of either kind delegated to the Central Government under Section 19-A is not excessive or uncanalised so far as the quasi-judicial power of the Central Government to give an opinion by way of a decision on an existing controversy is concerned, the doctrine of excessive delegation of authority has no application. The right of hearing being secured by a mere rule of construction, Section 19-A cannot be held invalid on the ground that it does not expressly provide for a hearing. It is true that Section 19-A unlike Section 7-A does not expressly require the Central Government to give a hearing before deciding a representation made to it by a private party. The reason for this omission seems to lie in the dual nature of the functions of the Central Government under S. 19-A. The same words have been used to give two different kinds of powers to the Central Government, namely, adjudicatory and rule making. As no hearing was required to be given before the Central Government exercises the latter power, no express requirement of a hearing was introduced in Section 19-A. But the Courts have always read the requirement of a hearing in construing a statute giving either quasi judicial or administrative power to the Government, the exercise of which would adversely affect a particular person. Such construction is applicable to Section 19-A also in so far as the Central Government thereunder acts to the prejudice of a particular person on existing facts. Case law discussed.

(Paras 19, 20, 21)

(E) Employees' Provident Funds Act (1952), S. 19-A — Order under — Reasons need not be detailed.

A quasi judicial order must state its reasons. An executive authority like the Government cannot be expected to give more detailed reasons such as, for instance, may be given by Courts of law. Where the order says "the Government is of the opinion that the wire cloth, wire gauges and wire nettings manufactured in your factory are general engineering products, and, therefore, your factory falls within the scope of the industry 'electrical, mechanical or general engineering products' included to Schedule I of the Act" the reasons why the Central Government thinks that the factory of the petitioner is covered by the Act are clear from the order. The order of the Central Government is a speaking order and is not bad for want of reasons.

(Para 22)
(F) Constitution of India, Arts. 19, 245 — Employees' Provident Funds Act (1952),

S. 19-A — Power to make general orders and provisions for future application — Section not unconstitutional on ground of excessive and uncanalised delegation of power to Central Government by legislature. AIR 1957 Cal 702, Dissented from.

In so far as the power given to the Central Government by Section 19-A to make general orders and provisions for future application is concerned, it cannot be said that Section 19-A is unconstitutional on the ground of excessive and uncanalised delegation of power by the legislature to the Central Government. Section 19-A itself lays down in great detail the precise nature of the power, when and the conditions subject to which the power is to be exercised the matters regarding which alone it should be exercised. The power cannot be exercised in respect of any other matter. It cannot, therefore, be said to be legislative power comparable and parallel to the plenary legislative power of the legislature. On the other hand, it is not the ordinary power to make subordinate legislation to make rules and regulations to carry out the purposes of a particular statute. The power to remove difficulties and doubts by making general orders and provisions of future application is neither as extensive as ordinary legislative power nor is it as restricted as the power to make subordinate legislation. It seems to stand somewhere between these two extremes. The discretion given to the Central Government under Section 19-A would not be abused. Secondly, Section 19-A gives no power to the Central Government to alter in any way the provisions of the Act. The delegation under Section 19-A being hedged in by strict conditions and being limited its application to specific matters, the delegation of power under Sec. 19-A is not to be viewed with disfavour. The finality of the order of the Central Government under Section 19-A must be construed to be for departmental purposes only. For, in so far as the orders or provisions made by the Central Government are contrary to the Act, they would be invalid by the terms of Section 19-A itself which authorises the Central Government to issue the orders and directions "not inconsistent with the provisions of the Act." The Civil Courts, the High Courts and the Supreme Court would always have the jurisdiction to hold such an order of the Central Government as ultra vires the Act. AIR 1957 SC 691, Dist.; AIR 1957 Cal 702, Dissented from.

(Paras 23, 24, 25)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 169 (V 57) —

(1970) 1 SCWR 337, Asstt. Commr.

Urban Land Tax, Madras v. Buckingham and Carnatic Co. Ltd.

The principle and method of determining compensation are provided for in Sec. 8 of the Requisitioning and Acquisition of Immovable Property Act, 1952 when any property is requisitioned or acquired. The act of requisition is not really an act of acquisition.

(Para 6)

There is no basis for the assumption that the limitations imposed on the powers of the Executive Authorities in public interests, for their guidance, are exceeded in relation to the plot requisitioned. When the Court is called upon to construe a statute it always assumes that the power conferred upon various authorities under the statute would be used properly and not in an arbitrary or capricious manner. Here a principle is laid down which is supported not only by a great weight of succeeding authorities, but by its inherent reasonableness. The administrative plenary discretion to requisition an immovable property was vested in the Central Government under Section 29 (1) and there is nothing to show that this discretion or power has been abused or misused in this case. There is no colourable exercise of statutory power vested in the Central Government under Section 29 (1) when such power or discretion is exercised bona fide. Case law discussed.

(Para 6)

(C) Defence of India Act (1962), S. 29 (1) — Union Territory — Order of requisition of plot for defence purpose passed by Administrator — Opinion of Administrator is opinion of Central Government which he was competent to form.

In a case of an order passed by Administrator for requisition of plot for defence purpose in Union territory, the opinion of the Administrator is the opinion of the Central Government which he was competent to form. As a combined reading of definitions in S. 3 (8), (58) (b), (60) (c) of the General Clauses Act the Central Government in relation to the administration of a Union Territory shall mean the Administrator acting within the scope of the authority given to him by Art. 239 of the Constitution and the 'State Government' shall mean, in a Union Territory, the Central Government.

(Para 7)

What the Administrator did must necessarily be capable of being related to the defence of India purpose. The expression 'defence of India' has a very wide meaning in Section 29 (1). The requisition of plot at the instance of the Military Authorities and after discussion between the Secretary, Ministry of Defence and the Administrator for extraction of stones and materials from quarry for expansion of Airport during emergency is a defence of India purpose.

(Para 7)

It is not competent to the Court to investigate the ground or the reasonableness of the opinion when an Act commits

to an Executive authority the decision of what is necessary or expedient. Case law discussed.

(Para 7)

(D) Defence of India Act (1962), Sections 29 (1), 40 — Union Territory — Order for requisition of plot for defence purpose by Administrator — Power to requisition though can be delegated under Section 40, delegation is not necessary as Administrator can make such order — (General Clauses Act (1897), Section 3 (8) and (58) (b).)

Under Section 40 of the Defence of India Act the power to requisition an immovable property can be delegated — But where an order of requisition in Union Territory is passed by the Administrator the delegation is not necessary as the Administrator can by virtue of the provisions of Section 3 (8), (58) (b) of the General Clauses Act (1897) requisition the plot for defence of India purpose.

(Para 8)

(E) Constitution of India, Article 226 — Defence of India Act (1962), Section 29 (1) — Principles of natural justice — Does not apply to order of requisition under Section 29 (1).

It is true that an order of requisitioning plot under Section 29 (1) of the Defence of India Act is an administrative order and a public authority who acts unlawfully by violating the principles of natural justice is acting outside its statutory powers because it is violating the implied conditions which Parliament is taken to have imposed, but this principle would not apply to the order of requisition under Section 29 (1) of the Act and for valid reasons. The Act does not provide for this opportunity and for good reasons. In an emergency, such an opportunity may defeat the very purpose in view. Rules of natural justice are inapplicable. They are no doubt important rules but Court should not seek their assistance on almost all occasions and in almost all circumstances. There is not in the Act necessary implication that the owner of an immovable property should be heard before it is requisitioned under Section 29 (1). Case law discussed.

(Para 9)

(F) Constitution of India, Articles 19 and 31 — Defence of India Act (1962), Section 29 (1) — Requisition of plot under — No violation of Article 19 or 31 — Though the Company whose plot is requisitioned is deprived of its plot during period of requisition, this deprivation is by authority of law as envisaged in Article 31 (1) — Further, Company would be entitled to payment of compensation under the law — Benefit of Article 19 is not available to Company which is a rational legal person. Case law discussed.

(Para 10)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 198 (V 56)=
1969-1 SCJ 543, Suresh Koshy v.
University of Kerala
- (1969) AIR 1969 Goa 6 (V 56). G. N.
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- (1969) AIR 1969 Goa 16 (V 55). G. D.
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- (1968) AIR 1968 SC 650 (V 55)=
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v. P. K. Roy
- (1967) AIR 1967 SC 122 (V 54)=
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- (1967) AIR 1967 SC 295 (V 54)=
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cals Ltd. v. Company Law Board
- (1967) AIR 1967 SC 1264 (V 54)=
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State of M.P.
- (1967) AIR 1967 SC 1269 (V 54)=
1967-2 SCR 625, State of Orissa
v. Binapani Dei
- (1967) AIR 1967 Goa 102 (V 54).
Kec Ayub v. Govt. of Goa,
Daman and Diu
- (1967) AIR 1967 Goa 169 (V 54).
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- (1966) AIR 1966 SC 740 (V 53)=
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v. State of Bihar
- (1965) AIR 1965 SC 1767 (V 52)=
1965-2 SCR 216, Bhagwan v. Ram
Chand
- (1965) AIR 1965 All 236 (V 52).
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- (1963) AIR 1963 SC 1811 (V 50)=
1963-2 SCJ 605, State Trading
Corporation of India v. Commercial
Tax Officer, Visakhapatnam
- (1962) AIR 1962 SC 145 (V 49)=
1962-2 SCR 794, State of V.P. v.
Moula Bux
- (1962) AIR 1962 SC 247 (V 49)=
(1962) 3 SCR 613, Union of India
v. Ram Kanwar
- (1959) AIR 1959 SC 107 (V 46)=
1959 SCR 1440, Radheshyam v.
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tona Ltd. v. Commrs. of Works
- (1941) 1941-3 All ER 45, Barnard
v. Gorman
- (1941) 1941-3 All ER 336=1942 AC
205, Liversidge v. Anderson
- (1917) 1917 AC 260=116 LT 417.
Rex v. Halliday
- (1850) 155 ER 165=5 Exch. 378.
Bowditch v. Balchin
- Venkatraya Ayengar assisted by S. V.
Srinath and A. Lobo, for Petitioner; S.
Tamba, Govt. Pleader, for Respondents;
S. K. Kakodkar, Amicus Curiae.

ORDER:— This cause has been instruct-
ed with affidavits by learned counsel who
have had the conduct of it. It has been
argued at length by both sides. It now
devolves upon me to give decision on the
basis of the affidavits and arguments.

2. We may glance for a few moments
at the background of facts out of which
this cause arises. To start with it was
on 19th November, 1964, that the Ad-
ministrator passed an order under Sec-
tion 28(1) of the Defence of India Act
1962, requisitioning an open plot of land
No. II situated in village Chikalim, be-
longing to the petitioner company by the
name of M/s. Chowgule Real Estate and
Construction Private Ltd. The petitioner
company wrote to the State Government
(respondent No. 1) on 26th November,
1964, requesting that this order be with-
drawn, as metals required by the Gov-
ernment would be supplied by it. By an
order dated 1st April 1965, the State
Government in exercise of the powers
conferred by Section 31 of the Defence
of India Act, directed the petitioner com-
pany to furnish information required by
them on the lines indicated. The actual
possession of the plot was taken on 16th
May 1965, notwithstanding the represen-
tations made for reconsideration on be-
half of the petitioner company, that the
order of requisitioning the plot be with-
drawn. The plot requisitioned was pur-
chased by the petitioner company with
a view to ensuring steady supply of
metals extracted for construction of their
factory buildings etc. The petitioner
company had the necessary organization
and resources to work the quarry situ-
ated in the plot and extract metals in large
quantities for the purposes of supply to
the Navy, and also for utilizing the re-
maining part for construction of their
factory building etc., but in spite of this
fact, the possession of the plot was en-

trusted to a private contractor, their rival in trade, for extracting metals required for expansion of the air-strip in Dabolim Airport and other connected constructions of the Navy. The contractor had been intending to use metals extracted from the quarry for his private works. The petitioner company represented again to the State Government for releasing the plot, but, as there was no response, the petitioner company filed the petition under Article 226 of the Constitution on 5th December 1967. The relief sought by the petitioner company in this petition is that the order requisitioning the plot (hereinafter referred to as 'the impugned order') be quashed by an appropriate writ etc., for the following reasons:— (1) that the impugned order for an indefinite period of time and a refusal to derequisition the same amounts to an arbitrary and colourable exercise of powers especially because the quarry is subject to the law of diminishing return; (2) that the impugned order is bad as requisite opinion was not formed by the Central Government in terms of S. 29(1), before its issue; (3) that the working of the quarry and the extraction of metals does not bear on the subject of securing the Defence of India purpose as stated in the impugned order; (4) that there is no written order passed by the Central Government delegating its power to requisition the plot in favour of the State Government; (5) that the Administrator having been appointed by the President of India to administer the Union territory cannot be delegated the executive function of the Union Government and, for this reason, even if there was no order of the Central Government delegating its powers to requisition the plot, delegation made in favour of the Administrator is not permissible in law having regard to the provisions of the Constitution of India; and (6) that the rules of natural justice have been violated as the petitioner company, as an owner, was not heard before the impugned order was passed. The petition was later amended on 29th October, 1968. This amendment became necessary in view of enactment by Parliament of Section 25 of the Requisitioning and Acquisition of Immovable Property (Amendment) Act, 1968, following revocation of the Proclamation of Emergency on 10th January, 1968 under Article 352(2)(a) of the Constitution. The effect of the amendment, according to the petitioner company, is that the defence of India purpose for which the plot was requisitioned under the Defence of India Act ceased to exist after the expiration of 6 months from 10th January, 1968, in terms of Section 1(3) of the Defence of India Act, and, therefore, in view of the proviso to Section 6 of the Requisitioning and Acquisition of Immov-

able Property Act 1952, it cannot continue to be held for the said purpose, assuming the impugned order is not invalid for the reasons mentioned earlier; in the premises the plot had to revert to the petitioner company after the expiration of the said period, notwithstanding enactment of the said Section 25, apart from the fact that the Administrator was not constituted as a competent authority for requisitioning the plot under the Requisitioning and Acquisition of Immovable Property Act, 1952. The additional grounds for attacking the impugned order are that it offends the provisions of Articles 19 and 31 of the Constitution. This is because of the acts of waste on the part of the State Government and its contractors. This, in broad, is the case of the petitioners.

3. The case of the respondents before enactment of the said Section 25, as set out in the counter-affidavit sworn on behalf of the State Government by its Revenue Secretary is that the power to requisition the immovable property can be exercised both by the Central Government or the State Government and the Administrator, under Section 29(1) read with Section 2(1) of the Defence of India Act. The Central Government as well as the Administrator formed the requisite opinion in terms of the said Section 29(1). The extraction of metals from the quarry for Defence Works has a bearing on the subject of securing the Defence of India purpose. The impugned order passed by the Administrator is in accordance with the provisions of law and, therefore, it is valid. There is no law which requires that the requisitioning cannot be for an indefinite period. What the Defence of India Act requires is that requisitioning of immovable property should not extend beyond the period for which such property is required for the purposes specified in the said Section 29(1). It is for the Navy, which is not a party to the present petition, to accept or rebut the averments that it did not have the organization nor equipment to undertake the operations of quarrying of metals. The principles of natural justice have not been violated. The requisitioning of the plot is an administrative act and, therefore, it is not justiciable. The petitioner company has not made out a case for grant of an appropriate writ etc. and, therefore, the petition should be dismissed. In the supplementary affidavit sworn by the same Revenue Secretary after enactment of the said Section 25, it was denied that with the revocation of the Proclamation of Emergency, the defence of India purpose ceased to exist. The purpose of securing the defence of India, according to him, continues to exist. The activity of quarrying operations is exclusively meant for securing the defence of

India purpose. As a result of the operation of Sections 6 and 8(2)(b)(iv) of the Requisitioning and Acquisition of Immovable Property Act 1952, damages other than normal wear and tear are contemplated and compensation has been provided for in this Act. The purpose of retaining the plot to carry on quarrying operations falls within the purview of the Requisitioning and Acquisition of Immovable Property Act 1952 as amended by the Requisitioning and Acquisition of Immovable Property (Amendment) Act 1968. There is also the counter-affidavit sworn by the Garrison Engineer to the effect that the plot containing the quarry is given to various contractors for extracting metals in accordance with the relevant clause of the contracts executed on behalf of the President of India. The metals extracted are to be utilized exclusively for the Defence Works, and that apart from this clause, contractors have also been instructed not to use the metals extracted in any other works. It is not the intention of the Navy and the M.E.S. organization to do the quarrying operations. This, in substance, is the case of the respondents.

4. The first question for consideration is whether the impugned order for an indefinite period of time is bad as argued by Mr. Venkatraya Ayengar, learned counsel for the petitioner company. The provisions of Sections 1(3) and 29(1) and (3) of the Defence of India Act 1962, to the extent they are material for the present purpose, may be read in connection with this argument (hereinafter referred to as 'the Act'):-

"Section 1(3) — It shall remain in force during the period of operation of the Proclamation of Emergency issued on the 26th October, 1962, and for a period of six months thereafter but its expiry under the operation of this sub-section shall not affect."

Section 29(1) — Notwithstanding anything contained in any other law for the time being in force, if in the opinion of the Central Government or the State Government it is necessary or expedient so to do for securing the defence of India, civil defence, public safety, maintenance of public order or efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community, that Government may by order in writing requisition any immovable property and may make such further orders as appear to that Government to be necessary or expedient in connection with the requisitioning;

Section 29(2) x x x x

Section 29(3) — Whenever any property is requisitioned under sub-section (1),

the period of such requisition shall not extend beyond the period for which such property is required for any of the purposes mentioned in that sub-section."

Section 1(3) is a duration-cum-saving clause. The Act remained in force 6 months after the Proclamation of Emergency was revoked on the 10th January 1968. The properties requisitioned under the Act will remain requisitioned for this period, until released earlier under Section 35 of the Act. If not released, requisitions under the Act have to be continued by an authority of law. This law is Section 25 of the Requisitioning and Acquisition of Immovable Property Act 1952, (hereinafter referred to as 'the Act'), inserted by Section 3 of the Requisitioning and Acquisition of Immovable Property (Amendment) Act, 1968, (hereinafter referred to as 'the 1968 Act'), with effect from 9th August, 1968. The 1968 Act repealed Ordinance 4 of 1962 bearing the same short title. The effect of Section 25 is that any immovable property requisitioned by the Central Government or its delegatee under the Act which was not released before the 10th January, 1968, shall, as from that date, be deemed to have been requisitioned under the 1952 Act for the purpose for which such property was held immediately before the said date, and all the provisions of the 1952 Act shall apply accordingly. As a result of these provisions, the legal position is that the plot continues to be under requisition from the 10th of November 1964. It was requisitioned for defence of India purpose and, this purpose, contended Mr. S. K. Kakodkar, appearing as Amicus Curiae, continues to exist. According to learned counsel for the petitioner company, requisition could only be for a definite and limited period and under the guise of requisition, the Government cannot hold the plot indefinitely. In support of this argument he relied on 'Juggital Kamlapat v. Collector', AIR 1945 Bom 280. The facts of this case may be briefly stated. In the beginning of January 1945, the Collector of Bombay served an order purporting to have been issued on behalf of the Central Government under Rule 75-A of the Defence of India Rules, 1939 read with the notification of the Government of India, Defence Co-ordination Department dated 25th April 1942, whereby a particular flat belonging to the petitioner firm was requisitioned from the date of the order. This order was challenged on various grounds. One of the grounds on behalf of the petitioner firm was that the order purported to requisition the flat for an indefinite term, and this action was not valid. In support of this ground, it was contended by Mr. M. P. Amin, learned counsel for the petitioner firm, that according to the first condition mentioned

in the said order the flat was to continue under requisition during the period of the war and 6 months thereafter. This period, submitted Mr. Amin, was an indefinite period and, therefore, the said order being vague and indefinite, was invalid, illegal and inoperative in law, Bhagwati J., (as he then was) repelled this contention by observing thus:—

"If the argument of Mr. M. P. Amin was to be accepted, the requisition order in question should have stated that the requisition was to continue for a determinate period, say four months, six months, eight months and so on. The requisitioning authority should have either by a sort of foresight or provision determined what was going to be the period of the duration of the present war and ought to have stated that period as the period of requisition or should have resorted to approximations in that behalf and stated the approximate period so arrived at as the duration of the present war, but should not have had resort to the expression which according to Mr. M. P. Amin was vague in so far as it said that the requisition order was to be for the period of the present war and six months thereafter. He contended that his clients were not in a position to know what was the period during which this requisition order was going to be in operation. They could not know whether it was for two months or two years or for any indefinite period beyond the same. How could they, therefore, make any arrangements for housing their various representatives, directors and managers of the various industries in which they had been interested as also the offices of those various concerns with any degree of certainty? This argument of Mr. M. P. Amin has only got to be stated in order to be discarded. It was not within the bounds of human possibility for any party howsoever shrewd, intelligent or invested with commonsense and foresight it may be to predict what was going to be the duration of the present war. The Court is certainly not going to expect that any party before it was going to hazard any such prediction and if it was not humanly possible to do so state with definiteness any period of requisition when the requisition of the property itself was going to be made for the efficient prosecution of the war which would mean for the duration of the war and as stated in the order for a period of six months thereafter. Nothing more need be said in order to demonstrate the absurdity of this contention urged on behalf of the petitioners. The period of the present war though indefinite in duration was definite in itself in so far as the petitioners were given in as clear terms as it could be an indication of the period for which their property was sought to be requisitioned by

respondent 1, viz., the duration of the present war. The user of this term was as definite as the user of the expression "the life time of A" which is used when settling or bequeathing remainder in favour of B..... ..

..... ..
The present war also was going to come to an end and is going to end sometime or other though the period of duration of the present war might be indeterminate. The user of the term "during the present war" could, therefore, not render that expression vague or indefinite as contended by the petitioners. It is as clear and definite as it could be. In my opinion, therefore, there is no substance whatever in this contention of the petitioners." (p. 286).

The justification for this long passage is that the observations made therein also repel the contention of Mr. V. Ayengar. The impugned order does not mention the period of requisition, but the duration of this period is clearly indicated in Sections 1(3) and 29(3) of the Act read with Sections 25 of the 1952 Act. Section 29(1) does not require that the period should be indicated in an order requisitioning an immovable property. The period of grave emergency envisaged by Article 352(1) of the Constitution, though indefinite in duration in terms of months and years is definite in terms of Sec. 1(3). There can be no grave emergency forever. As in the life of an individual so also in the life of a nation there are periods of normalcy and emergency; the former the rule, the latter an exception. If I may adopt, with respect, the language of Bhagwati J., the argument of Mr. V. Ayengar has only got to be stated to be discarded. The petition by the petitioner firm for a suitable writ was allowed but on different grounds. This decision does not help the petitioner company.

5. Mr. V. Ayengar also drew my attention to 'Union of India v. Ram Kanwar', AIR 1962 SC 247 in support of his further contention that a purpose originally legal may become illegal, notwithstanding the deeming fiction employed in Section 25. The broad facts of this case were that a certain flat in New Delhi was requisitioned by the Government of India by an order dated April 14th, 1943 under Rule 75-A(1) of the Defence of India Rules, for a period of one year from April 15th, 1943 to April 14th, 1944. This period was extended from time to time, and finally, by an order dated April 2nd, 1946, the flat was requisitioned from April 15th, 1946, until further orders of the Government of India. The flat was thereafter allotted to some officers of the Indian National Airways. The flat became vacant for 4 or 5 months in 1947. It was thereafter occupied by some dis-

placed persons from West Pakistan. They vacated the flat after some time and thereafter it was given to Trivedi Kala Sangam. In November 1952, the owner urged that it should be released because it was not in use of the officers of the Central Government, but was in possession of Trivedi Kala Sangam, which was a private dance and music school. The flat was not released in spite of repeated representations and, therefore, the owner filed a petition for a writ of mandamus in the High Court of Punjab under Article 226 of the Constitution. This writ was granted by the Single Judge of the Punjab High Court in October, 1954. The Union of India filed a Letters Patent appeal in the Circuit Bench of the Punjab High Court at Delhi. The appeal was heard by a Division Bench of that Court. They agreed with the learned Single Judge and, in the view taken of the matter, the appeal was dismissed. The Union of India then filed an appeal by special leave under Article 136 of the Constitution. Subba Rao J., (as he then was), speaking for the Supreme Court observed at p. 252:—

"Relving upon the deeming clause, it is contended that the requisition of the land and the user of the same by the Government under the 1947 Act should be deemed to be a requisition made, under S. 3 of the 1952 Act, for a public purpose, being the purpose of the Union, and as that purpose, namely, user by the Triveni Kala Sangam, had not ceased, the appellants were not bound to de-requisition under S. 6 of the Act. But the fiction created by S. 24(2) of the Act would operate only upon the requisition already made. The fiction could not validate any illegal act of the Government. Therefore, the question is what was the effect of the earlier requisition under the Rules as well as under the 1947 Act. If the requisition originally made was for purposes mentioned in R. 75-A of the Rules and continued under S. 3 of the 1947 Act only for the said purposes, under S. 3 of the 1952 Act the requisition of the property made for the said purposes would be deemed to be a requisition for a public purpose being a purpose of the Union. But the validity of the requisition could be judged on the basis of the pre-existing statutes and not on the basis of the provisions of sections of the 1952 Act. The result is that the requisition of a property made for public purposes under R. 75-A of the Rules would be deemed to be a requisition under S. 3 of the Act and all the provisions of the Act would apply accordingly.

We have pointed out that the requisition for the said purposes only continued under the 1947 Act. The purposes for which it was requisitioned must, there-

fore, be deemed to be the purposes mentioned in R. 75-A of the Rules. Even if S. 5 of the Act was excluded on the ground that no notice was issued under R. 75-A of the Rules, the proviso to S. 6 of the Act would be attracted. Under that proviso, where the purposes for which any requisitioned property was being used ceased to exist, the Central Government shall release the property, as soon as may be, from requisition. In the present case, on the facts it is manifest that the flat was not used for any of the purposes for which it was requisitioned for a number of years; and indeed, when the Act came into force, it was used only for locating the Triveni Kala Sangam, which is clearly not one of the purposes for which the flat was requisitioned. If so, it must be held that the purpose ceased to exist, and the respondents have acquired a right to be put in possession thereof under the said proviso."

The aforesaid observations are relied upon by learned counsel for the petitioner company, but, as I will show hereafter, they also do not help the petitioner company. The narration of some further facts may be necessary to enable us to follow the implications of these observations. The Requisitioned Land (Continuance of Powers) Act 1947 was enacted to provide for continuance of certain emergency powers in relation to land which, when the Defence of India Act 1939 expired, were subject to requisition effected under the Defence of India Rules made under that Act. Section 24(1) of the 1952 Act provided for repeal of the above 1947 Act. Section 24(2) provided that on the commencement of the 1952 Act the properties which were subject to requisition under the provisions of the 1947 Act shall be deemed to be property requisitioned under Section 3 of the 1952 Act and that all the provisions of the 1952 Act shall apply accordingly. The facts of this case are distinguishable from the facts of the present case. They differ completely from those with which we are concerned, and the decision turned for the most part upon considerations which are entirely absent here. It is well settled that a case is an authority for what it decides. I agree that the fiction in Section 25 of the 1952 Act would not validate any illegal act but, I may as well ask— "Where is the illegal Act?" The illegal Act must exist in reality and not in imagination. The plot was requisitioned in the present case for the defence of India purpose and it continues to be used for that purpose. This is one of the six purposes specified in Section 29(1) of the Act. The first proviso to Section 6 of the 1952 Act is not attracted as urged by Mr. V. Avengar. The defence of India purpose has not ceased to exist. The concept of defence of India is not ephemeral as rightly point-

ed out by Mr. S. K. Kakodkar. It is a whole-time affair. The validity of the requisition is being judged in terms of Section 29(1) of the Act, and not in accordance with Section 25 of the 1952 Act. The result is that the requisition of the plot for defence of India purpose which purpose still exists would be deemed to be requisition under Section 3 of the 1952 Act, and all the provisions of that Act would apply accordingly, the redeeming feature being non-application of other stringent provisions of the Act. The legal fiction in Section 25 has to be given full effect. In 'East End Dwelling Company Ltd. v. Finsbury Burrow Council', (1952) AC 109 Lord Asquith while dealing with the relevant provisions of the Town and Country Planning Act 1947, observed:—

"The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

This principle has been approved by the Supreme Court in 'Bombay v. Pandurang', AIR 1953 SC 244.

6. Mr. V. Ayengar next argued that the quarry is subject to the law of diminishing returns and that the act of requisition is really an act of acquisition because there would be depletion of metals in course of time and what may be left to the petitioner company, on release of the plot, would be bare land with stones and mortars and not metals. He went on to add that this amounts to arbitrary and colourable exercise of the power vested in the Central Government. Now, the concepts of requisition and acquisition are different, assuming the quarry is subject to the law of diminishing returns unlike timber and wine and also assuming a further depletion of metals. The right, title and interest to the plot is not extinguished. The plot continues to belong to the petitioner company. The principle and method of determining compensation are provided for in Section 8 of the 1952 Act when any property is requisitioned or acquired. The petitioner company would be entitled to compensation in both cases, and I find it difficult to appreciate the argument that the act of requisition is really an act of acquisition. This is an idle contention. In certain circumstances the principle of reinstatement may apply depending upon the facts of a particular case. The remedy for acts of waste (denied on behalf of the State Government) is by way of damages, but the requisition will not be affected. Mr. V. Ayengar also invited my attention to Section 44 of the Act which says that any authority acting in pursuance of the Act shall interfere with the ordinary avocations of life and

enjoyment of property as little as may be consonant with the purpose of ensuring the defence of India and other purposes specified in Section 29(1), and in this connection he relied on 'Vimlabai Deshpande v. Emperor', AIR 1945 Nag 8. Section 15 of the Defence of India Act 1939 was similar to the said Section 44. In regard to Section 15 of that Act, the learned Judges of the High Court of Nagpur made the following observations at p. 17:—

"the special powers conferred are to be used sparingly, and the ordinary lives and avocations of those proceeded against under the Act and its rules are to be interfered with as little as possible, and only to the extent consonant with the public safety and interest and the defence of British India. These conditions are express and restrictive. They are fundamental."

With respect, I agree. These observations will also apply to the said Sec. 44, but there is no basis for the assumption that the limitations imposed on the powers of the Executive Authorities in public interests, for their guidance, are exceeded in relation to the plot requisitioned. 'Kavalram v. Collector of Madras', AIR 1944 Mad 285, was another decision cited by him on Sections 15 and 16 of the Defence of India Act 1939. Section 16 was similar to Section 45(1) of the Act. Under Section 45(1), no order made in exercise of any power conferred by or under the Act shall be called in question. The learned Judges of the Madras High Court said that Sections 15 and 16 are to be read in conjunction; but this does not preclude the court from deciding whether the power has been conferred or whether power has been abused. I agree. This proposition of law is unexceptionable, but it must not be assumed that the power conferred upon the Executive by the statute will be abused. (Vide 'Allkinson J. R. v. Haliday', (1917) AC 260 (271)). This was a case of Habeas Corpus writ action. The law is well settled that when the Court is called upon to construe a statute it always assumes that the power conferred upon various authorities under the statute would be used properly and not in an arbitrary or capricious manner. Here a principle is laid down which is supported not only by a great weight of succeeding authorities, but by its inherent reasonableness. The administrative plenary discretion to requisition an immovable property was vested in the Central Government under Section 29(1) and there is nothing to show that this discretion or power has been abused or misused in this case. The argument on abuse of power is prompted by the affidavit of the Garrison Engineer that the purpose of requisitioning this quarry was to afford the prospective contractors the facility of quarrying stones

and metals etc., and thereby bring down the tendered amounts for the defence works. It is not clear to me how the petitioner company is really concerned with the question of tenders in relation to the plot requisitioned. What use can be made of the plot containing the quarry is the affair of the Government and not the petitioner company. The argument is misconceived. Mr. S. K. Kakodkar submitted that there is no colourable exercise of statutory power vested in the Central Government under Section 29(1) when such power or discretion is exercised bona fide. This submission is correct. In this connection I am pressed by him with the decision *Carlotta Ltd. v. Commrs. of Works*, (1943) 2 All ER 560. I do not propose to take time by a full recital of the facts. I would content myself with stating the broad facts of this case. This was a case where the factory of the appellants was requisitioned by the Commissioner of Works under the provisions of the Defence (General) Regulations 1939, Reg. 51 (1). This provision is almost similar to Section 29(1) of the Act. The order of requisition was passed in 1942, during the last World War. This order was challenged on various grounds which need not be mentioned. The validity of this order was maintained, and the appeal was dismissed. It was held by the Court of Appeal that Parliament had committed to the Executive the discretion of deciding when an order for requisition of premises should be made under the Regulation and with that discretion, if bona fide exercised, no Court could interfere. The impugned order is not bad for indefiniteness nor a refusal to release it amounts to an arbitrary and colourable exercise of power as argued at the Bar. I should have thought that this was clear without any particularly subtle reasoning. I think I have said enough on question No. 1 which is answered against the petitioner company.

7. I shall next consider questions Nos. 2 and 3 together. Was the requisite opinion formed by the Central Government in terms of Section 29(1) of the Act before its issue? This is a question of fact. Has extraction of metals any bearing on the defence of India purpose specified in the impugned order? This is a mixed question of fact and law. It was argued by Mr. V. Iyengar that the impugned order was bad as requisite opinion was formed by the Administrator and not by the Central Government. The impugned order shows that the opinion formed was of the Administrator. It was further argued that the Administrator did not apply his mind, assuming he was competent to form the opinion. It was contended by Mr. S. K. Kakodkar, learned counsel, and Mr. S. Tamba, learned Government Pleader, that the Administrator

was competent to form the opinion and he passed the order after applying his mind. It was further contended that the requisite opinion was also formed by the Central Government. In this connection my attention is invited to paragraphs 7 and 10 of the counter-affidavit sworn by the Revenue Secretary, wherein it is affirmed that on the basis of the demand made by the Military Estate Officer, Poona Circle, the plot was requisitioned after discussion between the Secretary, Ministry of Defence and the Administrator. There is correspondence to establish this demand. Mr. V. Ayengar submitted that the record of discussion has not been made available to this Court. This is so, but it is not necessary for the purposes of law that this record should be placed before the Court. There is no reason why the counter-affidavit should not be accepted in this behalf. The legal position may next be examined. The General Clauses Act 1897, was extended to this territory by Section 3 of the Goa, Daman and Diu (Laws) Regulation 1962 (No. 12 of 1962) and it came into force with effect from 30th January, 1963. The definition Section 3(8) thereof provides that in all Central Acts made after its commencement, unless there is anything repugnant in the subject or context the "Central Government" shall — (b) in relation to anything done or to be done, after the commencement of the Constitution, mean the President; and shall include, — (iii) in relation to the administration of the Union Territory, the Administrator thereof acting within the scope of the authority given to him under Article 239 of the Constitution. Section 3(58) (b), after the commencement of the Constitution (Seventh Amendment) Act 1956, includes within the definition of "State", a Union Territory. Under Section 3(60) (c) "State Government", as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act 1956, shall mean in a Union Territory, the Central Government. The Constitution (Seventh Amendment) Act 1956, was enacted on 1st November 1956. Section 3(52-A) defines "Union Territory" as meaning any Union Territory specified in the First Schedule appended to the Constitution. This territory is a Union Territory, and the combined operation of the definitions cited will show that in relation to the administration of a Union Territory the Central Government shall mean the Administrator acting within the scope of the authority given to him by Article 239 of the Constitution and the "State Government" shall mean, in a Union Territory, the Central Government. Article 239(1) of the Constitution provides that save as otherwise provided by Parliament by law, every Union Territory shall be ad-

administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such designation as he may specify. There is no parliamentary law to the contrary. The requisition of the plot under Section 29(1) of the Act in this case was at the instance of the Central Government in the light of the demand made by the Military authorities and after discussion between the Secretary, Ministry of Defence, and the Administrator. As pointed out earlier, the Central Government shall mean the President under Section 3(8)(b), and for the purpose of acting within the scope of the authority given to the Administrator by Article 239(1) of the Constitution, it is not necessary that the President personally should instruct the Administrator to requisition the plot. The Union Territories are, in fact, administered by the Central Government in the name of the President and on his behalf, to such extent as it thinks fit, through Administrators with designations such as Lt. Governor or the Chief Commissioner. The Administrator when he requisitioned the plot formed the requisite opinion, and this he was competent to do by virtue of S. 3(8)(b) (iii). In this connection learned Government Pleader invited my attention to the two decisions of this Court—'J. J. Rodrigues v. Union of India', AIR 1967 Goa 169 at p. 175 and 'G. D. Labour Union v. Govt. of Goa', AIR 1969 Goa 16 at p. 25 where—in the definitions of "appropriate Government" for the purpose of the Land Acquisition Act 1894 and the Industrial Disputes Act 1947, were considered in the context of the said provisions of the General Clauses Act. In addition reliance was also placed by this Court on Clause 6(1) (b) of the said 1962 Regulation, which closely follows the language of Section 3(60) (c) of the General Clauses Act. This Regulation is inapplicable to this case for the simple reason that it applies to pre-liberation Acts extended specifically to this territory. The Act is a post-liberation Act and it was extended to the whole of India including this territory. These decisions are relevant. The opinion of the Administrator is the opinion of the Central Government which he was competent to form. There is nothing repugnant in the subject or context to displace this view. Mr. S. K. Kakodkar submitted that the Administrator, as State Government, was also competent to form the opinion in view of the provisions of Section 2(i) read with Sec. 29(1) of the Act and also Section 3(60) (c) of the General Clauses Act. Under S. 2(i) of the Act "State Government" in relation to a Union Territory means the Administrator thereof. Section 29(1) of the Act enables the Central Government or the State Government to requisition an

immovable property for the purposes specified therein. The position of a Union Territory is different from that of the States specified in the First Schedule Part I appended to the Constitution. Part II specifies the Union Territories. As, pointed out earlier, the requisite opinion in this case was formed by the Administrator as the Central Government, although the said submission of Mr. S. K. Kakodkar is not without force. Mr. V. Ayengar invoked the assistance of 'Satya Dev Bushahri v. Padam Dev', AIR 1954 SC 587 (588), in support of his contention that the Administrator was not competent to form the opinion. The Supreme Court said in that case that Part C States, though Centrally administered, had a separate existence and were not merged with the Central Government. This observation was made with reference to the question whether the contract entered into by the Government of Vindhya Pradesh with the respondent Padam Dev is to be considered as a contract with the Central Government for the purpose of disqualification under the Representation of the People Act, 1951. The answer given by their Lordships of the Supreme Court was in the negative because Section 7(d) of that Act was not in terms extended to elections in Part C States and came in only with the qualifications mentioned in Section 17 of the Part C States Act 1951. If the object of citing this decision is to show that Union Territories have a separate existence like predecessor Part C States and that the President is an Executive Head of these territories, there can be no disagreement with Mr. V. Ayengar. The scheme of the Constitution is clear on this point, but, with respect, this decision does not directly deal with the question under consideration. This decision was followed by the Supreme Court in 'State of V. P. v. Moula Bux', AIR 1962 SC 145. In that case it was held by their Lordships that in the case of a contract entered into by the Government of the State of Vindhya Pradesh in respect of the property of the State, the proper authority to be named as the defendant in a suit brought against the Government was the State of Vindhya Pradesh and not the Union of India even though the State Government was defined in the General Clauses Act 1897 as the Central Government. This decision also, with respect, has no bearing on the question under consideration. It may, however, be added that for the removal of doubts Section 55 of the Government of Union Territories Act enacted in 1963 expressly provides that all suits and proceedings in connection with the administration of a Union Territory shall be instituted by or against the Government of India. The petition in this case has not

been filed against the Government of India, but against the State Government. I am not inclined to view seriously this defect in form. Did the Administrator apply his mind before passing the impugned order? I shall presently address myself to this question. The form of the impugned order is in conformity with the requirements of Section 46(3) of the above 1963 Act. Under Section 45(2) of the Act read with Section 4 of the Evidence Act, it is to be presumed that it was made by the Administrator. The impugned order opens with the words "Whereas the Administrator is of the opinion that it is necessary and expedient for securing the defence of India purpose that the immovable property mentioned in the Schedule be requisitioned". The opinion or satisfaction is subjective and is to be of the Administrator. He has to be reasonably satisfied ('*Liversidge v. Anderson*', (1941) 3 All ER 338, per Lord Wright). Ordinarily the ipse dixit of the Administrator would be enough and it would be difficult to prove that he did not. In fact, from the opinion when the impugned order states that he did. The Court would interfere if it could be shown that there are no grounds on which this opinion could be formed. In that case, the Court would infer that he did not honestly form that opinion, or that in forming it he could not have applied his mind to the relevant facts, '*Ross-Clunis v. Papadopoulos*', (1958) 2 All ER 23 at p. 33 (PC). There has to be a rational relation between the material available to the Administrator and the nature of satisfaction reached. Whether the plot was requisitioned for securing the defence of India purpose is an objective fact. The Administrator was required to form the opinion on this matter as a preliminary step to the exercise of the power conferred on him to requisition the plot. The determination of this fact and the exercise of the power based thereon are alike matters of an administrative nature. The necessity and expediency are matters for the Administrator to decide. It is not competent to the Court to investigate the ground or the reasonableness of the opinion when an Act commits to an Executive authority, as in the instant case, the decision of what is necessary or expedient '*Province of Bombay v. Kshaldas*', AIR 1950 SC 222. In this case the legality of requisition was questioned under the Bombay Land Requisition Ordinance, 1947. If the plot was requisitioned by the Administrator without there being a defence of India purpose, his action would be nullity in law in spite of emergency, and the opinion formed would be "no opinion" for the purpose of Section 29(1). Mr. S. K. Kakodkar, learned counsel, invited my attention to '*State of Bombay v. Vir-*

kumar', AIR 1952 SC 335, where Bose J., speaking for the Court, observed:—

"There is an authority for the view that war-time measures, which often have to be enacted hastily to meet a grave pressing national emergency in which the very existence of the State is at stake, should be construed more liberally in favour of the Crown or the State than peace-time legislation."

This is so, but, liberal construction cannot be carried too far so as to uphold requisitions during emergency which are not reasonably related to the purposes specified in Section 29(1) of the Act. In *Liversidge's* case, (1941) 3 All ER 338 (supra) at p. 361, Lord Atkin, in his famous dissent, ranked amongst his greatest, observed:—

"Their function is to give words their natural meaning, not perhaps in war time, leaning towards liberty, but following the dictum of Pollock, C.B., in *Bowditch v. Balchin*, (1850) 155 ER 165= 5 Exch 378 cited with approval by Lord Wright in *Barnard v. Gorman*, (1941) 1941-3 All ER 45 at p. 55. Pollock C.B., said, at p. 381: In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute. In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace."

This was a case of detention in prison during emergency of one *Liversidge* under the Defence (General) Regulations, Reg. 18-B, which provided for detention of persons of hostile associations. He sought to challenge the Home Secretary's right to order his detention without stating his reasons for believing that he was liable to be detained under these Regulations. The words— "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety, or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained"— were construed by the majority of the House of Lords as implying subjective opinion. The ratio was that where regulations are made for the safety of the realm and the administrative plenary discretion is vested in a Secretary of State, it is for him to decide whether he has reasonable grounds, and to act accordingly. In our case, Parliament has chosen to say explicitly in Section 29(1) of the Act that if in the opinion of the Central Government, it is necessary or expedient so to do for securing the defence of India and other purposes specified, in that case, by an order in writing, an immovable property can be requisi-

tioned. What the Administrator did must necessarily be capable of being related to the defence of India purpose, whether during war or peace. We have the counter-affidavit of the Revenue Secretary that at the instance of the Military Authorities and after discussion between the Secretary, Ministry of Defence and the Administrator, the plot was requisitioned for expansion of Dabolim Airport during emergency. This is a defence of India purpose related to Entry 1 of the Union List, Seventh Schedule, appended to the Constitution. The extraction of stones and metals from the quarry for expansion of the Airport has no doubt a material bearing on the defence of India purpose. In their correspondence with Government before the petition was filed, the petitioner company did not dispute this fact. This fact was later disputed at the Bar, but rather faintly. I am satisfied that the Administrator did apply his mind before requisitioning the plot. What is defence of India purpose is explained in the context of preventive detention by *Hidayatullah J.* (as he then was) in *Ram Manohar v. State of Bihar*, AIR 1966 SC 740 at p. 755, cited by Government Pleader. It was said that—

"the expressions defence of India and civil defence connote defence of India and its people against aggression from outside and action of persons within the country. These generic terms were used because the Act seeks to provide for a congeries of action of which preventive detention is just a small part."

The expression "defence of India" has a very wide meaning in Section 29(1). This purpose and also other purposes specified therein, such as — civil defence, public safety, maintenance of public order, or efficient conduct of military operations — are not mutually exclusive. They overlap and it is possible to conceive that some of these purposes may fall under two or more heads, depending upon the facts of a particular case. The decision in *'Saraswati v. District Magistrate'*, AIR 1965 All 236 cited by Mr. V. Ayengar is based on altogether different considerations. There it was held by the learned Single Judge of the Allahabad High Court that the requisition of an immovable property under Section 29(1) of the Act for the occupation of a member of the National Cadet Corps cannot have even a remote connection with the object of efficient conduct of military operations as envisaged in this section. It was also held that this object was wholly non-existent at the relevant time and the other object of securing the defence of India being dependant thereon it also disappears. This decision is not helpful for the present purpose. I would conclude that the impugned order is not bad for the reasons

mentioned by Mr. V. Ayengar on behalf of the petitioner company.

8. The questions Nos. 4 and 5 may next be considered. They can be disposed of quickly. Section 40 of the Act confers power on the Central Government and the State Government to delegate to any officer or authority any power or duty conferred by the Act or by any rule made under the Act. Under this section, the power to requisition an immovable property can be delegated. The contention of Mr. V. Ayengar is that there is no written order by the Central Government in favour of the Administrator or the State Government delegating its power to requisition the plot for securing the defence of India purpose. As stated earlier, the Administrator could by virtue of the provisions of the General Clauses Act cited earlier, requisition the plot for the defence of India purpose. The State Government could also requisition the plot for that purpose. It was stated by Mr. S. K. Kakodkar that delegation was not necessary in this case. I agree. The respondents are not relying on this section in support of the validity of the impugned order. The Administrator is appointed by the President under Article 239 of the Constitution, but in requisitioning the plot he did not function as a delegate. He functioned as the Central Government. In arguing these questions Mr. V. Ayengar seems to have overlooked the scheme of the General Clauses Act.

9. Was there any violation of the principles of natural justice in passing the impugned order? This is question No. 6. It is argued by Mr. V. Ayengar that as no opportunity was given to the petitioner company to place its point of view before the plot was requisitioned therefore the impugned order is void. This seems to be all too narrow a view. The Act does not provide for this opportunity and for good reasons. In an emergency, such an opportunity may defeat the very purpose in view. We are not here concerned with enquiries by domestic tribunals which may be quasi judicial or administrative in their nature. We are also not concerned with the exercise of power subject to a qualification repeatedly recognized that no man is to be deprived of his property without his having an opportunity of being heard. We are rather concerned with what is known as the power of 'Eminent Domain' exercisable for the purpose of defence in war or in an emergency. In normal times requisition of an immovable property is under the 1952 Act and acquisition under the Land Acquisition Act, 1894, where opportunity of being heard is given and the principles of natural justice observed. In *Carltona Ltd.*, case (1943) 2 All ER 560 (Supra) the order requisitioning the factory belonging to this company was chal-

lenged on various grounds; one of the grounds was that notice given to this company was a bad notice because it gave a reason which was not mentioned in the Defence (General) Regulations Reg. 51(1). This contention was repelled by Lord Greene M. R., speaking for the Court of Appeal, in the following words at page 562:

"It is to be observed that, in order to exercise the requisitioning powers conferred by the regulation no notice is necessary at all and, therefore, the question of the goodness or badness of a notice does not in truth arise. The giving of notice is not a pre-requisite to the exercise of the powers and, accordingly, the notice must be regarded as nothing more than a notification, which the Commissioners were not bound to give, that they are exercising those powers."

It is true that the order requisitioning the plot under Section 29(1) of the Act is an administrative order; in certain cases it has been held that the principles of natural justice were violated when Executive Authorities passed administrative orders involving civil consequences, but those cases are different—*Radheshyam v. State of M. P.*, AIR 1959 SC 107, *Bhagwan v. Ram Chand*, AIR 1965 SC 1767, *State of Jammu and Kashmir v. Bakshi Gulam Mohammed*, AIR 1967 SC 122, *State of Orissa v. Binapani Dei*, AIR 1967 SC 1269 cited by this Court in *Kec Ayub v. Government of Goa, Daman and Diu*, AIR 1967 Goa 102 at p. 112 and *G. N. Tilve v. Government of Goa, Daman and Diu*, AIR 1969 Goa 6. I would concede that a public authority who acts unlawfully by violating the principles of natural justice is acting outside its statutory powers because it is violating the implied conditions which Parliament is taken to have imposed, but this principle would not apply to the order of requisition under Section 29(1) of the Act and for valid reasons. Mr. V. Ayengar has not been able to cite any authority relating to requisition of an immovable property under this Section where compliance with principles of natural justice was considered necessary. He, however, invoked the assistance of two decisions of the Supreme Court in *L. N. Saksena v. State of M. P.*, AIR 1957 SC 1264 and AIR 1957 SC 1269 (supra), in support of the said argument. These decisions are with reference to the provisions of Article 311 of the Constitution. The facts of these cases are entirely different from the facts of the case argued at the Bar. I agree with Mr. S. K. Kakodkar that the rules of natural justice are inapplicable. They are no doubt important rules but let us not seek their assistance on almost all occasions and in almost all circumstances. Let us not bring them down from the lofty clouds and apply them indiscriminately. There are cases and cases. In *Union of*

India v. P. K. Roy, AIR 1968 SC 850 (858), *Ramaswami J.*, speaking for the Supreme Court, observed:

"But the extent and application of the doctrine of natural justice cannot be imprisoned within the straight jacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case. See the decision of this Court in 1965-3 SCR 218 at p. 222 = (AIR 1965 SC 1767 at p. 1770)."

There is not in the Act necessary implication that the owner of an immovable property should be heard before it is requisitioned under Section 29(1). In *Suresh Koshy v. University of Kerala*, AIR 1969 SC 193 (201), *Hegde, J.*, speaking for the Supreme Court, said:

"The rules of natural justice are not embodied rules. The question whether the requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point, the constitution of the Tribunal and the rules under which it functions."

There is not—and in the nature of things there cannot be—a rigid formula cabinining and confining these rules. This question also is decided against the petitioner company.

10. The seventh question—and happily the last question—is that there is a violation of Articles 19 and 31(1) of the Constitution. The argument of Mr. V. Ayengar is that because of the acts of waste on the part of the Government and its contractors working the quarry and extracting metals and stones therefrom the petitioner company is virtually deprived of the plot and its right to hold and dispose of the plot, on release, would be affected. This argument, if I may venture to say so, is not relevant, assuming the existence of acts of waste as pleaded. It is well settled that the benefit of Article 19 is not available to a company which is a rational legal person (see *Barium Chemicals Ltd. v. Company Law Board*, AIR 1967 SC 295 (305) approving *State Trading Corporation of India Ltd. v. Commercial Tax Officer Visakhapatnam*, AIR 1963 SC 1811). The petitioner company would be entitled to payment of compensation under the law and, therefore, the requirements of Clause (2) of Article 31 are observed. The petitioner company is deprived of its plot during the period of requisition, but this deprivation is by authority of law as envisaged in Clause (1) of Article 31. It is not the contention of Mr. V. Ayengar that this law is invalid. In my view neither Article 19 nor Arti-

cle 31 apply. They seem to have been erroneously invoked. The Courts no doubt are zealous in safeguarding the rights guaranteed under the Constitution. Rights declared in words might be lost in reality but this cannot be said of the present case.

11. Considering then, all the questions raised and the relevant facts and arguments, with care and application of my understanding to their result, I am of the opinion that the petition challenging the impugned order is devoid of substance and therefore, must be rejected with costs which are assessed at Rs. 300. Order accordingly. I am satisfied that the order, requisitioning the plot is valid.

Petition dismissed.

AIR 1970 GOA, DAMAN & DIU 93
(V 57 C 15)

C. MURAHARI RAO, A. J. C.

Francisco Oliveira, Appellant v. Piedade Almeida, Respondent.

Second Civil Appeal No. 21 of 1968, D/- 10-12-1969.

(A) Legislative Order No. 1952, Arts. 6, 2 — Question whether a person is 'Mundkar' as defined in Art. 2 — Civil Court has jurisdiction to decide — Art. 6 does not lay down that Civil Court cannot decide such question. AIR 1968 Goa 41, Dist. (Para 4)

(B) Legislative Order No. 1952, Art. 2 — Suit for possession of land — Defendant resisting suit on ground that he was in possession of land since more than 20 years as "Mundkar" — No evidence to show that he was residing on land mainly for purpose of cultivation or watch or protection — Held, defendant was not "Mundkar" — Mere residence of a person for long time on property of others was not sufficient to say, that he was "Mundkar". (Para 5)

(C) Civil P. C. (1908), O. 6, R. 17 — Amendment introducing new case in written statement — Suit for possession of land — Defendant claiming to be in possession as "Mundkar" — Application for permission to amend written statement and to add plea that he is agriculturist labourer — Amendment sought with view to take benefit under Tenancy Act — Amendment, held, could not be allowed as it will change the case altogether. (Para 6)

Cases Referred: Chronological Paras (1968) AIR 1968 Goa 41 (V 55). Smt. Paciencia de Oliveira of Santa Cruz v. Smt. Angelina Filomena Dias of Santa Cruz

S. K. Kakodkar, for Appellant; Ariosto Tovar Dias, for Respondent.

BN/BN/A658/70/YPB/M

JUDGMENT:— The suit filed by the respondent herein against the appellant for recovery of vacant possession of the suit land has been decreed by the Civil Judge, Sr. Division, Quepem and the first appeal preferred against that judgment by the appellant herein has been dismissed by the Sessions Judge, Panjim. The appellant has now come up in second appeal.

2. The suit was filed alleging that the plaintiff had purchased the suit property in 1962, that the appellant-defendant was occupying the suit land as a licensee of the previous owner of the property, that he (the appellant) is refusing to vacate the suit land and that he be evicted from the suit land. The defendant, i.e., the appellant herein, resisted the suit on the ground that he is in possession of the suit property since more than 20 years as 'Mundkar', that he is not in possession as a licensee as alleged in the plaint and that the suit was fit to be dismissed. Both the lower Courts held that the appellant was not a 'Mundkar'. They decreed the suit. The learned advocate for the appellant arguing before me on the following points contended that the appeal is fit to be allowed and the suit is fit to be dismissed:—

(1) The Civil Court had no jurisdiction to entertain the suit,

(2) The lower Courts did not understand the meaning of the word 'Mundkar',

(3) Petition filed by the appellant to amend the written statement and add an additional plea has been incorrectly rejected by the first appellate Court.

3. I have now to see whether there is any force in the contentions of the appellant.

4. The point about jurisdiction has been raised relying mostly on the provisions of legislative order No. 1952 and the report of the Committee of the Problems of Mundkars in the Union Territory of Goa, Daman and Diu. It is admitted by the learned advocate for the appellant that there is no specific provision barring the Civil Courts from deciding the point whether a person is a 'Mundkar' or not. On the basis of the preamble to the legislative order No. 1952 and Article 6 of that order it was urged by the learned advocate for the appellant that the spirit of law is that Mamlatdar alone should decide the point whether a person is a 'Mundkar' or not. After considering the arguments advanced before me by the learned advocate for the appellant, I am unable to find such a spirit in the law. Civil Courts will have jurisdiction to decide a matter unless barred specifically by law. Article 6 of legislative order No. 1952 is as follows:—

"The existence of "justa causa" referred to in sub-clause (e) of the former

article, shall be considered by the administrator of Concelho, in view of the proprietor's petition, after having carried out the necessary investigation and according to his prudent judgment, always having in mind the character of the relations between the parties the social status and the degree of education of each party as well as other circumstances prevailing in the case."

That article does not lay down that the Civil Courts cannot decide the point whether a person is a 'Mundkar'. The decision of this Court in 'Smt. Paciencia de Oliveira of Santa Cruz v. Smt. Angelina Filomena Dias of Santa Cruz', AIR 1968 Goa 41 was cited on behalf of the appellant, in the course of arguments but that decision has nothing to do with the point in dispute. To my mind Civil Courts have jurisdiction to decide the point whether a person is 'Mundkar' or not.

5. 'Mundkar' has been defined in Article 2 of legislative order No. 1952. That definition is as follows:—

"'Mundkar' or 'occupant' is the individual who resides with fixed habitation in a rural property of others, specially with the purpose of cultivation or watch and protection, may such habitation be constructed on his own, or may be constructed on the 'batar's' or proprietor's account, receiving from him or not any help in money or material for construction and establishment."

According to that definition a person who resides with fixed habitation in rural property of others specially with the purpose of cultivation or watch and protection shall be deemed to be a 'Mundkar'. The learned Sessions Judge of Panaji in his judgment while considering the evidence adduced by the appellant has opined that none of the appellant's witnesses had stated that the appellant was occupying the portion of the land where he had built a house for the purpose of cultivation or watch. It has been found by the first appellate Court that there is nothing on record to show that the appellant was staying on the suit land for the purpose of cultivation or watch. When the lower Courts tried to know whether it was established that the appellant was staying on the land in dispute for the purposes of cultivation or watch, it cannot be said that they did not understand the meaning of word 'Mundkar'. No doubt it is not necessary for a person to be called a 'Mundkar' to reside on other's property only for the purpose of cultivation or watch and protection but he must reside there specially or mainly for that purpose. In this case it appears from the judgments of the lower Courts that the appellant was not residing on the property of the plaintiff i.e., the respondent herein mainly for the purpose of cultivation

or watch, or protection. It was urged on behalf of the appellant that mere residence of a person for a long time on the property of others is sufficient to say that he is a 'Mundkar', but I cannot agree with that argument. To call a person 'Mundkar' the relations between the parties must be as mentioned in Article 2 of legislative order No. 1952. In my opinion the lower Courts understood fully the meaning of word 'Mundkar'.

6. In the first appellate Court the appellant prayed to permit him to amend the written statement and add the plea that the suit is fit to be dismissed as he is an agricultural labourer. A mundkar is not an agricultural labourer. The appellant by seeking to amend the written statement tried to take shelter under the Tenancy Act and change his case altogether. Such an amendment could not be allowed.

In all the 3 points argued on behalf of the appellant, I find no force. The appeal is dismissed with costs.

Appeal dismissed.

'AIR 1970 GOA, DAMAN & DIU 94
(V 57 C 16)

C. NURAHARI RAO, A. J. C.

Rosario Rodrigues, Petitioner v. W. G. Renadive and others, Respondents.

Writ Petn. No. 14 of 1969, D/- 18-12-1969.

Tenancy Laws — Goa, Daman and Diu Agricultural Tenancy Act (7 of 1964), S. 7 — Exercise of power under — Mamlatdar acts as tribunal or judicial officer and not as administrative officer. (Para 7)

S. K. Kakodkar with Gilman Fernandes, for Petitioner; G. D. Kamat, for Respondent No. 6.

ORDER:— This is a petition filed under Articles 226 and 227 of the Constitution of India. The petitioner prays to quash the orders passed by the Mamlatdar, the Collector and the Revenue Secretary.

2. For the disposal of this petition the only facts necessary to be mentioned are these: The petitioner took on lease land, plot No. 448, situate at Seraulim in auction by the Comunidade of Seraulim in 1961. Comunidade of Seraulim is the owner of that land. Previous to the petitioner taking the land on lease one Reniga Coutinho was cultivating that land on lease. That lady is the sister of respondent No. 6 herein. After the petitioner took the land on lease, he started cultivating it as lessee. Reniga Coutinho filed application before the Lt. Governor, Goa, Daman and Diu on 27-9-1963 to give the land in dispute to her stating that she was cultivating that land as lessee for

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number of years and that she was maintaining herself on that land. On that application it is said that the Chief Minister of Goa, Daman and Diu passed orders that Reniga Coutinho be treated as lessee of the land in dispute. The petitioner herein then applied to the Administrator of Comunidades through application dated 16-3-1965 to hold that he was lawful tenant in respect of the land in dispute. That application was made over by the Administrator of Comunidades to the Mamlatdar at Salcete for disposal under the Tenancy Act. The Mamlatdar numbered that petition as Tenancy Case No. 238 of 1966 and decided it on 20-8-1966. He held that he could not recognize the petitioner as lawful tenant because the Chief Minister had directed that the name of Reniga Coutinho be entered as tenant of the land. The appeal preferred by the petitioner herein against the order dated 20-8-1966 of the Mamlatdar to the Collector, Panjim was dismissed by that Collector. The petitioner preferred revision against the orders of the Mamlatdar and the Collector to the Revenue Secretary but that revision petition was also dismissed.

3. The petitioner now contends that the orders passed by the Mamlatdar, the Collector and the Revenue Secretary are not in accordance with the law, that the orders said to have been passed by the Chief Minister could not have the effect of law and that the Mamlatdar should have declared the petitioner lawful tenant under Sections 4 and 5 of the Tenancy Act after proper enquiry.

4. The point for determination is whether there is any force in the contentions of the petitioner.

5. Before considering the contentions of the petitioner, I have to consider the preliminary objections raised by the learned advocate for the respondent No. 6. It should be noted that none of the respondents other than respondent No. 6 is contesting this petition. It is argued by the learned advocate for the 6th respondent that for the two following reasons the petition is fit to be dismissed:—

(1) The petitioner while filing this petition on 21-4-1969 in this Court incorrectly alleged that he was in possession of the land in dispute, even though he was dispossessed from the land in dispute on 13-2-1969.

(2) The petitioner did not file any appeal against the order which the Administrator of Comunidades of Salcete might have passed in obedience to the instructions given to him by the Director of Civil Administration through his letter dated 14-2-1964.

At the very outset it may be stated that I find no force in the arguments advanced by the learned advocate for the

6th respondent. It is alleged by the 6th respondent that possession of the land in dispute was delivered to him (the 6th respondent) on 13-2-1969 by preparing a panchnama. Copy of that panchnama is found in this file. It shows that on 13-2-1969 the petitioner was not present on the land in dispute when possession is said to have been delivered to the said respondent by the Circle Inspector in obedience to the orders of the Mamlatdar. In the panchnama dated 13-2-1969 it is mentioned that the petitioner could not be present on the land as he was ill and was undergoing treatment. In view of the fact the petitioner was not present on 13-2-1969 on the land in dispute it could not be said that he had knowledge about the delivery of possession of the land in dispute. No order of the Mamlatdar has been filed to show that he accepted the correctness of panchnama dated 13-2-1969 and held that from 13-2-1969 the sixth respondent would be deemed to be in possession of the land in dispute. It is said that notice was served on the petitioner that possession of the land in dispute would be delivered on 13-2-1969 but there is no material to show that he knew that on 13-2-1969 in fact possession of the land was delivered to the respondent No. 6.

It cannot be said in this case that the petitioner intentionally spoke false before this Court, in connection with his possession over the land in dispute till the date of his filing of this petition.

6. The Director of Civil Administration by his letter dated 14-2-1964 informed the Administrator of Comunidades of Salcete that the Chief Minister had "resolved" by his communication dated 1-2-1964 that Reniga Coutinho should be recognized as tenant. The order said to have been passed by the Chief Minister has not been filed in this Court. There is nothing to show that after receiving letter dated 14-2-1964 from the Director of Civil Administration, the Administrator of Comunidades of Salcete passed any order about the land in dispute. When no order has been passed by the Administrator of Comunidades in obedience to the information furnished to him by the Director of Civil Administration it would not be correct to contend that the petitioner should have gone in appeal against an order passed by the Administrator of Comunidades and that as he did not prefer appeal, he could not approach this Court claiming relief under Articles 226 and 227 of the Constitution.

7. I now proceed to consider the contentions of the petitioner. The Mamlatdar by his order dated 20-8-1966 rejected the prayer of the petitioner to hold him lawful tenant in respect of the land in dispute mainly on the ground that the Chief Minister had resolved that Reniga Coutinho should be deemed to be the

tenant of that land. Under Section 7 of the Tenancy Act it is the Mamlatdar who has to decide whether a person is tenant or not. Under Section 58 of the Tenancy Act the Civil Courts have been barred from deciding matters which the Mamlatdar has to decide. While exercising powers under Section 7 of the Tenancy Act the Mamlatdar decides rights and he acts as a tribunal or a judicial officer. At the time of exercising those powers, the Mamlatdar should decide matters keeping in view the provisions of law. He should not decide as if he is an administrative officer. In this case unfortunately the Mamlatdar decided the case or the right alleged by the petitioner mainly on the ground that the Chief Minister had resolved that Reniga Coutinho should be deemed to be the tenant of the land in dispute. The actual order said to have been passed by the Chief Minister was not before the Mamlatdar. What exact order he passed, whether it was after enquiry and whether it was in accordance with any law, the Mamlatdar had no knowledge. The Mamlatdar should have kept in view the provisions of Sections 4 and 5 of the Tenancy Act and should have decided the contention of the petitioner without taking into consideration the alleged resolution of the Chief Minister.

8. For the reasons given above this petition is allowed. The impugned orders of the Mamlatdar, the Collector and the Revenue Secretary are set aside. The Mamlatdar is directed to dispose of the petition of the petitioner keeping in view the provisions of Sections 4 and 5 of the Tenancy Act and without taking into consideration the order said to have been passed by the Chief Minister of Goa, Daman and Diu. No order is made towards costs.

Petition allowed.

AIR 1970 GOA, DAMAN & DIU 96
(V 57 C 17)

V. S. JETLEY, J. C.

Vinayak Datta Durbhatkar and another,
Appellants v. State and another, Respondents.

Criminal Appeal Nos. 11 and 19 of 1969,
D/- 20-9-1969.

(A) Evidence Act (1872), S. 32(1) —
Dying declaration — Can form the sole
basis of conviction.

While considering the relevancy and admissibility of a dying declaration, the declaration has to be closely scrutinised as it is not given on oath nor is it subject to cross-examination. But it cannot be said that dying declaration cannot form

the sole basis of conviction unless it is corroborated by some other reliable evidence.

A dying declaration stands on the same footing as any other piece of evidence and has to be judged and tested in the light of surrounding circumstances and with reference to principles governing the weighing of evidence. In order to test the reliability of a dying declaration the Court has to see the circumstances in which the dying declaration has been made, for example, the opportunity of the dying man for observation, whether the capacity of the dying man to remember the facts stated had not been impaired at the time he was making the statement and also if the statement has been made at the earliest opportunity and was not the result of tutoring by interested parties. Once the Court has come to the conclusion that the dying declaration is a truthful version as to the circumstances of the death and the identity of the assailants of the victim, there is no question of further corroboration, AIR 1969 NSC 120, Foll. (Paras 4 and 5)

(B) Evidence Act (1872), S. 32(1) —
Dying declaration — Recording need not necessarily be by Magistrate.

A dying declaration cannot be said to be unsafe to rely on merely because it is recorded by a Head Constable and not a Magistrate. It is, no doubt, desirable that such a declaration should be recorded by a Magistrate but for the purpose of law this is not an indispensable requirement. (Para 6)

(C) Evidence Act (1872), S. 32(1) —
Recording of dying declaration — Need not be in question and answer form.

It is not an indispensable requirement of law that it should be recorded in a question and an answer form, and not in a narrative form. Recording of a dying declaration in a question and an answer form may perhaps be a better mode but there can be no hard and fast rule, AIR 1937 SC 904, Distinguished. (Para 6)

(D) Evidence Act (1872), S. 32(1) —
Dying declaration — At time of recording declarant not under expectation of death — Admissibility — English and Indian law — Difference between.

In regard to the admissibility of dying declaration, to say that when the deceased made the declaration if there was no prospect of his death then reliance cannot be placed thereon, is to overlook the language of Section 32(1) of the Act. Under that provision such statements are relevant whether the person who made them was or was not at the time when they were made, under expectation of death, whatever may be the nature of the proceeding in which the cause of his death comes into question. This part of the law is a departure from the English law where such statements should be

chaser is a person claiming under the transferor then certainly the plaintiff could protect his possession against him, because the auction purchaser would be equally estopped from enforcing any right against him as the judgment-debtor was. By merely attaching the property, the attaching creditor does not do any act which would come in conflict with the possession of the property by the plaintiff. We, therefore, do not accept the argument that by filing this suit, the plaintiff is trying to protect his possession.

21. Mr. Patel, the learned advocate for the plaintiff urged that the plaintiff is entitled to maintain this suit under O. 21, Rule 63, because that provision gives a claimant or objector who is defeated in his claim petition a right to bring a suit to establish the right claimed by him. Mr. Patel's argument is that the plaintiff filed his objection against the attachment by the defendant and since his objection was overruled, he is entitled under O. 21, Rule 63 of the Civil Procedure Code to bring a suit of this nature. In our opinion, the plaintiff was not entitled to file any petition of objection against attachment levied at the instance of the defendant. Since he has no right of any kind in the property he cannot file any proceeding which can be based only upon the existence of a right in property. By filing an application under Order 21, Rule 58 to get the attachment raised, the plaintiff was trying to establish in himself a right of possession which he, in fact, did not possess. Therefore, it was not open to him to file any application under Order 21, Rule 58, because thereby he took up a role of an attacker rather than that of a defender. Under the doctrine of part performance as enacted in Section 53-A, there is no active title in the plaintiff and therefore, he cannot seek to enforce, by initiating an action, a right to which he is not entitled.

22. It was also urged by Mr. Zaveri, learned Advocate for the defendant that the attaching creditor is not a person claiming under the judgment-debtor, that is, the transferor and therefore, the estoppel created by Section 53-A does not come in his way. The judgment-creditor has not derived any interest in the property through the judgment-debtor-transferor. In fact he is hostile to the transferor because it is against the judgment-debtor's desire that he has attached this property to satisfy the decree obtained against him. In our opinion, the attaching creditor cannot be said to be a person claiming under the transferor and therefore, the plaintiff cannot prevent him from attaching the property of the judgment-debtor even if it were assumed that by so doing he is protecting his possession. The estoppel created by Section 53-A does not arise

against anyone else except the transferor or persons claiming under him.

23. In AIR 1952 Orissa 143 (supra) it has been held "..... a suit by the transferee against an attaching creditor or the transferor under O. 21, R. 63, Civil Procedure Code is not one between him and the transferor or anybody claiming under the transferor. Hence the transferee as a plaintiff cannot avail himself of the benefits of the doctrine of part performance of contract for sale as against an invasion on his rights by attaching creditor of the transferor." In that case the Orissa High Court has dissented from the decision of a Single Judge of the Madras High Court in G. Audinarayudu v. Mangamma, AIR 1943 Mad 706. Having gone through this Madras decision, we have no hesitation in agreeing with the view of the Orissa High Court. Therefore also the plaintiff is not entitled to any declaration in his favour in this suit.

24. The next point urged by Mr. Zaveri is that the suit must fail as the judgment-debtor is not made a party to the suit. His contention is that the judgment-debtor is a party to the execution application; and since claim proceedings are part of execution proceedings, the judgment-debtor is deemed to be a party to a claim petition and hence he must be joined in a suit under O. 21, R. 63. Under Order 21, Rule 58 any person who has an objection to the attachment of any property in execution of a decree, can make an application complaining of such attachment. Rule 59 provides that the objector must show that he had some interest in, or was possessed of, the property attached. Rules 60, 61 and 62, then refer to the investigation of the claim or objection. Rule 63 lays down as follows:

"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

It is apparent that an objector or claimant would go to the Court only in respect of the right which he claims in the property. He is interested in seeing that his claim or objection is upheld. If the decision goes against him, as in this case, the claimant or the objector would file a suit to establish that right in the property on the basis of which he preferred the claim or objection. The primary dispute is between the objector and the attaching creditor. Hence, in order to get the attachment raised, the objector must make the attaching creditor a party to his petition. It may be that in certain cases he may think it proper to establish his claim as against the judgment-debtor also. But it will not be necessary for

him to do so in all cases. In those cases where the judgment-debtor has done some act indicating his hostile attitude to him, the objector or the claimant may also like to have his right or claim established, not only against the attaching creditor, but also against the judgment-debtor. In all cases therefore, it will be for the claimant or the objector to decide as to against whom he wants to establish his right in the property attached. If he proceeds against the attaching creditor alone, the decision will no doubt put an end to the dispute between him and the attaching creditor. But since the judgment-debtor has not been made a party to the claim petition or to the suit, the judgment-debtor will not be bound by any decision given in his absence. If the claimant or the objector wants the judgment-debtor also to be bound, he must make the judgment-debtor a party to the claim petition or the suit. It is not necessary, therefore, that the judgment-debtor should be made a party to a suit under Order 21, Rule 63, unless the claimant or the objector desires to establish his right to or interest in the property against him also. This point has been dealt with by a Full Bench of the Andhra Pradesh High Court in Chhimpramma v. Subramanyam, AIR 1957 Andh Pra 61 (FB). In that case it is observed:—

"It may be taken as settled law, and also consistent with practice, that a judgment-debtor need not be made a party to claim proceedings in which case, the Court decides only the right of the decree-holder to bring the property to sale against the claim of the claimant's right to have the property released. Such an order would not obviously bar the judgment-debtor who was not a party to the proceedings. It is equally settled that a judgment-debtor can also be made a party to such a proceeding, and in that event it would be binding on him and preclude him from setting up his claim unless he gets the said order set aside in a suit filed under O. 21, R. 63, C.P.C. within the time prescribed, Subject to the operation of the doctrine of res judicata, an order on a claim petition filed under O. 21, R. 58 of the Code of Civil Procedure, or a decree in a suit filed under R. 63 of that order, does not extend beyond the execution of the decree which has given rise to those proceedings." We are in agreement with these observations.

25. We may also refer to the following observations to be found in Mangru v. Taraknathji, AIR 1967 SC 1390:

"The effect of R. 63 is that unless a suit is brought as provided by the rule, the party against whom the order in the claim proceeding is made or any person claiming through him cannot reagitate in any other suit or proceeding against the other

party or any person claiming through him the question whether the property was or was not liable to attachment and sale in execution of the decree out of which the claim proceeding arose, but the bar of Rule 63 extends no further."

26. Mr. Zaveri relied upon the decision of a Single Judge of Kerala High Court in Mathai v. Kunjukochu, AIR 1963 Ker 236. In that case, the learned Judge, no doubt held that the judgment-debtor is a necessary party to a suit under O. 21, R. 63. The main reason on which the learned Judge has come to this conclusion is that the judgment-debtor is, as much interested in opposing the claim, as the judgment-creditor himself and therefore, there is every reason to hold that the judgment-debtor necessarily be made a party to the claim proceedings. The judgment proceeds upon an assumption that in all cases a judgment-debtor is interested in opposing the claim. In our opinion, this assumption cannot be made. Our experience of execution proceedings has shown that in many cases, the judgment-debtors accept the correctness of the claim or objection. We prefer to agree with the decision of the Andhra Pradesh High Court.

27. M. Zaveri relied upon the decision in Ghazi Ram v. Mangal Chand, (1906) ILR 28 All 41. That decision really goes against Mr. Zaveri. It lays down that the judgment-debtor is not a necessary party to a suit under Order 21, Rule 63. However, Mr. Zaveri relies upon the observations— "If an unsuccessful claimant brings a suit and he seeks to establish his claim against both the decree-holder and the judgment-debtor, the latter is of course a necessary party." We are in respectful agreement with this observation because we are also of the opinion that the judgment-debtor must be made a party to such a suit if the claimant seeks to obtain an order also against the judgment-debtor. Mr. Zaveri also relied upon the decisions in Ramchandrar Singh v. Raghupati Sahai, AIR 1945 Pat 189 and Moolchand v. Parmanand, AIR 1951 Nag 438. We have gone through these two cases and in our opinion they do not support the argument put forward by Mr. Zaveri. They only lay down that a person in whose favour an order is made in a claim proceeding should be made a party to the suit and that the decree-holder is a necessary party in a suit by a defeated claimant.

28. Mr. Zaveri then raised another point. There are two other creditors of Alihussain who have also obtained money-decrees and have filed execution applications in the Court at Sidhpur. They are Regular Darkhasts Nos. 76 and 77 of 1955. The Court has ordered them to be kept in rateable distribution with the execu-

tion application filed by the present defendant. Mr. Zaveri argued that the decree-holders in those two execution applications are also necessary parties to this suit, because those two other decree-holders are also to be deemed to be attaching creditors. No such contention was raised on behalf of the defendant either when the claim petition was heard or when the suit was tried in the trial Court or when the appeal was heard in the District Court. Apart from that, the contention seems to be devoid of any substance. It is not the case of Mr. Zaveri that these two other decree-holders have taken out any attachment of the property which is in possession of the plaintiff. Under Order 21, Rule 58 a claim or objection can be filed against the property which is under attachment. Therefore, the attachment of the property is a condition precedent to the filing of an application under Order 21, Rule 58. Since these two other creditors have not attached the property in possession of the plaintiff, there cannot arise any occasion for the plaintiff to file any claim petition against them or to file any suit against them. No cause of action has accrued to the plaintiff against those two other decree-holders. Mr. Zaveri relied upon the decisions in *Gourgopal Dev v. Kamalkalika Datta*, AIR 1934 Cal 559; *Balmokand v. Ram Saran Das*, AIR 1936 Lah 519 and *Manora Bai v. Sultan Bakath*, AIR 1968 Andh Pra 113, in support of his argument. These cases do not at all deal with the question whether those decree-holders whose Darkhasts are ordered to be kept in rateable distribution with the Darkhast of an attaching decree-holder, but who have not taken out attachment in their own Darkhasts, can be deemed to be attaching creditors on the basis of the attachment taken out by the attaching creditor alone. These decisions, therefore, do not help Mr. Zaveri. No other provision of law or authority was cited to us in support of his argument by Mr. Zaveri.

29. No other contention was raised before us. Since the plaintiff has no right to maintain such a suit, it is clear that his suit must fail and should be dismissed.

30. In the result, therefore, Second Appeal No. 424 of 1961 filed by the plaintiff is ordered to be dismissed with costs. Second Appeal No. 539 of 1961 is allowed and the decree passed by the learned Assistant Judge in Appeal No. 227 of 1959 is set aside and the suit of the plaintiff is ordered to be dismissed with costs throughout.

Order accordingly.

AIR 1970 GUJARAT 131 (V 57 C 19)

J. M. SHETH, J.

Chhaganji Khengarji and another,
Petitioners v. State of Gujarat, Respondent.

Criminal Revn. Applns. Nos. 464, 465 and 466 of 1966, D/- 22-8-1969, from order of S. J., Banaskantha at Palanpur in Cri. Appeals Nos. 49 and 37 of 1966.

(A) Prohibition — Bombay Prohibition Act (25 of 1949), S. 66 (1) (b) — Charge against accused under S. 66 (1)(b) — Charge must be proved by establishing that accused had consumed liquor in the prohibited area — Prosecution cannot absolve of that obligation by resorting to S. 106 or S. 114 of Evidence Act.

It is evident from Ss. 11, 13 and 66 (1) (b) of the Act that for the establishment of the offence under S. 66(1)(b), it has got to be proved that a person charged with the offence has consumed or used any intoxicant in contravention of the provisions of this Act or of any rule, regulation or order made, or of any licence, permit, pass or authorization issued thereunder. It is, therefore, evident that if a person has consumed liquor outside the State, where there is no such prohibition, the offence could not be said to have been committed by that person under the Act. It is therefore, necessary for the prosecution to prove that the person charged with the offence, consumed liquor within the prohibited area within the limits of the State. The prosecution cannot be absolved of that obligation by resorting to Section 106 or Section 114 of the Evidence Act. (Para 11)

Mere raising of presumption about consumption of liquor by accused on the basis of report of Chemical Analyser would not prove that he had done so in contravention of the Prohibition Act. That can be proved by establishing that the accused had committed the offence, that is to say, he had consumed alcohol within the prohibited area. The law is well settled that the offence under Section 66(1)(b) would be complete when a person consumes prohibited intoxicant but no presumption could be made that the person should be considered to have taken liquor at the place where he is found. Similarly, no presumption could be made that he had consumed the intoxicant within the prohibited area. No doubt, under Section 115-A of the Act, the Magistrate having jurisdiction at the place where the person is found, is competent to try and convict such a person if found guilty, but the person must, even before such Magistrate, be proved to have committed the offence. The offence would be committed only if he had consumed the intoxicant within the prohibi-

ted area. This fact can be established even by circumstantial evidence. AIR 1963 Guj 234 & Criminal Appeal No. 1121 of 1964, D/- 1-4-1966 (Guj), Rel. on.

(Para 16)

(B) Prohibition — Bombay Prohibition Act (25 of 1949), S. 66 (1) (b) — Charge against accused under S. 66(1)(b)—Find of alcohol exceeding 0.05 per cent w/v in blood of accused — Find can only prove that accused had consumed liquor — It cannot prove that he had consumed liquor at place where he was found. AIR 1963 Guj. 234, Rel. on.

(Para 18)

Cases Referred: Chronological Paras

(1969) Criminal Appeal No. 6 of 1968, D/- 13-8-1969 (Guj) 17

(1966) Criminal Appeal No. 1121 of 1964, D/- 1-4-1966 (Guj) 15

(1963) AIR 1963 Guj 234 (V 50) = (1962) 3 Guj LR 409 = 1963 (2) Cr LJ 273, State v. Dhulaji Bavaji 12

(1956) AIR 1956 SC 404 (V 43) = 1956 SCR 189 = 1956 Cr LJ 794, Shambhu Nath Mehra v. State of Ajmer 12

(1936) 1936-3 All ER 36, Seneviratne v. R. 12

(1923) 1923-2 KB 309 = 92 LJ KB 761, Caldwell v. Jones 18

M. R. Barot, for Applicants; K. M. Chhaya, Asst. Govt. Pleader, for the State.

JUDGMENT:— Common questions of law and fact arise in all these three revision petitions and hence, they are being disposed of by this judgment.

2. In Criminal Revision Application No. 464 of 1966, petitioner Chhaganji was prosecuted for offences punishable under Sections 85(1)(3) and 66(1)(b) of the Bombay Prohibition Act, 1949, which will be hereinafter referred to as the Act.

3. The prosecution story was that on 13th March, 1966 at about 1-30 p.m. the petitioner was found drunk near the hospital in a public place in Deesa town, district Banaskantha and he had also consumed liquor without a pass or permit. Learned Judicial Magistrate, First Class, Mr. N. G. Butala, in that Criminal Case No. 380, found that the petitioner was not found under the influence of drink. He was not found intoxicated. He, therefore, acquitted him of the offence under Section 85(1)(3) of the Act. He further found that the petitioner had consumed liquor without pass or permit. In view of that finding of his, he convicted him of an offence punishable under S. 66(1)(b) of the Act and sentenced him to suffer three months' rigorous imprisonment and to pay a fine of Rs. 500/- and in default of payment of fine, to undergo one and a half months' further rigorous imprisonment. Against that order of conviction and sentence recorded against the petitioner, the petitioner filed Criminal Ap-

peal No. 49 of 1966 in Sessions Court, Banaskantha District at Palanpur. Learned Sessions Judge, Palanpur, Mr. M. I. Pandya, who heard that appeal, dismissed it, upholding the order of conviction and sentence. Against that order, this revision application has been filed by the petitioner in this Court.

4. In Revision Application No. 465 of 1966, the petitioner was prosecuted for offences punishable under Sections 85(1)(3) and 66(1)(b) of the Act. The prosecution story was that the petitioner was found drunk in a public place at Kumbhar Vas in Deesa town, District Banaskantha, on 17th April, 1966 at 7-30 p.m. and he had further consumed liquor without pass or permit. The learned Judicial Magistrate First Class, in that Criminal Case No. 381 of 1966, found that the petitioner was not found drunk. He was not intoxicated. He found that he had consumed liquor without pass or permit. He, therefore, acquitted the petitioner of the offence punishable under Sec. 85(1)(3) of the Act and convicted him of the offence punishable under Section 66(1)(b) of the Act, and sentenced him to suffer three months' rigorous imprisonment and to pay a fine of Rs. 500/- and in default of payment of fine, to undergo one and a half months' further rigorous imprisonment. Against the order of conviction and sentence, the petitioner filed Criminal Appeal No. 37 of 1966 in the Court of Sessions Judge, Banaskantha District at Palanpur. The learned Sessions Judge who heard that appeal, dismissed that appeal, confirming the order of conviction and sentence passed against the petitioner. The petitioner has, therefore, filed the present revision petition in this Court.

5. In Criminal Revision Application No. 466 of 1966, the petitioner was prosecuted for offences under Sections 85(1)(1), 85(1)(3) and 66(1)(b) of the Act. The prosecution story was that on 19th April, 1966, at about 9-30 p.m., the petitioner was found drunk near the old S. T. Bus stand in a public place in Deesa town, District Banaskantha. He was unable to take care of himself. He had consumed liquor without pass or permit. The learned Judicial Magistrate, First Class, Deesa, in that Criminal Case No. 441 of 1966, convicted the petitioner of offences punishable under Sections 85(1)(1) and 85(1)(3) of the Act and sentenced him to suffer seven days' rigorous imprisonment and to pay a fine of Rs. 25/- and in default of payment of fine, to undergo seven days' further rigorous imprisonment. He also convicted the petitioner of an offence punishable under Section 66(1)(b) of the Act and sentenced him to suffer three months' rigorous imprisonment and to pay a fine of Rs. 500/- and in default of payment of fine, to undergo one and a half months' further rigorous imprisonment.

Substantive sentences were ordered to run concurrently. Against that order of conviction and sentences passed against the petitioner, he filed Criminal Appeal No. 50 of 1966 in the Court of Sessions Judge, Banaskantha District, at Palanpur. Learned Sessions Judge, Mr. M. I. Pandya, who heard that appeal, dismissed it, confirming the order of conviction and sentences passed against the petitioner. The petitioner has, therefore, filed this revision application in this Court.

6. In all these three revision petitions, Mr. Barot, learned Advocate, who appeared for the petitioners, submitted that the order of conviction and sentence passed against each of the petitioners in these revision petitions, cannot be sustained in law. This argument of his is based on his submission that there is no evidence, direct or circumstantial, led by the prosecution to prove that each petitioner in these revision petitions, consumed liquor within the limits of Gujarat State where liquor cannot be consumed without pass or permit. It has been urged by him that Deesa is situated in the neighbourhood of an area where there is no such prohibition. It was the duty of the prosecution to prove the circumstances to show that each petitioner in these revision petitions had consumed liquor in the prohibited area in the State of Gujarat. It is submitted by him that the learned Sessions Judge decided against the petitioners on this point, relying upon the provisions of Section 115-A of the Act. It has been submitted by him that after that section was engrafted and brought in the Statute book, the only problem solved was regarding the jurisdiction of the Court to try such an offence, if a person who has consumed liquor is found in a place situated within the jurisdiction of that particular Court. It has not solved the problem that the prosecution has to prove that the offence in question has been committed. The offence in question can be said to have been committed by the offender if it is proved that he has consumed liquor in contravention of the provisions of the Act. It was, therefore, necessary for the prosecution to prove that liquor was consumed within the prohibited area, i.e., within the area of the State of Gujarat, where liquor cannot be consumed without the necessary pass or permit.

7. Mr. Chhaya, learned Assistant Government Pleader, who appeared for the State, submitted that it would be well-nigh impossible for the prosecution to prove that a particular offender consumed liquor at a particular place. The prosecution could prove only that the person was found having consumed liquor and for the proof of it, the prosecution can rely upon the evidence of Chemical Analyst's analysis that alcohol was found in

the blood of the offender in excess of the prescribed limits and eventually, in view of the provisions of Section 66(2) of the Act, rebuttable presumption can be raised that the offender had consumed prohibited liquor. It was urged by him that the fact whether the offender consumed liquor at a particular place was a fact within his special knowledge and hence, in view of the provisions of Section 106 of the Evidence Act, it was for the offender to prove that he had consumed liquor at any place outside the limits of the State of Gujarat. It was further submitted by Mr. Chhaya that the offender in each of these revision petitions was found in Deesa town in a public place according to the finding arrived at by the lower Courts. In each of these cases, it was proved that in the blood of each of the offenders, ethyl alcohol found was more than .05% W/V. In view of that fact, presumption arose against each of them as indicated by sub-section (2) of Section 66 of the Act. That sub-section runs as under:—

"Subject to the provisions of sub-section (3) where any trial of an offence under clause (b) of sub-section (1) for the consumption of an intoxicant, it is alleged that the accused person consumed liquor, and it is proved that the concentration of alcohol in the blood of the accused person is not less than 0.05 per cent. weight in volume then the burden of proving that the liquor consumed was a medical or toilet preparation, or an anti-septic preparation or solution, or a flavouring extract, essence or syrup, containing alcohol, the consumption of which is not in contravention of the Act or any rules, regulations or orders made thereunder, shall be upon the accused person, and the Court shall in the absence of such proof presume the contrary."

8. There is no dispute that such a presumption arose against each of these petitioners in these revision petitions and the findings arrived at by the two Courts below that the petitioner in each of these revision petitions has not been able to rebut that presumption, are correct. There is, therefore, no doubt that the prosecution has proved that the petitioner in each of these revision petitions consumed prohibited liquor. It is an undisputed position that each of these petitioners was consumed in such condition in Deesa town, i.e. within the jurisdiction of Deesa Judicial Magistrate, First Class.

9. Section 115-A of the Act which is material for our purposes, runs as under:

"Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence of consumption of any intoxicant or hemp specified in CL (b) of sub-s. (1) of Section 66, may be tried by a Magistrate having jurisdiction either at the

place in which the offence was actually committed or at any place in the State in which the offender may be found." Ordinarily, the Court within whose jurisdiction the offence was actually committed, would have jurisdiction to try such an offence. But by engrafting this section and bringing it in the Statute Book, the Court within whose jurisdiction such an offender has been found, is also empowered to try such an offence. That section only solves the problem regarding jurisdiction.

10. The further problem, namely, whether the offender consumed liquor within the prohibited area, remained to be solved. Section 11 of the Act reads:—

"Notwithstanding anything contained in the following provisions of this Chapter, it shall be lawful to import, transport, manufacture, bottle, sell, buy, possess, use or consume any intoxicant or hemp..... in the manner and to the extent provided by the provisions of this Act or any rules, regulations or orders made or in accordance with the terms and conditions of a licence, permit, pass or authorization granted thereunder."

11. Section 13 of the Act, which is material for our purposes, reads:

"No person shall—

(a) bottle any liquor; for sale;

(b) consume or use liquor; or

(c) xx xx xx

Section 66 (1) (b) of the Act reads:

"Whoever in contravention of the provisions of this Act, or of any rule, regulation or order made, or of any licence, permit, pass or authorization issued, thereunder—

(b) consumes, uses, possesses or transports any intoxicant other than opium or hemp."

It is, therefore, evident that for the establishment of the offence in question, it has got to be proved that a person has consumed or used any intoxicant in contravention of the provisions of this Act or of any rule, regulation or order made, or of any licence, permit, pass or authorization issued thereunder. It is, therefore, evident that if a person has consumed liquor outside the State of Gujarat, where there is no such prohibition, the offence could not be said to have been committed by that person under the Act. It was, therefore, necessary for the prosecution to prove that each petitioner in these revision petitions, consumed liquor within the prohibited area within the limits of the State of Gujarat. The prosecution cannot be absolved of that obligation by resorting to Section 106 of the Evidence Act or Section 114 of the Evidence Act.

12. A Division Bench of this Court, before this Section 115-A was brought into the Statute book in the Act had to deal with this question in *State v. Dbluji*

Bavaji, 3 Guj LR 409 = (AIR 1963 Guj 234). J. M. Shelat, J., (as he then was), speaking for the Division Bench, at page 416 (of Guj LR) = (at p. 238 of AIR) made the following pertinent observations, which can be referred to, with advantage at this stage:—

"The learned Assistant Government Pleader next contended that it was within the special knowledge of the accused as to where he consumed liquor and, therefore, under Section 106 of the Evidence Act it would be for the accused to establish that he had consumed liquor at a place where it was not an offence to consume. It is a fundamental principle for our jurisprudence that in a criminal prosecution the onus of proof is upon the prosecution and there is no obligation upon the prisoner of proving facts especially within his own knowledge. Cf. *Seneviratne v. R.*, (1936) 3 All ER 36, where their Lordships of the Privy Council were dealing with Section 108 of the Ceylon Evidence Ordinance (No. 14 of 1895) which contained the same provisions as are to be found in Sec. 106 of our Evidence Act. The same question also arose in *Shambhu Nath Mehra v. State of Ajmer*, 1956 SCR 199 = (AIR 1956 SC 404) where their Lordships of the Supreme Court laid down the same principle, namely, that Section 106 of the Evidence Act does not abrogate the well-established rule of criminal law that except in very exceptional classes of cases the burden that lies on the prosecution to prove its case never shifts and Sec. 106 is not intended to relieve the prosecution of that burden. They also observed that, on the contrary, that section seeks to meet certain exceptional cases where it is impossible, or disproportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused and which can be proved by him without difficulty or inconvenience. But when knowledge of such facts is equally available to the prosecution if it chooses to exercise due diligence, they cannot be said to be especially within the knowledge of the accused and the section cannot apply. At page 203 of the report, it is observed that the word 'especially' means facts that are pre-eminently or exceptionally within the knowledge of the accused. Their Lordships have then observed that if the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not? Section 106, therefore, cannot be used to undermine the well-established rule of law that, the burden is on the prosecution and that it never shifts. The burden to establish that the offence took place within the jurisdiction of the learned Magistrate was clearly

upon the prosecution. It is nowhere stated by the prosecution that even with due diligence they could not find out the place where the offence occurred. As stated by the Supreme Court in Shambu Nath Mehra's case, the knowledge as to where the offence occurred would have (have) been equally available to the prosecution if it had chosen to exercise due diligence and, therefore, such knowledge cannot be said to be especially within the knowledge of the accused. Consequently, Section 106 would not apply."

In the instant case, it could not be said that it was well-nigh impossible for the prosecution to prove these facts. The prosecution could have proved it by leading circumstantial evidence and could have shown that the circumstances probalised that this consumption of liquor had taken place within the limits of this State. It would have been then, for the accused to show that he had not consumed liquor within the limits of this State.

13. It has been submitted by Mr. Chhaya that this decision had been given by a Division Bench of this Court before Section 115-A was brought into the Statute Book. As said earlier, engrafting of that section has only solved the problem of jurisdiction of the Court to try such an offence. The Court can try such an offence if a person who has consumed liquor is found at a place within the limits of its jurisdiction. It has not solved any other equally important problem. It has been submitted by Mr. Chhaya that if this is the position of law, then the prosecution would have insurmountable difficulties in proving such offences. I do not agree with that submission. No doubt, the prosecution will have some difficulties, but the prosecution can bring forward several circumstances which could probalise that the offence of consuming liquor was committed within the limits of this State and in that case, the burden will be shifted on to the accused to prove that he had really consumed the liquor outside the limits of this State. If there are any difficulties, the appeal should be to the Legislature and not to the Court.

14. So far as this question is concerned, even after the introduction of S. 115-A in the Act, there has been no material difference. Principle enunciated in the decision given by a Division Bench of this Court, on this point, still holds good and I am bound by that decision.

15. In an unreported decision of this Court in Criminal Appeal No. 1121 of 1964, D/- 1-4-1966 (Guj) Vakil, J., had to deal with a similar question, after Section 115-A of the Act was brought into the Statute Book. The relevant observations made are as under:—

"However, the learned Magistrate also acquitted the respondent of the charge

under Section 66 (1) (b), sub-section (2). It is pointed out that the Medical Officer had taken blood sample of the respondent and had forwarded it to the Chemical Analyser for the test. The report of the Chemical Analyser is on the record which shows that the blood sample of the respondent contained 0.1932 per cent. W/V of Ethyl alcohol. From this it was tried to be urged that the offence under sub-section (2) of Section 66 (1) (b) of the Bombay Prohibition Act read with Section 115-A should be taken to have been established. The learned Magistrate, it appears, did not accept this submission, and acquitted the accused of that charge also.

16. It is true that it could be presumed that the accused had consumed prohibited liquor because it was proved by the prosecution by the production of the report of the Chemical Analyser that the blood sample of the respondent contained more than 0.05 per cent. W/V of Ethyl alcohol. But mere raising of that presumption would not prove that he had done so in contravention of the Prohibition Act. That can be proved by establishing that the accused had committed the offence, that is to say, he had consumed alcohol within the prohibited area. The law is well settled that the offence under Section 66 (1) (b) would be complete when a person consumes prohibited intoxicant but no presumption could be made that the person should be considered to have taken liquor at the place where he is found. Similarly, no presumption could be made that he had consumed the intoxicant within the prohibited area. No doubt now, under Section 115-A of the Act, the Magistrate having jurisdiction at the place where the person is found, is competent to try and convict such a person if found guilty. But the person must, even before such Magistrate, be proved to have committed the offence. The offence would be committed only if he had consumed the intoxicant within the prohibited area. No doubt, this fact can be established even by circumstantial evidence. But the record of the present case fails even to establish it by circumstances.

In my opinion, this decision is a complete answer to all the arguments advanced by Mr. Chhaya on behalf of the State. In my opinion, this decision lays down a correct position of law in this behalf and I am in respectful agreement with it.

17. Mr. Chhaya invited my attention to an unreported decision of this Court in Criminal Appeal No. 6 of 1959, decided by Y. D. Desai, J., on 13-8-1969 (Guj). In my opinion, that decision does not lay down any principle which runs counter to the principle enunciated by Vakil, J., in the aforesaid decision. After referring

to that decision, Y. D. Desai, J., has observed:—

"The learned Judge, while laying down the proposition that the prosecution has to prove that the prohibited liquor was consumed within the jurisdiction has also observed in the last part of his judgment that the fact of liquor having been consumed within the prohibited area can in the facts of a given case be established by circumstantial evidence. In the matter before the learned Judge there were no such circumstances with the result that the order of acquittal came to be confirmed. In the present case, what we find is that the accused is a resident of Joravarnagar. He was found near his house having consumed liquor. The situation of Joravarnagar is such that it may be difficult for a man to go hundreds of miles away from there to take liquor and to come back such that he would be found unsteady in gait and stammering in speech. In the circumstances, I have no hesitation to hold that the accused had consumed within the State and not outside the limits of the State."

In the instant case, each petitioner was found having consumed liquor in Deesa town which is not far away from the areas of other State, where liquor could be consumed without any pass or permit. There are no circumstances in any of these cases to probalilise that each of these petitioners consumed liquor within the limits of the State of Gujarat and did not consume it outside the limits of this State.

18. As said earlier, it was submitted by Mr. Chhaya that in each of these cases, as per the chemical analyser's report, Ethyl alcohol found in blood taken from each of these petitioners was more than 0.05 per cent. W/V. It means that the alcohol had still not assimilated in the system. It was, therefore, urged that the processes of consuming liquor still continued and it could, therefore, be said that each of these petitioners had done part of consumption within the limits of this State. In my opinion, this argument is not well founded. It is not the assimilation of the alcohol that would prove consumption of alcohol. In the aforesaid case decided by the Division Bench of this Court, this point has been considered at length and the following observations have been made at pages 411 and 412 (of Guj LR) = (at p. 236 of AIR):—

"Now it is fairly clear that sub-section (1) (b) of S. 66 makes the act of consumption of an intoxicant an offence. The sub-section uses the word "consumes" which means that the act of drinking or consuming an intoxicant has been made an offence. The legislature has not used the words "having been found to have used or consumed". Therefore, the offence under Section 66 (1) (b) is complete when

a person consumes prohibited intoxicant. The Act does not define the word 'consume' and therefore, we must attribute to the word 'consume' its literary dictionary meaning. According to Webster's New World Dictionary, 1956 Edition, the word 'consume' means 'to drink or eat up, devour'. Lord Hawart C. J. while dealing with the word 'consume' in Section 4 of the Licensing Act, 1921, in *Caldwell v. Jones*, (1923) 2 KB 309 also has observed that the word 'consume' must be read in its natural and ordinary sense, and on such a meaning held in the light of the provisions of Section 4 of the Licensing Act that that section prohibited, except during the permitted hours, and subject to the specific exceptions provided for by the Act, the consumption on licensed premises of any intoxicant liquor, even though that liquor might not have been sold or supplied on those premises, but was brought into the premises by the person consuming it there. When the word 'consume' thus is given its dictionary meaning, it would mean to drink or to otherwise use prohibited liquor. There is a clear distinction between the act of consuming and the fact of a man having been found drunk. In fact the Act itself makes that distinction for under Section 66 (1) (b), the act of consuming has been made an offence while under Section 85 (1) the act of a man having been found drunk and incapable of taking care of himself in any street, thoroughfare or public place, has been made a distinct offence.

But it was contended that we must presume under Section 114 of the Evidence Act that the accused must have consumed liquor at the very place where he was found by the police, regard being had to the common course of natural events. But there is no such presumption in the Act that a person should be considered to have taken liquor at the very place where he is found intoxicated. With the facility of speedy transport available now-a-days it is always possible for a man to drink or consume liquor at one place and to be found in an intoxicated state at another place. Not only the Prohibition Act does not provide for any such presumption but it does not throw the burden upon the accused to prove that he drank liquor at a place other than the place where he was found intoxicated. Besides, there is nothing like the common course of natural events as contemplated by Section 114 of the Evidence Act for a person found intoxicated at one particular place to have of necessity consumed liquor at the very same place."

It could not, therefore, be said that each petitioner in these revision petitions had consumed liquor at Deesa town as blood was taken by the Medical Officer from each of them at Deesa and on examination of that blood, Ethyl Alcohol was found

in blood which exceeded 0.05 per cent. V/W. The find of it could only prove that the person concerned had consumed liquor. Find of it could not prove that he had consumed liquor at the place where he was found. It could not be said from its find that the offender had consumed liquor within the limits of the Gujarat State. As said earlier, there are no such circumstances brought on the record or pointed out by the learned Assistant Government Pleader from which it could be said that the circumstances probabilised that liquor was consumed by these offenders within the limits of Gujarat State. The order of conviction and sentence passed against each of the petitioners in these revision petitions for the said offence cannot, therefore, be sustained in law.

19. So far as the revision petition No. 466 of 1966 is concerned, that petitioner Koli Kalu Ramsi was also convicted of offences punishable under Section 85 (1) (1) and 85 (1) (3) of the Act and was sentenced to suffer seven days' rigorous imprisonment and to pay a fine of Rs. 25 and in default of payment of fine, to undergo seven days' further rigorous imprisonment for each of those offences. That order of conviction and sentence was not challenged in Criminal Appeal No. 50 of 1966 filed by him. In the revision petition filed in this Court also, that order has not been challenged and Mr. Barot has fairly conceded that it was not challengeable. There is clear and consistent evidence which has been found to be reliable and acceptable to hold the petitioner guilty of these offences.

20. The result is that Criminal Revision Applications Nos. 464 and 465 of 1966 succeed. These applications are allowed and the order of conviction and sentence passed against the respective petitioner of those revision applications is set aside. Each of them is acquitted of the offence punishable under Section 66 (1) (b) of the Bombay Prohibition Act, 1949. Their bail bonds are ordered to be cancelled. Rule is made absolute.

21. Revision Application No. 466 of 1966 partly succeeds. The order of conviction and sentence passed against the petitioner Koli Kalu Ramsi under Section 66 (1) (b) of the Bombay Prohibition Act, 1949 is set aside. He is acquitted of that offence. The order of conviction and sentence passed against him for offences under Sections 85 (1) (1) and 85 (1) (3) of the Bombay Prohibition Act, 1949, is upheld. He is ordered to surrender to bail. Rule is modified.

Order accordingly.

AIR 1970 GUJARAT 137 (V 57 C 20)

N. G. SHELAT, J.

Bai Bhanbai Mavji, Applicant v. Kanbi Karshan Devraj and another, Opponents.

Criminal Revn. Appln. No. 11 of 1969, D/- 17-6-1969 from order of S. J. Kutch at Bhuj in Cri. Revn. Appln. No. 33 of 1968.

Criminal P. C. (1898), S. 488 — Maintenance — Woman marrying second time during subsistence of first marriage — Cannot claim maintenance from second husband.

A woman who has contracted a second marriage during subsistence of her first marriage is not entitled to claim maintenance from the second husband as her marriage with him is void in view of Section 11 read with Section 5 (1) of Hindu Marriage Act. (Para 6)

"Wife" contemplated in Section 488 (1) is the lawfully wedded wife and any other woman much though she was living with another man as if she was his wife. When the term "wife" is used, it has to be taken as a legitimate wife by reason of a valid marriage according to the law governing the parties. No illegitimate wife is given any such right to claim maintenance under Section 488 (1) of the Act. AIR 1968 All 412 & AIR 1938 Mad 66 & 1963 (1) Cri LJ 131 (Mys), Rel. on. (Para 3)

Cases Referred: Chronological Paras (1968) AIR 1968 All 412 (V 55) =

1968 Cri LJ 1636, Naurang Singh Chuni Singh v. Smt. Sapla Devi 4 (1963) 1963 (1) Cri LJ 131 = 40 Mys LJ 746, Smt. Savithramma v. Ramanarasimhai 3

(1938) AIR 1938 Mad 66 (V 25) = 39 Cri LJ 228, A. T. Lakshmi Ambalam v. Andiammal 3

P. V. Hathi, for Applicant; K. N. Mankad (for No. 1) and K. M. Chhaya Asst. Govt. Pleader, for the State, Opponent No. 2.

ORDER:— Bai Bhanbai of Sukhpar, the applicant, filed Criminal Miscellaneous Application No. 24 of 1966 in the Court of the Judicial Magistrate. First Class, Bhuj for claiming maintenance at the rate of Rs. 150 per month against the opponent No. 1 under Section 488 of the Criminal Procedure Code, inter alia, alleging that she was the wife of the opponent and that she was ill-treated by her husband and ultimately driven out. She also alleged that she had two daughters and that she was pregnant at the date of the application. The application was resisted by the opponent, inter alia contending that she was not his lawfully married wife and that she was merely staying with him as his mistress, and that, therefore, she was not entitled to claim any maintenance from him. He also denied the allegations

about ill-treatment etc. The learned Magistrate after considering the effect of the evidence adduced in the case found that the petitioner was not the lawfully married wife of the opponent and consequently she was not entitled to claim any maintenance from him. As to the claim for maintenance of the children, the opponent was directed to pay at the rate of Rs. 15 per month to the applicant from the date of the application. Feeling dissatisfied with that order passed on 15th May 1968 by Mr. D. L. Vora, Judicial Magistrate, Bhuj, the applicant preferred Revision Application No. 33 of 1968 in the Court of Sessions Judge, Kutch at Bhuj. The contention before him was that she had her first husband alive and therefore, her alleged marriage with him was void. She cannot therefore, be said to be his lawfully married wife, even if she had contracted re-marriage with him. That was upheld by the Court and consequently it was found in agreement with the trial Court, that she was not entitled to claim any maintenance for herself from the opponent as his wife under Section 488 of the Criminal Procedure Code. The application thus came to be rejected. Feeling dissatisfied with that order passed on 14th October 1968 by Mr. V. J. Japee, Sessions Judge, Kutch at Bhuj, the applicant has come in revision before this Court.

2. Mr. Hathhi, the learned advocate for the applicant urged that the learned Sessions Judge has omitted to take into consideration the material evidence with regard to the divorce said to have been given by Kanbi, the previous husband of the applicant. Besides, it was urged that in the opponent's first written statement filed by his Advocate in the case on 23-2-1966, he had admitted the applicant's status as that of his wife, and that has been wrongly not taken into account, holding it to be inadmissible in evidence as hit by Section 129 of the Indian Evidence Act. That has resulted in an error of law and it has seriously affected the decision on the point in the case. It was on the other hand contended by Mr. Mankad, the learned advocate for the opponent, that the concurrent findings of both the Courts below about the applicant having failed to establish her status as wife of the opponent is one based on proper appreciation of the evidence and it cannot be interfered with in revision by this Court. He also urged that even if the written statement filed by the Advocate were taken into account, it cannot establish the fact of her marriage with him as required in law. Now it is conceded that Section 129 of the Indian Evidence Act sought to be applied by the learned Sessions Judge in holding that written statement as inadmissible in evidence, cannot apply. The effect thereof has, therefore, to be considered. Thus there was an error of law

in rejecting that part of evidence in the case, and it would, therefore, be open to consider the question by taking into account this piece of evidence along with other evidence in the case. I shall deal with that part of evidence hereafter.

3. In order that the applicant is entitled to claim maintenance under Section 488 of the Criminal P. C., it is essential for her to establish that she was the "wife" of the opponent and that her husband had refused to maintain her. Mr. Hathhi urged that all that Section 488 (1) requires is that she was the wife of the opponent and if that is established, the validity or otherwise of the marriage on account of certain other factors was not required to be gone into. According to him, it was an undisputed fact that she had contracted remarriage with the opponent and that she had given birth to two children by him. She was living with him for about 2½ years before the date of the application as his wife and was recognised as such in the society. That such evidence on record was enough to hold that she was his wife and that since she was neglected and deserted by her husband, she was entitled to maintenance under Section 488 of the Criminal P. C. On a plain perusal of Section 488 (1) of the Criminal P. C., it appears abundantly clear that what is contemplated by the term "wife" referred to therein is the lawfully wedded wife and that term at any rate does not cover any other person much though she was living with him as if she was his wife. It need not say the lawfully married wife as when the term "wife" is used, it has to be taken as a legitimate wife by reason of a valid marriage according to the law governing the parties. That becomes all the more clear from the expressions used in the second part thereof wherein reference is made to 'legitimate or illegitimate child' who can claim maintenance under Section 488 (1) of the Code. In other words the Legislature was clear in its mind to apply this provision in respect of children, either legitimate or illegitimate, born of a woman neglected or refused to be maintained by his or her father. If it intended to include any illegitimate wife, the Legislature could have said so just as it said in respect of children. It is thus clear that no illegitimate wife is given any such right to claim maintenance under Section 488 (1) of the Act. In the Law Lexicon of British India, by P. R. Afyar, 'wife' has been defined as 'a married woman.' For conferring the status of 'wife' on the woman, marriage must be valid under law. It does not say any 'woman', but speaks of 'wife'—and to be a wife of any person, she must have been married with him according to the law affecting the parties in that regard. No authority is needed for such a proposi-

tion. However, I may refer to a decision in the case of Smt. Savithramma v. N. Ramanarasimhaih, 1963 Cri LJ 131 (Mys), where it was held:

"The term 'wife' in Section 488 includes only a legitimate wife and excludes any illegitimate one. If the intention of the legislature was that provision is to be made for even the illegitimate wife just as in the case of children where the expression 'legitimate' or 'illegitimate' is used similar expression would have been employed."

Another decision in the case of A. T. Lakshmi Ambalam v. Andiammal, AIR 1938 Mad 66, may well be referred to. In that case, the person claiming maintenance was living with the man since long and had even a child by him as it is in the present case, and it was held that:

"Under Section 488, Criminal P. C. a woman is not entitled to maintenance even if she has lived with a man as his wife for 12 years and has also borne him a child. Only legally married women are entitled to maintenance under Section 488, Criminal P. C."

4. Mr. Mankad had then invited a reference to the decision in the case of Naurang Singh Chuni Singh v. Smt. Sapla Devi, AIR 1968 All 412. One Sapla Devi claimed maintenance under Section 488 of the Criminal P. C. from Naurang Singh on the ground that she was his married wife, and that she was neglected by him. That was resisted by the husband-opponent saying that she was not his legally wedded wife and that he was actually married to one Kalpa Devi about 15 years ago and had children by her. He had developed illicit intimacy with her and on that account she was not entitled to claim any maintenance. The trial Court found her to be the wedded wife of the opponent, and granted her maintenance. In revision before the Sessions Judge, it was held that though she was married with him, her marriage was not valid as opponent's marriage with Smt. Kalpa Devi still subsisted. He found, therefore, the marriage of Sapla Devi void under S. 5 read with S. 11 of the Hindu Marriage Act, 1955. That led him to make a reference to the High Court and the reference was accepted and she was held not entitled to maintenance she being not the legally wedded wife of the opponent. In the case before us it is the reverse in the sense that the applicant had a living husband when she contracted re-marriage with the opponent. That question has, therefore, to be considered with a view to find out if she was the wife meaning the legally wedded wife of the opponent when claim for maintenance was made. Now it is not in dispute that the parties are Hindus and they are governed by the provisions of the Hindu Marriage Act No. 25 of 1955 which

came in force on 18th May 1955. The applicant is said to be married with the opponent thereafter in the year 1963-1964. Section 5 thereof provides that a marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, and then CL (i) thereof says that "neither party has a spouse living at the time of marriage." Section 11 of the Act declares certain marriages as null and void. As stated therein, any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in Cls. (i), (iv) and (v) of Section 5. It is followed by Section 12 which relates to voidable marriages. The contention is that at the time when the applicant contracted re-marriage with the opponent, her previous husband was alive, and if that were so, her marriage that took place with the opponent was null and void under Section 11 of the Act inasmuch as it was in violation of the condition specified in CL (i) of Section 5 of the Act. It need not be declared as void by any Court. It is to be taken as null and void and that way ineffective in law as no marriage between any two Hindus can be solemnized if either party has a spouse living at the time of marriage after the Act came in force. If, therefore on the evidence it is found that at the time when she contracted re-marriage with the opponent, her previous husband Kanji was alive and that she had not obtained any valid divorce from him, her marriage with the opponent would be ab initio void and therefore, it would not make her his lawfully wedded wife. Consequently it would not create between them any rights and obligations which must normally arise from a valid marriage except such rights as are expressly recognised by the Act. A voidable marriage remains no doubt valid and it continues to subsist for all purposes unless a decree is passed by the Court annulling the same on any of the grounds mentioned in Section 12. But that would not be so in any case governed under Section 11 which declares the marriage null and void if it is solemnised in contravention of the conditions set out in Cls. (i), (iv) and (v) of Section 5 of the Act.

5. The point that arose to be considered by the Courts below, therefore, was as to whether her previous husband was alive and her marriage with him was subsisting at the date of her re-marriage with the opponent. The case put up by the applicant was that her previous husband had given divorce to her and her marriage ties no longer subsisted. Both the Courts have found on a proper appreciation of the evidence in the case that no such valid divorce had at all taken place be-

tween her and her previous husband Kanji and, therefore, she had her previous husband living at the date when she contracted re-marriage with the opponent. In fact she does not refer to any such divorce between her and her previous husband Kanji in her evidence in the case. The other evidence consisting of her father as also of her witness Ratna Naran has been fully considered by the Courts below and on a proper appreciation thereof they have rightly come to the conclusion that the evidence in no way establishes the fact about her having obtained divorce from her previous husband. That finding can hardly be challenged in revision before this Court. It is, therefore, clear that her re-marriage with the opponent which took place in about the year 1963 or 1964 was not a valid marriage and that way she was not the lawfully wedded wife of the opponent as contemplated under S. 483 (1) of the Criminal P. C. entitling her to claim maintenance from the opponent.

6. An attempt was made by Mr. Hathi to urge that the learned Sessions Judge has wrongly ignored the admission about her marriage having been admitted by the Advocate of the opponent in the statement Ex. 6. It appears that on receipt of the notice issued by the Court to show cause why the opponent should not be directed to pay maintenance to the applicant, the opponent's advocate Mr. Vaidya appeared in Court and filed a statement which does not bear the signature of the opponent and it bears only the signature of Mr. Vaidya. The first part refers to his having stated that the applicant was his wife by re-marriage. Later on it has been stated that she was bound to live with him as his Hindu wife. This statement was prepared by Mr. Vaidya, as per the instructions of his client, as his evidence shows. It was, therefore, said that this admission about the fact of their marriage binds the opponent and he cannot resile therefrom. Now in the first place, I find that the learned Magistrate had made an endorsement that it has been admitted in the proceedings on condition to obtain the signature thereon of the opponent. No such signature was thereafter obtained and in view of that endorsement it can be easily ruled out from any consideration as it cannot be taken on record of the case. Now for the purpose of introducing this statement on record, it is difficult to see how it could not be admitted in evidence in view of Section 129 or even under Section 126 of the Indian Evidence Act. As stated by me at the outset, even Mr. Mankad, the learned advocate for the opponent, has fairly and in fact rightly conceded that there can be no bar in any such statement being produced and proved as per the evidence of Mr. Vaidya recorded in the case. The question is as to what pro-

bative value should be attached to it in the circumstances of the case. Not only the statement has remained to be so signed and verified by the opponent, but on the contrary I find another written statement filed at Ex. 14 in the case wherein he has raised all the relevant contentions challenging the right of the complainant to claim maintenance. From the proceedings of this case, it appears that on that very day i.e., on 23-12-1966, one Mr. Dave appeared for the opponent and has given an application for obtaining time to file the written statement. The matter was adjourned for that purpose to 18-1-1967. On that day again and later on on two subsequent dates such as 16-2-1967 and 29-3-1967 the opponent's advocate had obtained time to file the written statement and it was thereafter that the written statement had come to be filed in the case. Mr. Vaidya was present before the Court on 23-12-1966 when he filed the statement, and if on that very day, as I said above, another advocate Mr. Dava for the opponent had also appeared and prayed for time to file the written statement in the same case, naturally that would have created some curiosity in the mind of Mr. Vaidya as to why time was asked for, particularly when he had already prepared and got typed the written statement for being filed in the case. Any advocate would certainly be expected to safeguard the interest of his client and if his client had chosen to engage some other advocate and obtain time for filing the written statement, it would be difficult to understand why Mr. Vaidya should hasten to put in that written statement on the first date of appearance and that again in his own signature only and without the signature of his client in the case. The Court had also given time to file the written statement not only once but on three occasions and it was thereafter that the written statement under the signature of the opponent had come to be given. In other words, in the absence of the signature of the opponent in the statement filed by Mr. Vaidya justifies us to hold that the opponent may not have agreed to what may have been stated therein as he said in the Court and that he had declined therefore to sign the same. Whatever that be, any such admission contained in a statement of this character cannot inspire any confidence and it would be risky to rely upon the same. After all any such admission of a fact may be relevant and not conclusive of the proof of any such fact in the case. The party affected thereby has every right to explain away the same and he had in fact challenged the marriage on other grounds, namely, about the applicant's husband being alive at the date of her re-marriage with the opponent. It

may well be that sufficient instructions may not have been obtained by him and he might have remained under the impression that she was the wife of the opponent by second marriage without realising at that time about the importance of the existence of her husband or about the absence of any divorce given by her previous husband to her. Whatever that be, the evidence in the case amply establishes that she had her first husband living and that her marriage with him was not dissolved by any valid divorce. When that was so, her second marriage with the opponent was void in view of Section 11 read with Section 5(1) of the Hindu Marriage Act. The learned Sessions Judge was, therefore, right in holding that the applicant failed to establish that she was the lawfully married wife of the opponent so as to entitle her to claim maintenance from him under Section 488 of the Criminal Procedure Code.

7. In the result, the application fails and it is dismissed.

Revision dismissed.

'AIR 1970 GUJARAT 141 (V 57 C 21)

P. N. BHAGWATI, C. J. AND DIVAN, J.

The Commissioner of Expenditure Tax, Gujarat I, Ahmedabad, Applicant v. Shri Ambalal Sarabhai and others, Respondents.

Expenditure Tax Reference No. II of 1966, D/- 18-9-1968.

Expenditure Tax Act (1957), S. 5(a) — "Occupation" — Meaning of — Profit making motive not necessary — Tests — Comprises any activity which occupies time and attention and which is not momentary — Engagement in large number of social and welfare institutions is "occupation" within meaning of S. 5(a) — (Words and Phrases — "Occupation").

The activity of assessee's wife in attending meetings of a number of institutions of social welfare, is "occupation" within the meaning of S. 5 (a). It is not necessary that income or profit motive should exist before an activity can be termed a vocation or occupation within the meaning of S. 5(a).

The word "occupation" is a word of large and indefinite import and its meaning is not susceptible of any precise or definite formulation. No universal test can be laid down for determining when an activity amounts to an "occupation" and when it does not. But whatever else "occupation" may comprise, activity in a specific line of endeavour which engages or occupies time and attention of a person and which is carried on with a certain amount of continuity or regu-

larity in the sense that it is not "momentary" — not "an isolated or semi-occasional and temporary adventure" in that line of endeavour — would certainly constitute "occupation". (Para 5)

Thus where it was found as a fact that the assessee's wife was associated in one capacity or another with twenty-four different institutions engaged in social and constructive work, and her activity in this particular line of endeavour was not momentary or in the nature of an isolated or semi-occasional adventure but it was a continuous regular activity engrossing her whole life, it must be held to be her "occupation" within the meaning of S. 5(a) and it is unnecessary to consider whether it also constituted her "vocation." AIR 1959 SC 75, Applied; AIR 1963 Guj 166, Foll. (Para 6)

Cases Referred: Chronological Paras (1963) AIR 1963 Guj 166 (V 50)=

(1966) 59 ITR 262, Commr. of Expenditure-Tax v. Mrs. Manorama Sarabhai 3

(1959) AIR 1959 SC 75 (V 46)=(1959) 35 ITR 48, P. Krishna Menon v. Commr. of Income-Tax 2

(1888) 3 Tax Cas 105, Commrs. of Inland Revenue v. Incorporated Council of Law Reporting 2

J. M. Thakore, Advocate General instructed by M. G. Doshit of M/s. Bhaisanker Kanga and Girdharlal, for Applicant; K. H. Kaji, for Assessee.

BHAGWATI, C. J.:— This Reference raises a short question of law relating to the applicability of Section 5(a) of the Expenditure Tax Act, 1957. The question is whether a certain amount expended by the assessee's wife for the purpose of attending meetings of four institutions of social welfare is exempt from expenditure tax under that provision. The Reference arises out of assessment of the assessee as an individual for the assessment year 1959-60, the relevant account year being the financial year 1958-59. The assessee's wife was, during the relevant year of account, associated in different capacities with about twenty-four institutions and organizations engaged in social welfare work and she was also connected with certain other institutions and organizations with which she had to carry on correspondence during the relevant year of account. Out of these twenty-four institutions with which she was associated in one capacity or the other, there were four whose meetings were held outside Ahmedabad and they were (1) Kasturba Gandhi National Memorial Trust, (2) National Council of Women, (3) Bombay State Welfare Board, and (4) Nutan Bagh Shiksha Sanstha. The assessee's wife incurred an expenditure of Rs. 5,182/- for attending the meetings of these four institutions during the relevant year of account. The expenditure

of the assessee's wife was included for the purpose of computation in the taxable expenditure of the assessee under Section 4(ii) and the question therefore arose whether the expenditure of Rs. 5,182/- incurred by the assessee's wife was taxable as expenditure of the assessee or was exempt from expenditure tax. The assessee claimed that this expenditure was incurred by his wife wholly and exclusively for the purpose of her vocation or occupation of social service carried on by her and it was therefore exempt from expenditure tax under Section 5(a). The claim to exemption was negated by the Expenditure Tax Officer on the ground that there was no possibility of any income arising from the activity of the assessee's wife and it could not therefore be regarded as a vocation or occupation within the meaning of Section 5(a). The assessee thereupon preferred an appeal to the Appellate Assistant Commissioner but the Appellate Assistant Commissioner took the same view as the Expenditure Tax Officer and the appeal was unsuccessful. The assessee then carried the matter in appeal to the Tribunal and before the Tribunal the fortunes were reversed: the assessee succeeded in establishing his claim to exemption under Section 5(a). The Tribunal took the view that in order that an activity should be a vocation or occupation within the meaning of Section 5(a), it was not necessary that there should be any element of profit making motive in it or that it should be carried on by the assessee with intent to make profit. The Tribunal pointed out that the assessee had furnished a list of various institutions and organizations with which his wife was connected in different capacities and observed that it was therefore evident that the assessee's wife was a woman dedicated to social and constructive work and in the circumstances the activity of the assessee's wife must be held to be a vocation or occupation of a social worker within the meaning of Section 5(a). The Tribunal also held that the expenditure in question was incurred by the assessee's wife in connection with her vocation or occupation of a social worker and the expenditure was therefore exempt from tax even though in carrying on the activity she was not actuated by any profit making motive. The Tribunal rejected the contention of the Revenue that under Section 5(a) the only expenditure which was eligible to exemption was expenditure incurred by the assessee and since the expenditure in the present case was an expenditure incurred by the assessee's wife, no exemption could be claimed in respect of it under Section 5(a). The Tribunal pointed out that it would be highly iniquitous if the benefit of the exempting provisions contained in Section 5 was held restricted

only to expenditure actually incurred by the assessee and was not extended to expenditure which, though not actually incurred by the assessee, was yet includible in the taxable expenditure of the assessee. The Tribunal accordingly held that the expenditure incurred by the assessee's wife was exempt under Section 5(a). This view taken by the Tribunal is challenged before us in the present Reference made at the instance of the Commissioner of Expenditure Tax.

2. Two questions are referred to us for our opinion and they are:

(1) Whether on the facts and circumstances of the case, the Tribunal was justified in holding that the activities which the wife of the assessee was engaged in amounted to a vocation or occupation within the meaning of Section 5(a) of the Act?

(2) Whether on the facts and in the circumstances of the case, the assessee was entitled to claim exemption under Sec. 5(a) of the Act in respect of the expenditure incurred by the wife of the assessee wholly and exclusively for the purpose of her vocation or occupation? We may point out at the outset that so far as the second question is concerned, the Revenue did not press it and it is therefore not necessary for us to answer it. The only question argued before us was the first question and that raises the issue as to whether the activity of the assessee's wife during the relevant year of account could be said to be a vocation or occupation carried on by her within the meaning of Section 5(a). The determination of this issue obviously depends upon a proper interpretation and application of Section 5(a) and we will therefore set out that provision in extenso:

"5. No expenditure-tax shall be payable under this Act in respect of any such expenditure as is referred to in the following clauses, and such expenditure shall not be included in the taxable expenditure of an assessee—

(a) any expenditure, whether in the nature of revenue expenditure or capital expenditure, incurred by the assessee wholly and exclusively for the purpose of the business, profession, vocation or occupation carried on by him or for the purpose of earning income from any other source."

The Revenue contended that in order that an activity may be a vocation or occupation within the meaning of Section 5(a), it must be shown that it was indulged in with a motive of making profit; that as the activity of social service carried on by the assessee's wife was not performed with a view to making profit and there was no element of profit making motive in it, the assessee's wife could not be said to be carrying on a vocation or occupation

within the meaning of that section. The Revenue relied strongly on the context in which the words "vocation or occupation" occur in the section and particularly the juxtaposition of the words "for the purpose of earning income from any other source" as indicating the legislative intent that vocation or occupation must also be an activity calculated to produce income. But this contention can no longer be accepted in view of the decision of the Supreme Court in *P. Krishna Menon v. Commr. of Income-Tax*, (1959) 35 ITR 48=(AIR 1959 SC 75). The assessee in that case was teaching his disciples Vedanta without any motive or intention of making profit out of such activity and the question was whether in the absence of profit making motive or intent, the activity could be regarded as a vocation. The Supreme Court held:

"..... it is not the motive of the person doing an act which decides whether the act done by him is the carrying on of a business, profession or vocation. If any business, profession or vocation in fact produces an income, that is taxable income and none the less because it was carried on without the motive of producing income. This, we believe, is too well established on the authorities now to be questioned. It was decided as early as 1888 in the case of *Commrs. of Inland Revenue v. Incorporated Council of Law Reporting*, (1888) 3 Tax Cas 105, 112 and followed ever since, that 'it is not essential to the carrying on of trade that the people carrying it on should make a profit, nor is it even necessary to the carrying on of trade that the people carrying it on should desire or wish to make a profit' it matters not whether that activity is called by the name of business, profession, vocation or by any other name or with what intention it was carried on."

This decision of the Supreme Court was given in reference to a question arising under the Income-Tax Act but the reasoning on which it is based must apply equally to a question arising under the Expenditure Tax Act. Moreover, there is also a decision of a Division Bench of this Court consisting of K. T. Desai, C. J., as he then was, and myself in *Commr. of Expenditure-Tax v. Mrs. Manorama Sarabhai*, (1966) 59 ITR 262=(AIR 1963 Guj 166) where following the above decision of the Supreme Court, we have taken the view that it is not necessary that income or profit motive should exist before an activity can be termed a vocation or occupation within the meaning of Section 5(a). We must therefore hold, rejecting the contention of the Revenue, that mere absence of profit making motive or intent does not take an activity out of the category of vocation or occupation and the activity of the assessee's

wife could not be denied the character of vocation or occupation merely because she was carrying on that activity without any motive or intent of earning income.

4. But the question still remains whether the activity of the assessee's wife could be said to constitute vocation or occupation within the meaning of Section 5(a). Now "occupation" is admittedly a word of much wider import than "vocation" and if the activity of the assessee's wife falls within the category of "occupation", it would be unnecessary to consider whether it constitutes "vocation" as well. We will therefore first consider whether the activity of the assessee's wife could be regarded as an "occupation" within the meaning of that term as used in Section 5(a). That raises a question: what is the true meaning of "occupation" in Section 5(a)? Whilst considering this question, it is necessary to bear in mind that the object of enactment of Expenditure-Tax Act was to impose an annual tax on personal expenditure so that it might discourage excessive personal expenditure and encourage savings. The non-personal expenditure incurred by an assessee was therefore sought to be excluded and that was done by enacting *inter alia* the exempting provisions in Section 5. Section 5(a) exempted expenditure incurred by an assessee wholly and exclusively for the purpose of business, profession, vocation or occupation carried on by him or for the purpose of earning income from any other source, for such expenditure would be clearly non-personal expenditure. Now it is significant to note that in enacting this exemption, the Legislature did not restrict itself to the well-worn formula "business, profession or vocation" employed in the Income-Tax Act but enlarged it by adding a word of large connotation, namely, "occupation". The legislative intent clearly was to bring within the scope and ambit of the exempting provision non-personal expenditure incurred by an assessee in connection with a much wider class of activity than what would be comprehended within the expression "business, profession or vocation". The Revenue also did not dispute this proposition and conceded that "occupation" was a word of much wider signification than "vocation" which, in its turn, was again wider than "business" or "profession", but the contention of the Revenue was that howsoever wide that word might be, it did not include within it activity such as the one carried on by the assessee's wife in the present case. What then does the word "occupation" mean?

5. The decided cases illustrate the futility of attempting a definition of the word "occupation". So vast is the range of human activity and so diverse and

varied its nature that it is well-nigh impossible to find a definition exclusive or inclusive which will take in all activities falling within the matrix of "occupation" and leave out those which do not. The word "occupation" is a word of large and indefinite import and its meaning is not susceptible of any precise or definite formulation. No universal test can be laid down for determining when an activity amounts to an "occupation" and when it does not. But there are certain features which are, in any view of the matter, definitely indicative of what is "occupation" and they are clearly brought out in the discussion of the word "occupation" in *Corpus Juris Secundum*, Vol. 67, page 74. "The word 'occupation'" says *Corpus Juris Secundum*, "is employed as referred to that which occupies time and attention"; it also means "a calling or a trade" and then the *Corpus Juris Secundum* proceeds to elaborate the meaning:

"There is nothing ambiguous about the word 'occupation' as it is used in the sense of employing one's time. It is a relative term, in common use with a well-understood meaning, and very broad in its scope and significance. It is described as a generic and very comprehensive term, which includes every species of the genus, that compasses, the incidental, as well as the main, requirements of one's vocation, calling or business. The word 'occupation' is variously defined as meaning the principal business of one's life; the principal or usual business in which a man engages; that which principally takes up one's time, thought and energies; that which occupies or engages the time and attention; that activity in which a person ... is engaged with the element of a degree or permanency attached....."

The word 'occupation' has reference to the principal or regular business of one's life, The word particularly refers to the vocation, profession, trade, or calling in which a person is engaged for hire or for profit, and it has been repeatedly held that a person's principal business and chief means of obtaining a livelihood constitutes his occupation. The term 'occupation' expressed the idea of continuity; a continuous series in transactions; and implies regularity in a specific line of endeavour. Furthermore, time is a necessary ingredient, and, although it need not be protracted, it must not be momentary. As generally understood, the term does not include an isolated or semi-occasional and temporary adventure in another line of endeavour, and does not extend to acts and duties which are simply incidents connected with the daily life.....

A person may engage in more than one occupation, or he may engage in two occupations at the same time, as where he carries on his chief occupation and also another as a side line."

It may be debatable whether the idea of continuity or regularity is a necessary ingredient of the concept of "occupation" and if so what degree of regularity or continuity is requisite to qualify an activity for coming within the category of "occupation". But one thing is clear that whatever else "occupation" may comprise, activity in a specific line of endeavour which engages or occupies time and attention of a person and which is carried on with a certain amount of continuity or regularity in the sense that it is not "momentary" — not "an isolated or semi-occasional and temporary adventure" in that line of endeavour — would certainly constitute "occupation". Applying this test to the facts found by the Tribunal, the activity of the assessee's wife must be held to be her "occupation".

6. The Tribunal found as a fact that the assessee's wife was associated in one capacity or another with twenty-four different institutions engaged in social and constructive work: she was a Vice-President in some of the institutions, a trustee and treasurer in some others and a member of the managing committee in the rest; she was also devoting her time and attention to the care and management of Kasturba Sevalaya, Sardarnagar, Ahmedabad which is a home for unattached women and children and old and infirm men. The Tribunal on the basis of these facts held that the assessee's wife was a woman who had dedicated her life to social and constructive work. The assessee's wife was thus engaged in social and constructive work and her activity in this particular line of endeavour was not momentary or in the nature of an isolated or semi-occasional adventure but it was a continuous regular activity engrossing her whole life; she was "dedicated to social and constructive work". The activity of the assessee's wife was not an isolated or stray activity in the field of *social and constructive work*, nor an activity indulged in by way of hobby to utilise her leisure hours but it was a serious pursuit to which she had dedicated her life and it must therefore be held to be her "occupation" within the meaning of Section 5(a). In this view, it becomes unnecessary to consider whether it also constituted her "vocation" within the meaning of that section.

7. Our answer to the first question therefore is that the Tribunal was justified in holding that the activity in which the assessee's wife was engaged amounted to an "occupation" within the meaning of Section 5(a). The Commissioner will pay the costs of the Reference to the assessee.

Reference answered.

before us that the petitioners were guilty of laches for having surrendered to the jurisdiction of the company and having accepted employment under the company as far back as 1963 when the company was set up it was too late in the day to complain about the terms and conditions of their service about five years after they had started working under the company. The learned counsel therefore submitted that on the ground of laches alone the petition was liable to be dismissed.

5. Before entering into the merits of the arguments advanced by the parties it may be necessary to settle a slight controversy raised by the parties to the petition. While the petitioners have categorically asserted in their petition that they were permanent employees of the Sericulture Department, having been shown from year to year in the civil list and provision having been made for these posts in the departmental budget, this allegation has not been categorically denied by the State in its affidavits who has in a most dexterous fashion tried to deny this allegation and has given more or less an evasive answer. The State in its affidavit says that the petitioners are employees of the company, but does not say that before the company came to be established the petitioners were not permanent employees of the Sericulture Department of the Government. Furthermore the State has not produced the service records or the service books of the petitioners to show that they were not permanent employees of the Government.

The manner in which they have denied the averment regarding the petitioners being permanent servants of the Government may be quoted as under:—

"Averments made in para 1 of the petition are admitted to this extent that the petitioners are the citizens of India and the residents of Jammu & Kashmir State. It is denied that they are the officers of the Jammu & Kashmir Government Department. Regarding the members of the staff there are no names of the persons to whom it refers nor have their particulars been given and in the absence of these particulars no reply can be given. It is further submitted that the averment is not admitted."

6. It will be noticed from the averments quoted above that the Secretary to the Industries Department of Jammu & Kashmir who has given the affidavit has not chosen to deny categorically that the petitioners were ever permanent employees of the Government. Mr. Chagla also in the course of his arguments did not seriously contest the allegation of the petitioners that they were permanent employees of the Sericulture Department of the Government. What the secretary to the Department of Industries has said in

his affidavit is that at the time when the affidavit was given, the petitioners were not officers of the Jammu & Kashmir Government Department. In other words the State has practically admitted impliedly that before the formation of the company the petitioners were permanent employees of the Government.

7. Mr. Chagla further submitted that the respondent 3 being the Managing Director of the Company no writ will lie against him. This position was, however, conceded by Mr. Asoka Sen appearing for the petitioners who confined his relief only against the first respondent which is the State of Jammu & Kashmir.

8. For these reasons we are constrained to hold that on the materials before us it has been proved beyond any shadow of doubt that the petitioners were permanent employees of the Government working in the Sericulture Department before the existence of the J. & K. Industries Ltd. Company.

9. We would now examine the contentions raised by the counsel for the petitioners. To begin with, there can be no doubt that the petitioners were permanent Government employees of the Sericulture Department and the names of the first two petitioners are mentioned in the civil list of the years prior to 1962. For instance in the civil list of 1962 dated 1-1-62 at pages 174 and 178 Mr. Kaul petitioner No. 2 has been mentioned as having entered the service on 18-1-1999 (Bikrami) and promoted as Dy. Director on 19-3-61. The position of this petitioner prior to the formation of the company is shown on 19-3-1961. Similar is the entry with regard to petitioner I Ghulam Qadir who is shown on 1-6-62 as Offg. Dy. Director. In these circumstances therefore we have now to see if by virtue of the impugned notification the conditions of service of the petitioners were affected to their prejudice or whether or not the effect of the notification was to terminate their services and constitute them into an absolutely new entity.

In this connection the first argument advanced by Mr. Sen was that there was nothing in the order of the then Sadar-i-Riyasat or in the Articles of Association or in the Memorandum of Association to authorize the Government to change the conditions of service of the petitioners, whose services were entrusted to the company. The order creating the J & K Industries to be governed by a Board of Directors is dated 3-10-63 and runs as follows:—

"Sanction is accorded to the formation of company under the J & K Companies Act, 1997, for the running of the Industrial undertakings mentioned in the annexure of this order. The articles and

memorandum of association of the said company as per annexure to this order are also approved and it is directed that these be registered under Jammu and Kashmir Companies Act, 1937".

10. It is true that there is nothing in this order which authorizes the Government to change the terms and conditions of service of the petitioners, nor does it empower the administration of the company to interfere with the conditions of service of the petitioners. Mr. Sen drew our attention to Article 89 of the Articles of Association which runs thus:—

"Notwithstanding anything contained in any of these Articles the Sadar-i-Riyasat may from time to time issue such directives or instructions as he may think fit in regard to the company, and the Directors shall duly comply with and give effect to such directives or instructions."

It was submitted by Mr. Sen that while this Article authorizes the Sadar-i-Riyasat to issue directions regarding the finances, conduct of business and affairs of the company, it does not give the Sadar-i-Riyasat any authority to interfere with or alter the conditions of service of the employees of the Sericulture Department whose services were placed at the disposal of the company. In our opinion the contention raised by the learned counsel for the petitioners is sound and must prevail. Article 89 (Supra) does not contain any power which is given to the Sadar-i-Riyasat to alter the conditions of service of the petitioners who were entrusted to the company.

Nevertheless the Sadar-i-Riyasat being the fountain of all powers had a constitutional right to make rules or to amend the Jammu and Kashmir Civil Service Rules or to alter the service conditions of the petitioners unilaterally without their consent. In exercising such a power it was not necessary that the Sadar-i-Riyasat should have been authorised by the company or by the Articles of Association. Furthermore in issuing SRO. 36 dated 11-2-66 we do not think that the Sadar-i-Riyasat purported to act under any provision of the Articles of Association, but he acted under the general rule-making powers given to him under Section 124 of the State Constitution. To what extent these rules are valid is of course a different matter.

Mr. Sen further drew our attention to Article 73 (5) of the Articles of Association which runs as under:—

"Without prejudice to the general powers conferred by the last preceding Articles, and the other powers conferred by these Articles, the Directors shall exercise the following powers with the sanction of the Sadar-i-Riyasat, that is to say, powers; to appoint and promote and at

their discretion, remove, retire or suspend such managers, secretaries, officers, clerks, agents or servants, for permanent, temporary or special services as they may, from time to time, think fit and to determine their powers and duties and fix their salaries or emoluments and to require security in such instances and to such amount as they think fit provided that no appointment the maximum pay of which is Rs. 2000 or more per mensem shall be made without the prior approval of the Sadar-i-Riyasat."

11. It was submitted that under this sub-clause of Article 73 the Directors with the sanction of the Sadar-i-Riyasat had been given specific powers regarding appointment, promotion, etc., of the servants of the company, but even this clause does not empower the company to alter the conditions of service of the petitioners. Even if this be so, the observations made with respect to Article 89 equally apply to this Article also. The question for determination in the present case is not the incompetency of the company to alter the conditions of service of the petitioners, but it relates to the competency of the Government to change the conditions of service of Government servants by violating their statutory and constitutional safeguards. The argument advanced by Mr. Sen on this score is therefore, rejected.

12. Another important contention raised by Mr. Sen which requires serious consideration is the application of legal principles laid down in *Nokes v. Doncaster Amalgamated Collieries*, (1940) AC 1014 at page 1018 = (1940) 3 All ER 549 at page 553. In this case Viscount Simon who spoke for the House of Lords observed as follows:—

"..... after weighing the reasoning in those judgments and the arguments presented at the bar of this House, I have come to the conclusion that contracts of personal service are not automatically transferred by an order under Section 154.

x	x	x	x	x	x
x	x	x	x	x	x

The truth is that many contracts are not capable of being dealt with by the method said to be involved in the language of Section 154. For example, what would become of a contract which remunerates a manager with a share of the profits of a constituent undertaking, or a contract with a medical man to attend the servants of a company at a fixed total fee? Such contracts cannot be dealt with simply by substituting a new employer for the old for the nature of the contract necessarily depends upon the old employer continuing to be a contracting party, and any change of employer gives the contract an entirely new meaning."

The ratio decidendi in this case was that where a servant entered into a written contract with the company his service could not be transferred to another company by the owner unilaterally without the consent of the servant.

What happened in that case was that the appellant had entered into a written contract of service with a company and served as a coal miner. On June 4, 1937 an order was made under S. 54 of the Companies Act transferring to the respondent company the property, rights, and liability of the colliery company which stood dissolved under S. 153 of the Act. The appellant appeared to have absented himself without sufficient cause and the respondent company having sustained a loss brought an action under the Employers and Workmen Act. Their Lordships held that a transfer of the assets and liabilities of the Company by itself would not operate as a transfer of the service contracts entered into by the employees of the previous company which were not capable of being transferred.

13. In the present case if what was done in 1940 AC 1014=1940-3 All ER 549 (supra) was sought to be done by the J. & K. Industries Company by virtue of the impugned notification, then the case would have been directly in point. We, however, do not think that the services of the petitioners were transferred to the company without any reservations. What happened was that the services of the petitioners were entrusted with the company, to start with on the same terms and conditions, and subsequently it was the Government itself and not the company which altered the conditions of service the status and other benefits enjoyed by the petitioners to their prejudice and without their consent. The sole question for determination is as to whether the Government was competent to do this. In these circumstances therefore while the principles enunciated in the Nokes' case, 1940 AC 1014=1940-3 All ER 549 (supra) may be a valuable guide to us in determining the validity of the action of the Government it would not be on all fours with the facts of the present case; it may be necessary to reproduce the entire note 6 in order to understand its legal implications.

"Service in the companies set up under Companies Act and wholly owned by Government should not be treated as foreign service for the purpose of grant of deputation allowance. So far as J. & K. Industries are concerned there was a large number of employees from the Industrial concerns who were not entitled to pensionary benefits and these should now be treated as the employees of J. & K. Industries Ltd. Some few employees of erstwhile Sericulture Department who were entitled to pensionary benefits should

also likewise be treated as employees of J. & K. Industries and their pension shared by the Government and the Company under rule of proportion. In these circumstances no deputation allowance shall be permissible. There are, however, some Government servants who have been sent on deputation to these companies who will continue to be governed by the terms of deputation already sanctioned.

In future individual cases of grant of deputation allowance may, however, be examined in their own merit in accordance with the broad principles laid down as under:—

(i) A deputation or duty allowance may be considered where the circumstances of the posting of the person concerned suggests considerable personal inconvenience or additional expenditure, e.g., having to work at an out of the way place where he normally would not have been required to work, or

(ii) Where a person has to be selected very carefully for a particular post in view of the nature of its responsibilities and duties and some recognition of the fact in the form of a suitable allowance would be merited.

(iii) It should be accepted as a general rule that all deputationists must be considered for promotion in their parent Organization should a vacancy occur. In such event if they are suitable they should be given the promotion and the Corporation should either be required to give them the additional pay or to return the official to their parent organization.

(iv) There should be no objection to a deputationist receiving promotion while on deputation. Such promotion however, shall not confer any rights in the matter of compensation or emoluments on return to the parent organization."

Serious exception has been taken to the first part of note 6 which seeks to treat the petitioners as employees of the J. & K. Industries from the date of the said notification. It would appear that there is some amount of inconsistency between the first and the second part of note 6 itself. While the first part clearly mentions that service in the companies set up under the Companies Act and wholly owned by the Government (which includes the present company) should not be treated as foreign service for the purpose of grant of deputation allowance, yet the second part says that employees of erstwhile Sericulture Department who were entitled to pensionary benefits should be treated as employees of the J. & K. Industries. Thus while for the purpose of deputation allowance the servants of the company would not be deemed to be in foreign service but would be Government servants, in other respects,

they would be deemed to be employees of the company and not of the Government. No rational basis for this classification appears to have been made out either in the amended rule incorporated in note 6 or in the affidavits filed by the State.

14. The matter does not stop here. It is provided that the employees of the erstwhile Sericulture Department who were entitled to pensionary benefits should also likewise be treated as employees of the J. & K. Industries. This part of the rule applies to the petitioners and changes their status from that of Government servants to servants of a limited company. The petitioners by virtue of this change appear to have been deprived of the following important safeguards, privileges and emoluments.

(a) By being treated as employees of the company they have lost the safeguards granted to Government servants under S. 126 of the State Constitution because they ceased to be in the service of the State by force of this rule.

(b) They will not be entitled to the revised dearness allowance from November 1967 like other Government servants but were to get the same only from January 1968.

(c) The petitioners would be deprived of the revised grades of Government servants following the recommendation of the Pay Commission implemented on 27-2-1968 and subsequent revision of grades if any.

(d) By being treated as servants of the company the moment the company is liquidated their services would stand terminated.

15. These are the disadvantages and handicaps from which the petitioners have suffered by virtue of the impugned notification.

16. We have now to see as to what is the effect of the Government order. It is true that it is open to the Government to change the conditions of service of the petitioners from time to time unilaterally and without their consent, as held by the Supreme Court in *Roshan Lal v. Union of India*, AIR 1967 SC 1889 at p. 1894 where their Lordships observed as follows:—

"The emoluments of the Government servant and his term of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee."

17. It is, however, one thing to alter the conditions of service of a Government servant from time to time and quite a different thing to terminate his services altogether or to convert the nature of his service from one form to another resulting in a complete transformation of the character of the service.

18. In the instant case if the petitioners are to be treated as employees of the company the character and nature of their service is completely changed and they would cease to enjoy the immunity and protection given to them by S. 126 of the State Constitution; and if a Government servant who is entitled to protection under S. 126 is suddenly deprived of this protection without any notice then such an action cannot but be held to be either as a termination of his service or a reduction in rank. Secondly as pointed out above, a Government servant has certain advantages over a private servant. Government service is a statutory contract and is governed by statutory rules and constitutional safeguards and therefore there is a sense of security both in the character and in the tenure of service. It is not a matter of insignificance that a person who enjoys this security loses it by one stroke of pen, and this is what has happened to the petitioners in the present case. The petitioners have ceased to be Government servants and have become private servants of the company overnight, with the result that prior to the passing of the Government order their service could not have been terminated without giving notice to them under S. 126 of the State Constitution but after the passing of the order they could be dismissed at a moment's notice without complying with the provisions of S. 126.

Apart from this basic loss, the petitioners have also suffered financial loss in emoluments inasmuch as they would no longer enjoy the grades which are revised from time to time either due to rise in prices or on the recommendation of the Pay Commission. The mere fact that their present emoluments have not undergone any change and that they would be entitled to the same pensionary benefits can hardly compensate the loss which the petitioners have suffered by virtue of the impugned order. In this connection we might notice an argument which was put forward by Mr. Chagla that the Sericulture Department was abolished with the formation of the J. & K. Industries into a limited company. In this connection Mr. Chagla quoted Art. 207 of the KCSR which runs thus:—

"If an officer is selected for discharge owing to the abolition of his permanent post he shall, unless he is appointed to another post the conditions of which are deemed to be at least equal to those of his own, have the option.

(a) of taking any compensation, pension or gratuity to which he may be entitled for the service he has rendered; or

(b) of accepting another appointment on such pay as may be offered and continuing to count his previous service for pension."

This argument runs against the proposition adumbrated by Mr. Chagla because there is no allegation in the reply of the State or in any of the annexures filed by it that before transferring the service of the petitioners to the company or before passing the impugned notification the petitioners were notified of their being discharged from service and given an option either to take compensation or to opt to be appointed under the company. Indeed if the procedure laid down in Art. 207 of the KCSR would have been followed the petitioners would have had no grievance. This procedure was, however not followed and this is an additional reason which invalidates the impugned order. Note 6 is at the most a supplementary rule and it cannot override a specific and substantive provision contained in Art. 207 of the KCSR. It follows therefore that if the petitioners' services are terminated and they are transferred to some other company, then such action is contrary to the provisions of Art. 207 which has not only a statutory force, but is also backed by the authority of the Constitution inasmuch as the rules framed have been saved by the Constitution. Thus we are in agreement with the argument of the learned counsel for the petitioners that the impugned notification contained in note 6 is clearly violative of S. 126 of the State Constitution and is also hit by Art. 207 of the KCSR quoted above. On this ground alone the aforesaid notification so far as it affects the petitioners is entitled to be struck down as being invalid.

19. We might now refer to some authorities in support of the view that we have taken in the present case.

20. In the celebrated case of Parshotam Lal Dingra v. Union of India, AIR 1958 SC 36 it was clearly pointed out that where a Government servant has a right to a post or to a rank under the terms of employment or the rules governing the conditions of service, then termination of such service or of reduction to a lower post attracts at once Art. 311 of the Constitution of India. In other words this case clearly lays down that whenever the service of a permanent Government servant is terminated or his rank is reduced, it is hit by Art. 311 of the Constitution of India which corresponds to S. 126 of the State Constitution, and no such termination or reduction in rank can take place without giving a reasonable opportunity to the concerned employee to show cause regarding the action proposed to be taken against him.

21. In AIR 1967 All 197, Kidar Nath v. State of U.P. the same view is expressed.

22. In a later case of the Supreme Court in Moti Ram Deka v. General

Manager N. E. Frontier Rly., AIR 1964 SC 600 it was clearly pointed out that the termination of the services of a permanent civil servant otherwise than by operation of superannuation, retirement etc. amounted to removal within the meaning of Art. 311 of the Constitution of India. In this connection their Lordships observed as follows:—

"The question which arises for our decision in the present appeals is: if the service of a permanent civil servant is terminated otherwise than by operation of the rule of superannuation, or the rule of compulsory retirement does such termination amount to removal under Article 311 (2) or not? It is on this aspect of the question that the controversy between the parties arises before us..... A person who substantively holds a permanent post has a right to continue in service, subject of course, to the rule of superannuation and the rule as to compulsory retirement. If, for any other reason, that right is invalid and he is asked to leave his service, and termination of his service must inevitably mean the defeat of his right to continue in service and as such it is in the nature of a penalty and amounts to removal. In other words, termination of the service of a permanent servant otherwise than on the ground of superannuation or compulsory retirement must per se amount to his removal and so, if by R. 148 (3) or R. 149 (3) such a termination is brought about, the Rule clearly contravenes Art. 311(2) and must be held to be invalid."

23. The aforesaid decisions of the Supreme Court clearly show that any rule which amounts to a termination of the service of a permanent Government servant without complying with the requirements of Art. 311(2) of the Constitution of India (S. 126 of the State Constitution) is invalid. This decision, in our opinion, applies with full force to the facts of the present case where the first Part of note 6 seeks to terminate the services of the petitioners as Government servants without at all complying with the requirements of S. 126 of the State Constitution.

24. The aforesaid case of the Supreme Court was noticed in a recent Full Bench case of the Court in Abdul Khalik v. State of J. & K., AIR 1965 J & K 15 (FB) where it was held that a permanent post could not be abolished without complying with the requirements of S. 126 of the State Constitution. In this case their Lordships of the Full Bench held as follows:—

"Moreover it seems to us that so far as a permanent servant is concerned, the moment his service is terminated except by way of compulsory retirement under a valid rule or by operation of the rule of superannuation, the termination would

amount *per se* to removal from service. The question of his conduct does not come into the picture at all. In fact the language of S. 126 of the State Constitution which is the same as in Art. 311 of the Constitution of India, does not refer to any conduct of the employee concerned. All that S. 126 of the State Constitution says is that the employee must be given a reasonable opportunity to show cause against any action proposed to be taken against him. Even if the service of a permanent servant is terminated on the abolition of a post, it is certainly an action, and a very serious action which has been taken against the servant and hence the provisions of S. 126 of the State Constitution are clearly invoked. Here, in fact, lies the essential difference between the status of a temporary servant and that of a permanent servant. In the case of the former, S. 126 of the State Constitution or Art. 311 of the Constitution of India would not be attracted, unless his termination is by way of punishment or penalty and in the case of the latter, however the very removal *per se* would amount to punishment provided the termination is not by way of retirement or by operation of the rule of superannuation... In the present democratic set up, it is necessary for the State to ensure the safety and security of its servants and that is why the servants have been guaranteed protection by the Constitution. If it is held that the Government or the authority concerned has an absolute right to abolish the post without complying with the procedure laid down in Art. 311 of the Indian Constitution or S. 126 of the State Constitution, it will be giving the Government or the authority concerned very wide and uncanalised powers which are capable of being misused at one time or the other. The right of a permanent servant to hold the post is a very valuable right and any forfeiture or extinction of this right must in the very nature of things attract the protection afforded to the servants under S. 126 of the State Constitution." (See page 21 of the Reports).

25. One of us was a party to the aforesaid decision and spoke for the court in the case. It is manifest from a consideration of the aforesaid authorities that the right of a permanent servant being a very valuable right and being safeguarded by a constitutional provision, the appointing authority cannot put an end to this right by stultifying and bypassing the constitutional provisions and thus striking a death-blow to the safety and security of service which a permanent Government servant possesses.

26. To the same effect is the decision in Divisional Personnel Officer, Southern Rly., Mysore v. Raghavendrachar, AIR

1966 SC 1529 where their Lordships of the Supreme Court held as follows:—

"One test for determining whether the termination of service was by way of punishment or otherwise is to ascertain whether under the service Rules but for such termination the servant has the right to hold the post."

Even if it be assumed for the sake of argument that the transfer of the petitioners to the company does not amount to termination of their service or removal from service there can be no doubt that in view of the radical changes brought about by the impugned notification in the terms or conditions of service, the rank and position, the emoluments and the privileges enjoyed by the petitioners, to the detriment and to the prejudice of the petitioners, is tantamount at least to their reduction in rank within the meaning of Section 126 of the State Constitution. In these circumstances therefore the impugned notification is invalid as being hit by S. 126 of the State Constitution.

We are fortified in our view by a decision of the Supreme Court in *Shitla Sahal v. N. E. Rly., Gorakhpur*, AIR 1966 SC 1197 at p. 1199 where their Lordships observed as follows:—

"If a civil servant has a right to a particular rank, then the very reduction from that rank will operate as a penalty, for he will then lose the emoluments and privileges of that rank."

27. The law in America also appears to be the same. In Vol. LVI of the *Corpus Juris Secundum* certain valuable principles are laid down which afford valuable guidelines for us to determine the issues in this case. At page 412 (Art. 31) it has been observed that in the absence of a statute to the contrary, an employment for an indefinite term may be terminated at the will of either party, regardless of the length of service. It is further observed that this rule is followed notwithstanding the fact that the contract of employment provides for payment at a daily, weekly, monthly or yearly rate.

Similarly at page 414 (Art. 31) the following observations appear:—

"As a general rule employment contracts which in some form purport to provide for permanent employment..... are terminable at will by either party where they are not supported by any consideration other than the obligation of service to be performed on the one hand and wages or salary to be paid on the other."

Another pertinent observation is to be found at page 421 which appears to be directly in point. This observation is as follows:—

"Where the master disposes of his business to another without notifying the

servant of the change and the latter continues his services thereafter, the master is liable for the servant's wages as long as he remains without notice, and knowledge by the employee of the negotiations which resulted in the disposal of the business will not release the employer from such liability.

x x . x

"The mere forming of a corporation by an employer and the use of the corporate name in the business for which he has hired the servant do not terminate the employment, where there is otherwise no change in the manner of conducting the business and the employer continues to be the real owner." (See Art. 34).

28. The effect of this observation is that by the mere fact that the Sericulture Department was constituted into a corporate body would not ipso facto put an end to the service of the employee nor would the real owner be absolved from his responsibilities. Note 6 in the instant case, however, seeks to change the owner and takes away the rights which are vested in the employee and thus it clearly amounts to termination of his service or for that matter an unlawful termination on that account.

29. The conclusion deducible from the first para of the observations at page 421 (quoted above) is that where there is a change of masters a consequent change in the conditions of the service of an employee cannot be made without notice to or without the consent of the employee concerned. Note 6, as indicated above, seeks to bring about a radical change in the terms and conditions of the service of the petitioners without notice to them and without obtaining their consent. For these reasons the only inference that can be drawn is that on the date of the impugned order, by altering the character of the petitioners from Government employees to employees of the company, their services were terminated and this could not be done without resorting to the procedure laid down in S. 126 of the State Constitution as also in Art. 207 of the KCSR.

30. Mr. Sen drew our attention to the fact that the impugned notification contained in note 6 apart from violating Art. 207 of the KCSR is also inconsistent with Rr. 16, 16-A, 18, 37, 37-A and 37-B and a host of other rules. In view of our clear finding that note 6 is violative of S. 126 of the State Constitution and therefore invalid, it is not necessary for us to examine this particular argument raised by the learned counsel for the petitioners. We might, however, mention the fact that what is struck down as invalid and as amounting to terminating the ser-

vice of the petitioners is only the following part of note 6:—

"Some few employees of erstwhile Sericulture Department who were entitled to pensionary benefits should also likewise be treated as employees of J. & K. Industries and their pension shared by the Government and the Company, under rule of proportion."

31. Before closing this part of the case, it may be necessary for us to examine the validity of the argument put forward by Mr. Chagla. Mr. Chagla submitted that since the department of Sericulture itself was abolished and the petitioners were in the service of the Company, the abolition of their posts has not resulted in any prejudice to the petitioners. This argument fails to consider the amount of mischief that has been caused by the objectionable part of note 6 as pointed out above. The argument further ignores the fact that if the intention of the Government was to abolish the services of the petitioners and absorb them elsewhere, then it was incumbent on the Government to have adopted the procedure laid down in Art. 207 of the KCSR by giving option to the petitioners either to take compensation or to be absorbed in the service of the company on the terms and conditions mentioned in note 6. No such procedure was adopted, but by one stroke of pen the posts of the petitioners were abolished. Furthermore, such an action on the part of the Government violates S. 126 of the State Constitution as pointed out above, since Mr. Chagla himself admitted that by virtue of note 6 the posts held by the petitioners stood abolished.

32. Another important ground on which the impugned notification was attacked by the learned counsel for the petitioners was that it was violative of Art. 16 of the Constitution of India, as only one set of Government servants namely those belonging to the Sericulture Department were selected for hostile discrimination by being treated as servants of the company, whereas the Government servants of other departments did not suffer from these handicaps. Secondly it was pointed out that the distinction sought to be drawn by note 6 between an employee entitled to pensionary benefits and non-pensionary benefits was neither reasonable nor rational so as to afford a basis for classification. Thirdly it was urged that although Government servants from 21 departments were transferred to various companies, it were the employees of the Sericulture Department alone who were to be treated as employees of the company, and would cease to be Government servants. Lastly it was urged that the distinction regarding payment of deputation allowance even between Gov-

ernment servants transferred to the company was purely discriminatory.

33. As regards the first argument it does not appeal to us. The Department of Sericulture was undoubtedly a commercial activity of the Government and had been run on commercial lines. If the Government desired to streamline this department by putting it in charge of a Board of Directors by constituting a corporate body like the J. & K. Industries, then the employees belonging to the Sericulture Department formed a class by themselves and the classification was both reasonable and rational in relation to the object which was sought to be achieved by the act of the Government. It is not alleged that there was any discrimination inter se between the employees of the Sericulture Department. For these reasons therefore Art. 16 was not violated so far as this part of the case is concerned.

34. As regards the distinction between employees entitled to pensionary benefits and those not entitled to pensionary benefits there does not appear to be any discrimination. Since the petitioners' right to get pensionary benefits was left untouched they could possibly have no grievance against the order of the Government granting pensionary benefits to others.

35. Thirdly as regards the grievance made on the score of deputation allowance, we think this has some force. We pointed out in the very beginning that note 6 is itself inconsistent on this point. While the first part of note 6 clearly says that service in the companies set up under the Companies Act should not be treated as foreign service for the purpose of grant of deputation allowance, yet it seeks to discriminate between two employees both of whom are equally circumstanced. If the general rule is that for the purpose of deputation, service in the companies would not be treated as foreign service, so as to earn deputation allowance, then anybody transferred to the companies should not get any deputation allowance, there appears to be no rational basis for the provision that while some employees belonging to the Sericulture Department who are transferred to the company would not get deputation allowance, other employees of the same company who were getting it from before would continue to get deputation allowance. In other words a premium was sought to be placed on the employees of the Sericulture Department because they were transferred to the company some time after other employees who were getting deputation allowance. The rule does not give any guidelines to indicate why this discrimination has been made. We are, therefore, in agreement with the counsel for the petitioners that the part of the rule which relates to the grant of

deputation allowance is discriminatory and must be struck down as being hit by Art. 16 of the Constitution of India.

36. Thus as a result of our findings on the above points the first part of the entire note 6 which is as follows:—

"Service in the companies set up under Companies Act and wholly owned by Government should not be treated as foreign service for the purpose of grant of deputation allowance. So far as Jammu & Kashmir Industries are concerned, there were a large number of employees from the Industrial concerns who were not entitled to pensionary benefits and those should now be treated as the employees of the J. & K. Industries Ltd. Some few employees of erstwhile Sericulture Department who were entitled to pensionary benefits should also likewise be treated as employees of J. & K. Industries and their pension shared by the Government and the company under rule of proportion. In these cases no deputation allowance shall be permissible. There are however, some Government servants who have been sent on deputation to these companies who will continue to be governed by the terms of deputation already sanctioned" is struck down as invalid being violative of Art. 16 of the Constitution of India, S. 126 of the State Constitution and Art. 207 of the KCSR.

37. It was, however, faintly suggested by Mr. Chagla that note 6 was only in the nature of an explanation. This argument was, however, given up by Mr. Chagla when it was pointed out to him that even the State in its affidavits alleged that note 6 amounted to a full-fledged statutory rule made by the Governor under his rule-making power.

38. The last argument raised by Mr. Chagla to meet the contention of Mr. Sen was that the petition should be dismissed on the ground of laches. It was pointed out that although the company was formed as far back as 1963 the petitioners had submitted to the jurisdiction of the company, carried on their work and never raised any objection to their transfer from the Sericulture Department to the Company. This argument appears to be based on some misconception. In the first place when the company came into existence by order of the Sadar-i-Riyasat on 10-8-63 and the petitioners services were transferred to the company there was no order by the Sadar-i-Riyasat altering, changing or effacing the service conditions of the petitioners. On the other hand the order stated that the services of the petitioners were entrusted to the company a term which implied that the petitioners were to continue in service on the same terms and conditions as before. It is also not disputed that before the passing of the impugned noti-

fication this was the position. In these circumstances there was no question of, nor any occasion for the petitioners to protest or to make any grievance against the Government order.

The petitioners felt aggrieved for the first time when the impugned notification in the form of note 6 was passed on 11-2-1966 which completely transformed their status and actually put an end to the nature and character of their service. As soon as this rule was passed, the first representation was made to the Government as far back as 17-10-66 (Annexure A to the petition). The Government does not appear to have passed any order on this representation which was followed by other representations without any result. When the petitioners were, however, convinced that they would not get any justice from the Government, they approached this court for an appropriate writ. In these circumstances the delay in filing the petition has been satisfactorily explained by the petitioners and we are not in a position to reject the petition on this ground alone.

39. Thus the conclusions that emerge from the findings given by us may be summarized as follows:

(1) That the petitioners have been proved to be permanent and confirmed Government servants holding substantive posts prior to their transfer to the company in the year 1963.

(2) That the impugned notification (SRO 36 dated 11-2-66) amounts to termination of the service of the petitioners or their removal from service and has been passed without complying with the mandatory requirements of the provisions of S. 126 of the State Constitution and is therefore invalid on this account.

(3) Even if the aforesaid notification does not amount to termination of the service of the petitioners or their removal from service it doubtless results in a material reduction of the rank held by the petitioners prior to their transfer to the company and attracts S. 126 of the State Constitution and is therefore invalid on this ground also.

(4) That the aforesaid notification is invalid as being inconsistent with the provisions of Art. 207 of the KCSR as the procedure laid down in this Article has not been observed.

(5) That the first part of note 6 which provides for deputation allowance being granted to one set of employees of the company and not to the petitioners is clearly discriminatory and is therefore invalid, being violative of Arts. 14 and 16 of the Constitution of India.

(6) That the second part of note 6 of the KCSR which prescribes conditions and lays down the guiding principles for giving deputation allowance to employees

of the company on the merits of each case is perfectly valid and is not hit by Arts. 14 and 16 of the Constitution of India.

(7) That the petitioners, have given a reasonable explanation for the delay, if any, in filing this petition and hence the petition is clearly maintainable.

For the reasons given above, we allow this writ petition and hold that note 6 to the extent indicated above is invalid and ultra vires and destitute of any legal effect. We therefore grant a writ of Mandamus directing the respondent to place the petitioners in the same position in which they were before the notification SRO 36 dated 11-2-66 was passed as regards their service conditions etc. The petitioners will be entitled to costs of Rs. 300/- to be paid by the first respondent. Since it is conceded by Mr. Sen that no relief is sought against other respondents against whom no writ lies, the petition is dismissed as against respondents 2 and 3.

40. JASWANT SINGH, J.: I agree.

Petition allowed.

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S. M. F. ALI, C. J. AND
JASWANT SINGH, J.

Lassa Baba, Petitioner v. Gaffar Butt and others, Respondents.

Civil First Appeal No. 31 of 1966, D/- 30-12-1969, against decree of Dist. J., Srinagar, D/- 7-7-1966.

(J. & K.) Right of Prior Purchase Act (2 of 1993) (Smt.) (as amended in 1959), S. 14 — Land in several Khasra numbers sold by single and indivisible transaction — Sale price also consolidated — Right of prior purchase to different tenants of different Khasra numbers not available.

It is well settled that a purchaser cannot be required to submit to partial pre-emption nor is he entitled to demand it: AIR 1929 PC 58, Foll. (Para 12)

Looking at the context, the intention of the Legislature in enacting S. 14 is that in case the original contract of sale be one and indivisible, the right of prior purchase should extend to the whole of the land sold and not to a portion of it, i.e., the person claiming prior purchase should be a tenant in the entire property which is subject of the sale. (Para 14)

Hence, in the case of sale of land comprised in several Khasra numbers by one and indivisible transaction, the sale price also being consolidated, if all the plaintiffs claiming right of prior purchase as tenants are not in possession of all the Khasra numbers (i.e., if some are tenants of some Khasra numbers and others are

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tenants of other Khasra numbers), the plaintiffs cannot be said to have proved their superior right in respect of the entire land and their suit for possession on the basis of that right cannot succeed; AIR 1936 All 732 & AIR 1961 J & K 36, Disting. (Para 16)

Cases Referred: Chronological Paras

(1961) AIR 1961 J & K 36 (V 48), Mir Mobd. v. Mehta Bhagwandas	15
(1936) AIR 1936 All 732 (V 23) = 1936 All LJ 456, Mt. Zainab Bibi v. Umar Hayat Khan	15
(1934) AIR 1934 Lah 429 (V 21) = 35 Pun LR 513, Mohd. Shafi v. Allah Din	5
(1929) AIR 1929 PC 58 (V 16) = 56 Ind Cas 80, Mohd. Wajid Ali Khan v. Puran Singh	12
4 J & K LR 193	5
1 J & K LR 366	5

S. Kaul, for Petitioner; J. M. Bhan, for Respondent.

JASWANT SINGH, J.— This civil first appeal which is directed against the judgment and decree dated 7-7-1966 of the learned District Judge, Srinagar, dismissing the appellant's suit for possession of 36 Kanals and 9 marlas of land situate in Chandi Har, Tehsil Khas Srinagar, on the basis of right of prior purchase arises in the following circumstances:—

2. The aforesaid land comprised in Khasra Nos. 1 (measuring 6 Kanals and 7 Marlas); 2 (measuring 5 Kanals and 2 Marlas); 3 (measuring 2 Kanals and 19 Marlas); 4 (measuring 2 Kanals and 17 Marlas); 5 Min (measuring 2 Kanals and 17½ Marlas); 7 (measuring 10 Kanals and 14 Marlas); 8 (measuring 5 Kanals and 12½ Marlas); Khewat No. 65 Min, was sold by Shri Ragho Koul son of Shri Shiva Koul, Smt. Sidha Lakashi widow of Shri Mahesh Koul and Shri Bansi Lal Koul son of Shri Mahesh Koul residents of Syed Kucha, Kawdara, Srinagar, in favour of Gaffar Butt and Mohd. Butt sons of Mohda Butt residents of Chandihar Wangpora, Tehsil Khas vide: sale deed dated 27-4-1962 for an ostensible consideration of Rs. 10,000/-. Claiming themselves to be the tenants of the suit land excepting Khasra No. 3 (measuring 2 Kanals and 19 Marlas) the appellants brought a suit in the Court of District Judge, Srinagar, on 20-7-1962 for pre-emption of the aforesaid land. The suit was resisted by the respondents 1 and 2 inter alia on the grounds that the market value of the suit land being 50,000/- rupees the suit was beyond the jurisdiction of the Court; that the suit had not been properly valued for purposes of court-fees and jurisdiction, that the suit was not tenable as, the appellants had no preferential right of purchase as against them; that the suit was bad for mis-join-

der of parties and non-joinder of necessary parties as also for mis-joinder of causes of action; that the suit was bad for joinder of strangers; that the defendants were protected tenants of the suit land, that Rs. 10,000/- had been fixed in good faith and actually paid to the vendors and the market value of the suit lands was not less than 75,000/- rupees.

3. On the pleadings of the parties the following issues were framed:—

(1) Whether the plaintiffs have a right of prior purchase over defendants 1 and 2 over the suit land? O.P.P.

(2) On proof of Issue No. 1 in affirmative, whether the sale price has been paid or fixed in good faith? O.P.D. 1 & 2.

(3) On Issue No. 2 being proved, what is the market price of the suit land? O.P.P.

(4) Whether the suit is not maintainable in present form, if so, on what grounds? O. P. D. 1 and 2.

(5) Whether there is mis-joinder of parties, non-joinder of necessary parties and mis-joinder of causes of action if so, what would be its effect on the suit? O.P.D. 1 & 2.

4. The plaintiffs examined Habbib Sheikh, Ghulam Din, Ramzan Butt, Wail Butt, Mohd. Abdullah Patwari, and Ghulam Mohd. Butt witnesses. Rahman Butt one of the plaintiffs also appeared as a witness on his own behalf. In rebuttal the defendants-vendees examined Sadig Butt, Assad Rather, Ragho Koul, Salam Butt, Sultan Dar, Ali Mohd., Ghulam Mohi-ud-Din and Haji Kamal Butt. Besides these witnesses Gaffar Butt defendant also appeared as his own witness. After the close of defendants' evidence the plaintiffs examined Sultan Sheikh, Ghulam Din and Rehman Seikh. In addition to these witnesses Lassa Baba and Gaffar Wali Plaintiffs also appeared as witnesses on their own behalf.

5. On consideration of the evidence led by the parties the learned trial Court came to the conclusion that the suit was bad as Mst. Hajra, one of the plaintiffs, did not figure as a tenant in the Khasra Girdawari produced by the plaintiffs. It further came to the conclusion that Mst. Hajra was a minor and Khaliq Baba did not leave behind any daughter bearing the name of Mst. Hajra. Consequently it held that the suit was liable to be dismissed as the plaintiffs had joined a stranger with themselves as a co-plaintiff. It accordingly decided issue No. 5 against the plaintiffs. In regard to issue No. 1 the trial Court held that since Khasra No. 3, measuring 2 kanals and 19 marlas, was admittedly in possession of the defendants-vendees as tenants and from the deposition of the patwari it was proved that Khasra No. 4 measuring 2 kanals and 17 marlas was also in the cultivating possession of the defendants-vendees the

plaintiffs could not be held to be tenants of these two parcels of the suit land. It further came to the conclusion that the sale being one and indivisible and the vendors and vendees having treated the whole transaction as one and indivisible and the sale price also being consolidated, and all the plaintiffs not being in possession of all the Khasra numbers sold, some of them being tenants of some Khasra Numbers and some being tenants in the other Khasra Numbers the plaintiffs who were not tenants of a particular Khasra Number, could not be granted a decree for that Khasra number on the basis of his being a tenant of the other Khasra number, and it not being possible to bifurcate the transaction or the sale price of the different portions of the land the plaintiffs could not succeed in their claim. It would be advantageous at this stage to refer to the following passage occurring in the judgment of the trial Court:—

"From what has been stated above, the position that emerges is that the defendants-vendees are the tenants of two survey numbers, one measuring 2 kanals and 19 marlas and the other 2 kanals and 17 marlas (survey numbers 3 & 4). Some of the defendants are the tenants of a portion of the land sold and some others are tenants of other portions. The sale and the sale price are one and indivisible. The vendors and the vendees treated the whole transaction as one and indivisible. The plaintiffs who are not tenants of a particular survey number cannot be granted decree for possession on the basis of Right of Prior Purchase of that Survey number. The bifurcation of the sale price would not be an easy matter, considering the fact that the land sold may not be of one and the same quality. The pre-emptor and the vendees are both tenants of portions of the land sold. It cannot therefore, be held that the plaintiffs-pre-emptors have succeeded in establishing the prior right of purchase."

Relying, upon the decisions reported in 1 J & K LR 366; 4 J & K LR 193 and AIR 1934 Lah 429 the trial Court decided Issue No. 1 against the plaintiffs.

6. Its finding in regard to issue No. 2 was that the price of the land sold was bona fide fixed at Rs. 10,000 and the same was actually paid. Accordingly it decided the issue in favour of the defendants-vendees.

7. In view of its finding in respect of Issue No. 2 the trial Court refrained from deciding issue No. 3.

8. In regard to issue No. 4 it held that this issue being connected with issue No. 5 which had been found against the plaintiff, the suit was liable to be dismissed.

9. On the above findings the trial Court dismissed the suit of the plaintiffs-appellants on 7-7-1966 as already stated.

10. Against this judgment and decree the plaintiffs came up in appeal to this Court and for a proper and effective disposal of the matter we thought it necessary to remit the following two issues to the trial Court vide our order dated 30th July, 1968.

(1) Whether Mst. Hajra shown in the plaint as daughter of Khalik Baba is the same person as Mst. Azizi?

(2) If issue No. 1 as set out above, is proved in the affirmative whether Mst. Azizi alias Mst. Hajra is or can be regarded as a tenant of the land comprised in Survey Nos. 1 and 2 situated in Village Chandihar, Tehsil Srinagar.

11. The Trial Court has in the course of its report submitted to this Court, found that Mst. Hajra's father had three wives, that Mst. Shah Mali, the mother of Mst. Hajra, was the second wife of Khaliq Baba that Khaliq Baba divorced Mst. Shah Mali and thereafter married Mst. Azizi and that he had to change the name of his daughter from Mst. Azizi to Mst. Hajra because the names of both his wife as well as his daughter being Mst. Azizi, he did not think it proper to call both his daughter and wife by the same name. It has therefore, found issue No. 1 in favour of the plaintiff. As regards issue No. 2 it has found that Mst. Azizi, the daughter of Khaliq Baba, was entered as tenant in the Girdawari as far back as Rabi 1961, that the land left by Khaliq Baba was being cultivated by his son and daughter and that the defendants having admitted all the plaintiffs including Mst. Azizi to be tenants, Mst. Azizi could not but be regarded as a tenant of survey Nos. 1 and 2 of the suit land.

12. In view of the evidence recorded by the trial Court after remand it cannot now be held that Mst. Hajra was a total stranger or the suit was bad on account of her joinder as co-plaintiff. This however, does not put an end to the controversy. The real question that still remains to be decided is whether in view of the fact that the plaintiffs have been found not to have any preferential or superior right of purchase in respect of Khasra Nos. 3 and 4 of the suit land and some of these are tenants of some suit survey numbers and some of others, the suit can succeed. It is well settled that a purchaser cannot be required to submit to partial pre-emption nor is he entitled to demand it. I am fortified in this view by a decision of the Privy Council in Mohammad Wajid Ali Khan v. Puran Singh, AIR 1929 PC 53.

13. It would be well at this stage to refer to Section 14 of the Right of Prior Purchase Act as amended by the Jammu and Kashmir Right of Prior Purchase

(Amendment) Act 1959 which governs the suit:—

"14. Persons in whom right of prior purchase vests in respect of sale of agricultural land and village immovable property. Notwithstanding anything contained in any law, rule or custom but subject to the provisions of Section 13, the right of prior purchase in respect of agricultural land and village immovable property shall vest—

(a) Where the sale is by a sole owner or occupancy tenant or, in the case of land or property jointly owned or held, by all the co-sharers jointly—

Firstly—in the tenant cultivating such land where the sale is of agricultural land; in the tenant occupant thereof where the sale is of village immovable property, and

Secondly—in the persons in order of succession who but for such sale would be entitled on the death of the Vendor or Vendors, to inherit the land or property sold:—

(b) when the sale is of a share out of the joint property and is not made by all the co-sharers jointly:—

Firstly—in the lineal descendants of the Vendor in order of succession;

Secondly—in the co-sharers, if any;

Thirdly—in the tenant cultivating such land where the sale is of agricultural land and in the tenant occupant when the sale is of village immovable property; and

Fourthly—in the persons, not included under the above categories in order of succession, who but for such sale would be on the death of the Vendor entitled to inherit the land or property sold;

(c) if no person having the right of prior purchase under Cls. (a) and (b) exercise it then:

Firstly—in the owners of the mahal wherein such agricultural land or property is situate; and

Secondly—in the tenants other than those specified above.

14. Looking at the context the intention of the Legislature, appears to be that in case the original contract of sale be one and indivisible the right of prior purchase should extend to the whole of the land sold and not to a portion of it, i.e., the person claiming prior purchase should be a tenant in the entire property which is subject of the sale.

15. The two rulings namely AIR 1936 All 732 and AIR 1961 J & K 36 (to which my Lord the Chief Justice was a party) cited by the learned counsel for the appellants are clearly distinguishable and do not help his clients. The first ruling is founded on the peculiar language of Section 16 of the Agra Pre-emption Act. The second ruling viz., AIR 1961 J & K 36

relates to a case where different parcels of land were sold by two different vendors to two different vendees who were absolute strangers but the transactions were embodied in a single sale deed and the sale price was stated to be a consolidated sum. It was in view of these circumstances that it was held that the suit was not hit by the rule against partial pre-emption and it was observed that the rule against partial pre-emption applied only to those transactions which while contained in one deed could not be broken or separated; it could not be applied to a case where two distinct and separate transactions of sale are embodied in one sale deed in which case each of the transactions is an independent sale by itself and a pre-emptor would be able to pre-empt each such sale or one of them only, as he might choose.

16. For the foregoing reasons we are of opinion that as the plaintiffs have failed to prove their superior right in respect of the entire land their suit cannot succeed.

17. In the result the appeal fails and is hereby dismissed but in the circumstances of the case without any order as to costs.

18. S. M. F. ALLI, C. J.:— I agree.
Appeal dismissed.

AIR 1970 JAMMU AND KASHMIR 108
(V 57 C 29)

JASWANT SINGH, J.

Jagat Ram Aryan, Appellant v. Jammu and Kashmir State and others, Respondents.

Application No. 131 of 1969, D/- 29-11-1969.

(A) Civil P. C. (1908), O. 33, R. 5 (d) — "Cause of action" — Meaning — Words imply good and subsisting cause of action.

The words 'cause of action' as used in O. 33, R. 5 (d) imply a good and subsisting cause of action and the Court can reject the application for permission to sue in forma pauperis where the claim is prima facie barred by limitation or by any other law. AIR 1915 Mad 398 (2) & AIR 1941 Nag 320 & AIR 1932 Rang 107 (FB) & AIR 1934 Rang 111 & AIR 1960 Ker 196, Ref. (Para 12)

(Application for permission to sue in forma pauperis held in the instant case to be prima facie barred by limitation.)

(Para 15)

(B) Limitation Act (1963), Art. 7 — Limitation Act (1908), Art. 102 — (J. & K.) Limitation Act (9 of 1955), Art. 73 — "Wages" include salary as well.

"Wages" include salary as well. A claim for loss of salary in 1969 by a permanent Government servant, who was suspended in 1950 and who had attained superannuation (age of 55 years) in 1962.

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would be prima facie barred by limitation in view of Art. 73 of J. & K. Limitation Act: AIR 1947 FC 23 & AIR 1962 SC 8 & AIR 1969 All 542, Rel. on.

(Para 13)
(C) Limitation Act (1963), Art. 74 — (J. & K.) Limitation Act (9 of 1955), Articles 22 and 23 — Claim for damages for personal injury and malicious prosecution — Process of persecution and prosecution lasting for 13 years — Claim preferred beyond 1 year from date of decision in last criminal case is prima facie barred.

A claim for damages for personal injury and malicious prosecution is governed by Arts. 22 and 23 of J. & K. Limitation Act. If a tort or torts are committed by several persons acting in common conspiracy the charges of conspiracy merge into the tortious act and the claim has to be brought within a period of 1 year from the date the plaintiff is acquitted or prosecution is otherwise terminated. Where the allegation by the suspended Government servant is that the process of his persecution and prosecution lasted for 13 years with effect from 1950 and the last criminal case in which he was involved was decided in his favour in 1963, the claim for damages preferred in 1969 is manifestly barred by time: AIR 1968 J & K 98, Rel. on.

(Para 14)
The fact that the last communication from the State Government disallowing the claim was received on 1968 does not affect the terminus a quo for the claim. AIR 1934 Rang 111, Rel. on. (Para 15)

Cases Referred: Chronological Paras

- (1969) AIR 1969 All 542 (V 56) =
1969 Lab IC 318, Union of India v. Hari Om 13
- (1968) AIR 1968 J & K 98 (V 55) =:
1968 Kash LJ 374, B. K. Gulam Mohd. v. Ghulam Mohd. Sadiq 14
- (1962) AIR 1962 SC 8 (V 49) =:
1962-1 SCR 886, Madhav Laxman Vaikunthe v. State of Mysore 13
- (1960) AIR 1960 Ker 196 (V 47) =:
1960 Ker LJ 631, Kanthaswami Pillai v. Shivarama Pillai 13
- (1947) AIR 1947 FC 23 (V 34) =:
1947 FCR 89, Punjab Province v. Tara Chand 13
- (1941) AIR 1941 Nag 330 (V 28) =:
1941 Nag LJ 473, Dargah of Saint Miskeenshah Barena Pir, Chhatarpur v. Hardayal Prashad 12
- (1934) AIR 1934 Rang 111 (V 21) =:
ILR 12 Rang 124, H. Pascal v. Secy. of State 12, 15
- (1932) AIR 1932 Rang 107 (V 19) =:
ILR 10 Rang 357 (FB), U. Ba Dwe v. Maung Lu Pan 12
- (1915) AIR 1915 Mad 398 (2) (V 2) =:
1 Mad LW 668, Subramania Chetty v. Kulayappan 12
- S. Amar Chand, for Respondent No. 1:
S. A. Salaria, for Respondents Nos. 2 and 3.

ORDER: This is an application by Jagat Ram Aryan, a member of Legislative Assembly of the State, for permission to sue in forma pauperis for recovery of Rs. 1,00,00,000 (Rupees one crore). The amount is claimed as special damages from the respondents jointly or severally for the wrongs alleged to have been done by them as joint tort feasers to the petitioner and the members of his family. In the application which has been filed by him on 12-2-1969, it has been alleged by the petitioner that he was appointed as Harijan Special Officer in the permanent cadre and grade of 200-20-300 vide Cabinet Order No. 35-C/48 dated 15-4-1948, that respondents 2, 3 and 4 conspired to establish an independent State at the head of the Sub continent of India, and used the whole Government machinery in furtherance of that aim, that they designed various tactics and stratagems to achieve that end, that they also tried to induce him to support their machinations against India, that on his failure to fall in line with their machinations to betray the country by straying from the right course they conspired against him in 1950 and suspended him without any written order or charge, that after his suspension a series of cases were trumped up against him by the respondents with the ulterior motive of annihilating him and his family members thus subjecting them to nervous, mental and physical torture and economic distress, that he was hurled from one jail to another and from one Court to another, that his property was confiscated under verbal orders of respondents 2, 3 and 4, that this process of prosecution and persecution continued from 1950 to September, 1963, that on his acquittal in the last case he applied to the Chief Minister for his reinstatement with all the increments etc. that had fallen due to him, that on 3-7-1967 he was informed by the Deputy Secretary to Government, General Department, that the Government had not been able to find sufficient reasons to open his case, that thereafter he approached the Chief Minister in appeal against the decision of the Government, that on 27-2-1968 the Chief Minister informed him vide his Note 1692-CS/68 that he could not but uphold the decision taken in the case on 3-7-1967, and that in June, 1968 he served the respondents with notice under Section 80, Civil P. C. claiming one crore of rupees as special damages. In Paragraph 8 of the application the petitioner has laid a claim for rupees one crore as special damages from the respondents as joint tort feasers for the pecuniary loss of his salary and mental, nervous and physical torture to which he and his family members have been subjected by them. In paragraph 9 of his application the petitioner has stated that he has not got the means to pay the court-fee of Rupees

61462 required to be paid on his plaint.

2. A notice with regard to this application was issued to the respondents, first three of whom have contested the application. Respondent No. 1 i.e. the State of Jammu and Kashmir, has averred that the petitioner has deliberately omitted to give details of the order of his appointment and the terms and conditions of his service, that the Government created two temporary posts of Special Officers, for Harijans, that the petitioner was appointed against one of the said posts, that on the petitioner's own showing he ceased to function under orders of the Revenue Minister from 1950, that in view of these facts the petitioner has no cause of action for the present suit, that the petitioner being a temporary employee on a temporary post and having ceased to function from 1950 is not entitled to claim the arrears of pay or any declaration, that the temporary employee in 1950 could be disbanded and his discharge could not be held illegal nor could it create any right in him for declaration to the effect that he be deemed to be a permanent employee and entitled to pay thereof after the date of his discharge, that the suit for arrears of salary and declaration is clearly time barred and the petition does not disclose any cause of action. It has been averred by respondent No. 1 in para No. 6 of its objections that the petitioner has not disclosed as to how he had a right to claim rupees one crore as damages.

3. Respondents Nos. 2 and 3 have inter alia averred that the petitioner is possessed of sufficient means and property to pay the court-fee and cannot as such be treated as pauper in the eye of law, that the petitioner's claim for damages is *prima facie* time barred and cannot be allowed after the expiry of one year.

4. The parties were given an opportunity of proving the averments made by them. Whereas the petitioner has produced Prem Nath, Ghulam Mustafa, Hari Lal besides appearing as his own witness, the respondents have not led any evidence in rebuttal.

5. Prem Nath who is an Agriculture and Horticulture overseer has stated that he has seen the land belonging to the petitioner, that the said land is of a very inferior quality, that the value of the land is approximately Rs. 100 per kanal and that the petitioner's family consists of about 20 members who are all dependent upon him. In cross-examination the witness has stated that he does not know the extent of the land of the petitioner, that one of the petitioner's son who is employed in the Post Office is getting a salary of Rs. 75 per mensem, that his other son is a school teacher drawing a salary of Rs. 100 P. M. and his third son is an employee in the Police Department about whose salary he is not aware.

6. Ghulam Mustafa, a member of the Legislative Assembly, has stated that the petitioner owns an old house in village Matta, that the value of the said house is about Rs. 2500, that the petitioner owns 40 to 50 kanals of land, that the land is of inferior quality, its value not being more than Rs. 150 per kanal, and that the family of the petitioner consists of 20 members who are all dependent upon him. In cross-examination the witness has stated that a member of the Legislative Assembly gets Rs. 400 as monthly allowance besides Rs. 75 as conveyance allowance. The witness has also admitted that the petitioner owns two bullocks worth about Rs. 300.

7. Hari Lal has stated that he has been the Principal of Higher Secondary School, Kishtwar, that he has seen the house of the petitioner which is of old type, that the value of the house is about Rs. 2,000, that the value of the petitioner's land is Rs. 100 per kanal and that the family of the petitioner consists of 15-20 members, all of whom are dependent on the petitioner. In cross-examination the witness has stated that the petitioner has two bullocks the value of which is about Rs. 200.

8. Appearing as his own witness the petitioner has stated that he has only two kanals of land which he got as result of the operation of the Big Landed Estates Abolition Act, besides 32 kanals of land which he inherited from his father, that his three sons are coparceners in the said land and ancestral house, that on demand of their shares in the property by his sons he executed a gift-deed dated 14th January, 1969 in their favour, that the market value of his land was Rs. 50 per kanal, that he is getting an honorarium of Rs. 475 per mensem as member of the Legislative Assembly and that he has Rs. 8,000 to pay by way of debt. In cross-examination the petitioner has admitted that according to the version of the Government he was removed from service in 1950 but he did not get any written order to that effect, that the first application for restoration was submitted by him in 1950, that the second application was submitted by him in 1955 and the last application was submitted in 1964. He has further admitted that his claim for damages is under tort, that out of the sum claimed by him Rs. 9,95,0000 is on account of mental torture suffered by himself and the members of his family, and that he has not got the means to pay the court-fee of Rs. 61462.

9. Appearing on behalf of respondent No. 1 Mr. Amar Chand Additional Advocate General, has not seriously disputed that the petitioner is not able to pay the court-fee required on his claim. He has, however, referred to O. 33, R. 5 (d)

of the Civil P. C. and has contended that the application for permission to sue in forma pauperis cannot be granted in view of the fact that the petitioner has no subsisting cause of action capable of enforcement in Court and not barred by the law of limitation.

10. In the course of the written arguments submitted by the petitioner it has been inter alia contended that he does not possess the means to pay the requisite court-fee, that his suit is governed by Art. 119 of the Limitation Act and not by Arts. 22 and 23 thereof and that since the last order disallowing his claim was passed by the Government on 28th February, 1968 his claim is within time.

11. So far as the capacity of the petitioner to pay the court-fee required on his claim is concerned I have no doubt in view of the evidence adduced by him that he is not in a position to pay the court-fee amounting to Rs. 61462.

12. It cannot be and it is not, however, denied that the Court has power to reject an application for permission to sue in forma pauperis under O. 33, R. 5 (d) of the Code of Civil Procedure if it does not show a cause of action. Now it is well settled that the words 'cause of action' as used in the aforesaid provision of law imply a good and subsisting cause of action and the Court can reject the application for permission to sue in forma pauperis where the claim is prima facie barred by limitation or by any other law. Reference in this connection may be made to the decision reported in AIR 1915 Mad 398 (2), AIR 1941 Nag 330, AIR 1932 Rang 107 (FB), AIR 1934 Rang 111 and AIR 1960 Ker 196.

13. Let me now see whether the application discloses a subsisting cause of action or whether the claim, is prima facie barred by limitation as contended by Mr. Amar Chand. Assuming without holding that the petitioner was appointed to a permanent post and was only suspended and not removed from service in 1950 A. D. still as according to his own showing he is now 62 years of age he could not have continued in service as of right after 55 years of age which, was attained by him in 1962. The suit for loss or arrears of salary cannot, therefore, be held to be within time in view of Art. 73 of the State Limitation Act which provides a period of three years for a suit for wages not expressly provided for by the first schedule. Now there can be no manner of doubt that wages include salary as well. In Punjab Province v. Tara Chand, AIR 1947 FC 23 it was held that a suit for arrears of salary was governed by Art. 102 of the Indian Limitation Act 1908 (which corresponds to Art. 73 of the State Limitation Act, Act No. 9 of 1955) and not by Art. 120 of the Indian Limitation

Act 1908 (which corresponds to Art. 119 of the State Limitation Act 1955). This decision of the Federal Court was approved by their Lordships of the Supreme Court in Madhav Laxman Vaikunthe v. State of Mysore, AIR 1962 SC 8, and has also been recently followed by the Allahabad High Court in Union of India v. Hari Om, AIR 1969 All 542 in view of these rulings the claim of the petitioner for loss or arrears of salary cannot be held to be within time.

14. The claim for damages for personal injury and malicious prosecution is also time barred. Such a claim is governed by Arts. 22 and 23 of the Limitation Act which prescribe only a period of one year for the suit. In Bk. Ghulam Mohd v. Shri Ghulam Mohd. Sadiq, AIR 1968 J & K 98, it was held that when tort has been committed by two or more persons, an allegation of prior conspiracy to commit the tort adds nothing and the prior agreement merges in the tort. It was further held in this decision that a suit for malicious prosecution or for damages for false imprisonment has to be brought within a period of one year and no distinction can be made in respect of the number of persons by whom the wrong may have been perpetrated. It was further held there that if a tort or torts are committed by several persons acting in common conspiracy the charge of conspiracy merges into the tortious act and the rule of one year limitation would apply as provided in Arts. 19, 22, 24 and 25 of the Limitation Act. It would be advantageous at this stage to refer to the following observation made in the aforesaid decision by Hon'ble Anant Singh J.:

"A conspiracy to injure by itself is not actionable in tort, unless some injury is caused resulting in damage and when any injury resulting in damages accrues, the conspiracy merges into tortious act or acts. The gist of tort being damage and when in pursuance of a conspiracy, individual torts are committed by the defendants action for damages in tort would lie within one year from the date or dates of such tort or torts, and not from the date of the conspiracy. For, in such cases, the conspiracy merges into tort or torts." Now in the present case on the petitioner's own showing the process of his persecution and prosecution lasted for thirteen years with effect from 1950 and the last criminal case in which he was involved was decided in his favour in September 1963. The present claim which has been preferred in February, 1969 is thus manifestly barred by time.

15. There is also no substance in the contention of the petitioner that since the last communication disallowing the claim was received by him from Chief Minister on 28th February, 1968 his claim should be treated to be within time. This line of argument cannot prevail in view of the

clear language of Art. 23 of the Limitation Act which lays down that terminus a quo for a suit governed by that Article would begin from the date the plaintiff is acquitted or prosecution is otherwise terminated. A more or less similar contention was raised in AIR 1934 Rang 111 (Supra) but was repelled. It would be advantageous to refer in this connection to the following observations made therein by Leach, J.:-

"This leads me to the question whether the petition which has been filed in this case discloses a cause of action which still subsists"

In paragraph 34 the petitioner pleads that by an order dated the 15th December, 1932 he was "finally informed that his case has been fully considered," and he interprets this as meaning that the local Government finally decided on that date that his career in the Government service should be terminated with effect from the 1st October 1922. There is no force in this argument. The cause of action, if any must date from the day when the petitioner was dismissed from the Government Service. That date the petitioner himself gives in his petition as the 19th September 1922, although he served upto the 30th September 1922. The case being governed by Art. 115 of the Limitation Act, it is obvious from the petition itself that the alleged cause of action has been long time barred. No purpose would be served by numbering the petition as a plaint and then dealing with the question of limitation."

The foregoing discussion leads me to the conclusion that the petitioner has no subsisting cause of action.

16. For the foregoing reasons, the application for permission to sue in forma pauperis is rejected but without any order as to costs.

Application dismissed.

AIR 1970 JAMMU AND KASHMIR 112
(V 57 C 21)

JASWANT SINGH, J.

Suchet Singh, Petitioner v. State of J. & K., Respondent.

Writ Petn. No. 15 of 1968, D/- 30-12-1969.

(A) Constitution of India, Arts. 301, 304 (b), 19 — J. & K. Passenger Taxation Act (12 of 1963) — Imposition of tax under — Does not amount to restriction on trade and commerce and is not violative of Articles 301, 304 and 19.

It is now well settled that only such restrictions or impediments as directly and immediately impede or hamper the free flow of trade, commerce and intercourse, whether intra-State or inter-State, fall

within the prohibition imposed by Article 301 and subject to the other provisions of the Constitution may be regarded as void. AIR 1961 SC 232 & AIR 1962 SC 1406 & AIR 1963 SC 1928 & AIR 1969 SC 147, Rel. on. (Para 8)

It is also well settled that a tax may in certain cases directly and immediately restrict or hamper the flow of trade, but every imposition of tax does not do so. AIR 1961 SC 232 & AIR 1969 SC 147, Rel. on. (Para 9)

The levy of tax under J. & K. Passenger Taxation Act, 1963, does not violate Articles 301, 304 and 19.

(Paras 13, 14 and 16)

The burden of the tax imposed by the Act, does not fall directly and immediately on trade, commerce or intercourse but falls on the passengers carried by motor vehicles. Further, the tax is compensatory and regulatory and does not amount to a restriction as conceived by Art. 301 of the Constitution. In return for the tax the State Government improves and maintains roads, provides parking stands, employs personnel for controlling vehicular road traffic and carries on other activities which confer benefits on and provide facilities to citizens including passengers and owners of Motor Vehicles. (Para 13)

Again, the tax being intended for raising money for carrying on functions of Government and for sustaining manifold welfare activities undertaken by the State the burden imposed by it is reasonable and in public interest. (Para 14)

Tax laws have to stand the scrutiny of Art. 19. That being so, as soon as the validity of a tax law passed under Article 304 (b) of the Constitution is challenged under Art. 19, the State would be entitled to rely on the fact that the revenue raised by the tax law serves public purpose and that is its justification for being treated as a reasonable restriction on the individual's fundamental right under Art. 19 (1) (g). AIR 1964 SC 925, Foll. (Para 15)

(B) Constitution of India, Pre. — Taxing statutes — Interpretation — Constitutional validity — Violation of Art. 14, 19 or 301 — Power to strike down is to be exercised with circumspection.

The power conferred on the High Court to strike down a taxing statute if it contravenes the provisions of Art. 14, 19 or 301 has to be exercised with circumspection, bearing in mind that the power of the State to levy taxes for the purpose of governance and for carrying out its welfare activities is a necessary attribute of sovereignty and in that sense, it is a power of paramount character. AIR 1964 SC 925, Foll. (Para 14)

(C) Constitution of India, Art. 246 — Delegated legislation — J. & K. Passenger Taxation Act (12 of 1963), S. 10 — Does

or both of the Ordinance, some of them also for offences under other laws, such as Sections 143, 147, 294, 323, 341, 353, 448 and 506 of the Indian Penal Code and Section 25 of the Indian Telegraph Act. On the 24th December, the State Government decided to withdraw cases not involving serious personal violence or destruction of property and it directed the Inspector-General of Police to "take immediate action for the withdrawal of the cases accordingly through the Public Prosecutors concerned." Accordingly towards the end of January or early in February 1969, applications were made to the several Courts by the Public Prosecutors concerned (namely, the Assistant Public Prosecutors in charge of the cases) under Section 494 of the Criminal Procedure Code for the necessary consent. In most of the cases the applications were allowed despite opposition by the complainants who appeared by counsel; and the accused persons were acquitted. The complainants have come up in revision against the grant of the consent and the consequent acquittal. We are here dealing with sixteen such cases, Crl. R. P. Nos. 201 to 206 being in respect of employees of the Accountant General's Office, Trivandrum, and the rest, of employees of the Posts and Telegraphs department.

2. Section 494, Criminal Procedure Code, runs as follows:

"Any public prosecutor, may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,—

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences." As pointed out by the Supreme Court in *State of Bihar v. Ram Naresh Pandey*, AIR 1957 SC 389 two things are clear from a plain reading of the section. The first is that the power to withdraw is conferred on the Public Prosecutor and on no one else; and, although this is an executive power, it is a power which he must exercise in the light of his own judgment and not at the dictation of some other authority, however high. That being so, the discussion at the bar as to whether the executive power in respect of this matter is vested in the State by reason of, "administration of justice" being in the State List, and, "Criminal Pro-

cedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution", being in the Concurrent List, or whether it is vested in the Union by reason of, "Union Public Services" being in the Union List seems to be largely beside the point. So also whether, even if the power falls within the executive power of the Union, Article 256 (subject to any direction given thereunder by the Central Government none has, in fact, been given) and Article 258 (2) (in the light of the decisions in *Emperor v. Sibnath Banerji*, AIR 1945 PC 156 and *Anant Baburao v. State*, AIR 1967 Bom 109 would not confer executive power on the State. For, there can be no question of the executive power, either of the Union or of the State, being exercised contrary to law; and when, as we have seen, the law confers the power of withdrawal on the Public Prosecutor, that means that that power must be exercised by the Public Prosecutor and by no one else.

3. The second thing that is clear from a plain reading of the section is that the power or withdrawal conferred on the Public Prosecutor is not an absolute power. He can withdraw from the prosecution only with the consent of the Court and this curb is placed on his power in order to ensure that the power is not abused, in other words, is not exercised for improper reasons or to serve improper ends.

4. The questions that arise before us then are: First, was the power in these cases in fact exercised by the Public Prosecutor in the light of his own judgment; and, secondly, was the grant of consent by the Courts proper, in other words, was the application for withdrawal made on proper grounds and was there material placed before the Court to substantiate those grounds. If either question is answered in the negative, these petitions, it seems to us, must be allowed.

5. The order made by the State Government on the 24th December, 1968 runs thus:

"Consistent with the policy of Government in relation to mass agitation and strike, it has been decided to withdraw with the leave of the court the cases registered in connection with the Central Government Employees strike on the 19th September, 1968 except those involving serious personal violence or destruction of property. It is ordered accordingly.

The Inspector-General of Police will take immediate action for the withdrawal of the cases accordingly through the Public Prosecutors concerned."

This order, it seems to us, shows scant respect for the law and is in disregard of the duty and the responsibility of the State Government to enforce the law. It must be remembered that the Public Prosecutors in these cases are not independent members of the legal profession but full time Government servants working under the immediate control and direction of the District Collectors, themselves subordinates of the Government. In all the applications for withdrawal, this order of the Government was mentioned as a ground for withdrawal—to many of them a copy of the order was appended—and we are sure that, in the circumstances, every one of the Public Prosecutors must have felt himself bound by the order to withdraw from the prosecution irrespective of his own views in the matter, the only matter left for his decision being whether the case involved "serious personal violence or destruction of property", whatever might be meant by the qualification, "serious".

6. The State Government does not appear to have appreciated that there can be no question of executive policy in a region covered by the law. The only valid policy, if policy it can be called and therefore the only relevant policy, is the policy of the law. The law must be enforced whatever be the views the executive might entertain. The policy, such as it is, disclosed by the State Government's order is clearly opposed to the law. The law, namely, the Essential Services Maintenance Ordinance, 1963, makes certain acts, whether they do or do not involve personal violence or destruction of property, punishable. Its very purpose is to prevent strikes in essential services by prohibiting them on threat of penalty. That a strike is the result of mass agitation is obviously an aggravating rather than an extenuating factor, for, in such a case, the greater would be the harm which the law seeks to prevent. Mass agitation is not a cover for all sin; on the contrary, it often makes the sin more harmful; and to say that it is the policy of the Government in relation to mass agitation and strikes that, for no other reason than that the offences were committed in the course of a mass agitation or a strike, offenders against the law should not be proceeded against—and that is what the withdrawal of the cases against them amounts to—except in cases involving serious personal violence or destruction of property, is nothing but a defiance of the law. It is little use exclaiming (apparently with reference to material that has not been placed before us) that the Central Government was also guilty of like defiance when, it is said, it directed that important public men or leaders of political parties should

not be arrested for offences against the Ordinance notwithstanding that the Ordinance, by section 7 thereof, makes such offences cognizable.

7. What would you make of a policy which, for example, directed that persons committing the offences of rioting and simple hurt should not be proceeded against merely because the offenders are large in number and have mass support and a continuing motive, as if these were factors bringing the case within some exception of the Indian Penal Code instead of being, as they really are, aggravating factors because both the harm actually caused and the chances of repetition are greater? Would you not say that it is an unlawful policy lending encouragement to the commission of further offences? And would you not be apprehensive that, given the values informing such a policy, if it is simple hurt that is condoned today, it might well be grievous hurt tomorrow, and, who knows what the day after.

8. The State Government's order, it is clear, discloses no legitimate ground for the withdrawal of the cases. The applications for withdrawal made in these cases, though made by different persons, are in substance the same. We shall set out in full the application in Cr. R. P. No. 205 of 1969, which it is agreed, makes out the best case, if case there be, for a withdrawal:

"1. Application made by the Assistant Public Prosecutor, Grade I, Trivandrum, under section 494 of the Cr. P. C. for consent of the court to withdraw from the prosecution of the above case.

2. I am in charge of the prosecution of the accused in the above case.

3. The accused, 39 in number, have been charge-sheeted by the Central Crime Police under section 5 of the E. S. M. Ordinance, 1968.

4. The allegation in the charge-sheet is that on 19-9-1968 at 10 a.m. the accused assembled in front of the main gate of the Accountant General's Office and obstructed the loyal officers who came for work. The accused also struck work and instigated and incited the other workers to strike work as a part of their agitation against the Central Government.

5. The strike was organised and resorted to by large section of Central Government employees for the purpose of getting their service conditions improved in terms of a charter of demand placed before the Central Government by various unions of the Central Government employees.

6. Due to lapse of time and change of attitude of the Central Government on the one hand and the employees on the other during the interval understanding and

good-will have been considerably restored and the situation has become more or less normal. The Central Government also have expressed its view to consider the position of its employees favourably.

7. It appears that the restoration of peace and good feelings between the employees and the Central Government will be promoted by the withdrawal of the case not involving serious personal violence or destruction of property.

8. The Government of Kerala also has considered the matter and have expressed their view that cases arising in connection with the strike on 19-9-1968, except those involving serious personal violence or destruction of property be withdrawn.

9. A reading of the charge will convince that the accused have not committed any offence (on the date of occurrence) involving any destruction of property or any personal violence against C. Ws. 1 and 2. Now they have called off their strike. For the existence of much more peaceful atmosphere and friendship between the employees in the office the withdrawal from the prosecution of this case at this stage seems to be necessary.

10. I have examined all the aspects in particular the facts of this case and being the person in charge of the prosecution of this case I am of the view that considering all the circumstances in particular the absence of any features which may render withdrawal of the case objectionable in law, interest of justice require that this case be withdrawn.

11. To the best of my knowledge there is no material on record in the case or any other grounds which stand in the way of the court in according permission to withdraw from the prosecution of the above case.

12. For the reasons stated above, it is humbly prayed that the court may be pleased to grant permission to me to withdraw from the prosecution of the above case.

9. It is difficult to formulate a general principle for determining the grounds on which a Public Prosecutor may legitimately seek withdrawal, or, looked at from another angle, the grounds on which the Court can properly grant or withhold its consent. The only general test we can think of, namely, that consent should be withheld if the withdrawal would tend to further the mischief the law seeks to prevent and that it should be granted if it is likely to have the opposite effect, is too general to be of much use in practice. But, as in most such matters, there might be no great difficulty in reaching a decision on the facts of a particular case there is none here. The court gives its consent in the exercise of its judicial dis-

cretion and before granting consent, it must be satisfied that the grounds stated for the withdrawal are proper grounds, grounds which, if true, would make the withdrawal a furtherance of, rather than an hindrance to, the object of the law. Further, that there is material to substantiate the grounds alleged, though not necessarily material gathered by the judicial method.

10. One of the well-established grounds on which a withdrawal can properly be based is that there is no evidence in the case which would warrant a conviction. In such a case it would certainly not further the object of the law to harass the accused and waste the time of the court, the witness, the prosecution and the defence by going on with the case. But in none of the cases we are here considering is the withdrawal based on such a ground.

11. We shall now proceed to consider the grounds, such as they are, stated in the application which we have set out in full. Paragraphs 1 to 4 of the application only contain statements of fact and have no bearing on the question of withdrawal excepting that the application is made by the Public Prosecutor in charge of the case. Paragraph 5 is probably not intended as a ground for withdrawal even if it echoes the State Government's order of the 24th December 1968. However that might be, the very object of the law being to prohibit and punish strikes "organised and resorted to by large sections of Central Government employees for the purpose of getting their service conditions improved in terms of a charter of demand placed before the Central Government by various unions of the Central Government employees", that can scarcely be a ground on which a withdrawal can be sought. The grounds stated in paragraphs 6 and 7 of the application would no doubt be relevant and proper grounds were they well-founded. But, it seems to us that there is no material placed in respect of these grounds beyond the bare assertion of the Public Prosecutor; on the other hand, such material as there is, is against this assertion. Lapse of time there has no doubt been; but the change of attitude on both sides and the restoration of good-will and normalcy alleged in paragraph 6 are not matters for the Public Prosecutor's subjective satisfaction. If true, concrete facts substantiating the allegation should have been forthcoming; yet none are stated. And if the Central Government had expressed any views in the matter, one would have expected the orders or communications expressing those views to be placed before the Court. No such thing was done and no attempt whatever was made to show how "the restora-

tion of peace and good feelings between the employees and the Central Government will be promoted by the withdrawal of the case not involving serious personal violence or destruction of property". The very fact that not merely did the Central Government not think fit to withdraw the order it had made on the 13th September 1968 under section 3 of the Ordinance, but that, on the 28th December, Parliament thought it necessary to replace the Ordinance by an Act, the Essential Services Maintenance Act, 1968, and, by section 9 (2) thereof, to continue the order as if it were an order made under the Act, is ample indication that there could have been no such change in the situation as to warrant the non-prosecution of persons who had committed offences under the Ordinance. So also the circumstance that officers of the Central Government, namely, the complainants in these cases, appeared before the Court and opposed the withdrawal of the prosecutions.

12. We may in this connection mention that it is pointed out that in none of the objections filed by these complainants is it stated that they were opposing the applications for withdrawal under instructions from the Central Government; and it is said that if the statements made by the Public Prosecutor as to the attitude of the Central Government and as to the relations between the Central Government and its employees were unfounded, one would have expected the Central Government itself to oppose the applications and to have come up in revision to this Court. It would no doubt have been better if the Central Government had done so—that the Central Government as such is not a party to the proceedings in the courts below is no impediment, for, in a matter of such public importance the High Court can be expected to exercise its powers of revision *suo motu* if there is sufficient ground for the exercise, and the *locus standi* of the person bringing the matter to the notice of the High Court would, in that case, be of no consequence—and, possibly, the criticism that the Central Government has adopted an equivocal attitude is justified. But we are quite unable to agree that this leads to the inference that the opposition by the complainant is due to some private spite, or, alternatively, that the Central Government, chary of stepping into the arena itself, is fighting some ulterior battle of its own making a cat's paw of its subordinates. In any case, what we have to consider is whether there is any material at all to substantiate the grounds stated. That, as we have seen, there is not.

13. The ground stated in paragraph 8 which, it seems to us, is the ground that

compelled the applications for withdrawal is, as we have seen, not a legitimate ground.

14. Coming to paragraph 9, the persons referred to as C. Ws. 1 and 2 therein are the complainants in the case. They made the complaints as officers of the Central Government and not to vindicate any personal grievance of theirs and that they suffered no personal injury seem to us altogether irrelevant. Nor was there any calling off of the strike. It was avowedly a one-day strike and it took its full course.

15. The remaining paragraphs only state the conclusions reached by the Public Prosecutor and pray for consent to withdraw from the prosecution.

16. It is clear from what we have stated that both the questions that we have posed in paragraph 4 above must be answered in the negative.

17. We might perhaps state that our attention has been drawn to some decisions which say that considerations of State policy are relevant on the question of grant of consent under Sec. 494 of the Code. Apparently, the purpose is to show that the State Government's order of the 24th December, 1968 is an order based on policy considerations. We have already shown that the policy set out therein being a policy opposed to the law cannot be taken into consideration. It only remains to add that the word, "State" as used in those decisions is not to be confused with, "State Government". It is used in the sense of the sovereign power; and the State policy referred to is the policy of that limb of the sovereign power whose duties and responsibilities are affected by the mischief to prevent which the law has created the offence. In relation to the offences under the Indian Penal Code it might well be that the limb is the State Government; but, in relation to the offences under the Essential Services Maintenance Ordinance and the Indian Telegraph Act, there can be no doubt that the limb is the Central Government.

18. We might mention that the *locus standi* of the petitioners to move us in revision has been questioned. As we have already indicated, this is not of any consequence, for, this is a matter in which we would have felt bound to act irrespective of the *locus standi* of the petitioners.

19. In the result we allow these petitions, set aside the orders of consent made by the courts below and the acquittals consequent thereto. We direct that the accused persons concerned be retried by the District Magistrates having jurisdiction or by such other Magistrate of competent jurisdiction other than the Magistrate who heard the case in the first in-

stance, as the District Magistrate might direct.

Petitions allowed.

AIR 1970 KERALA 165 (V. 57 C 27)

FULL BENCH

**P. GOVINDAN NAIR, K. K. MATHEW,
AND T. S. KRISHNAMOORTHY,
IYER, JJ.**

P. S. Menon, Petitioner v. State of Kerala and others, Respondents.

O. P. Nos. 2078, 2303, 2591, 2600, 2709, 2979 and 3057 of 1966, D/- 2-4-1969.

(A) States Reorganisation Act (1956), Ss. 115 (5), 117 — Matters relating to integration of services resulting from State reorganisation — Central Government is final authority. (P.T. conceded.)

(Para 5)

(B) Constitution of India, Art. 234 — Appointments of persons other than district judges to judiciary service — Consultation with Public Service Commission and High Court — Requisites of — Letter to Government, by Registrar of High Court for filling vacancies of District Munsifs — Direction therein to adopt qualifications as prescribed in Rr. 314 and 315 of Civil Courts Guide — Public Service Commission prescribing those qualifications for recruitment — Interview in presence of High Court Judge — Appointments made by Rajpramukh in accordance with selection list — Article 234 is substantially complied.

(Para 12)

(C) Constitution of India, Art. 316 — State Public Service Commission already constituted before 26-1-1950 continuing working thereafter — Plea that appointment of its members is not made in compliance with Art. 316 — De facto doctrine is attracted — Public policy requires that acts done by de facto officers must be considered valid — Plea is not sustainable, and more so after lapse of long period.

(Para 15)

(D) Constitution of India, Art. 226 — Writ of quo warranto — Grounds of attack — Permissibility — Petition by public servant challenging seniority list — Validity of constitution of Public Service Commission cannot be questioned by way of collateral attack on Commission.

(Paras 9, 15)

(E) States Reorganisation Act (1956), S. 115(5) — Integration of services after State reorganisation — Equation of posts of Munsifs of Madras State with those of Travancore-Cochin State — Adoption of principle of functional parity with reference to nature, powers and responsibilities of posts — No contravention of Section 115(5).

(Paras 30, 34)

(F) States Reorganisation Act (1956), S. 115 (5)—Integration of Magistrates with civil judiciary — Creation of separate cadre and separate rules for them — No violation of principles of integration of services — Constitution of India, Art. 16.

The creation of a separate cadre in civil judiciary for District Magistrates and Sub-Divisional Magistrates who were functioning in the Travancore-Cochin area on the eve of the Act does not violate any of the provisions of the State Reorganisation Act and it cannot be said that the Munsifs coming from Madras State to Kerala are thereby treated in an unfair or in an inequitable manner. As after the separation of judiciary from executive promotions of the Magistrates to executive posts were closed and they could not also be integrated with members of judiciary service, it was inevitable that there should be a separate cadre for such officers. In matters of integration where persons working in different systems and in different States have to be integrated it is possible that all the hopes and expectations of those who are to be integrated may not be fulfilled or realised. From this alone to posit that the principles settled are inequitable is not proper or justified. (Para 42)

Moreover merely because separate Rules are framed for Magistrates and they are allowed to reckon their service as Magistrates while considering seniority in the cadre of Munsif it cannot be said that Article 16 of the Constitution is violated. Article 16 does not guarantee that once a person has become a member of a service nothing will be done by the State Government to alter what the members of the service consider to be their chances of promotion according to the rules prevailing at the time of recruitment. If this be so, rules framed under Art. 309 can never be altered. AIR 1965 Punj 401, Foll.

(Para 44)

(G) States Reorganisation Act (1956), S. 115(5) — Public servant holding officiating post on promotion and also substantive lien of post of lower grade — Inclusion of his name in seniority lists of both grades is necessary. AIR 1964 SC 1361, Foll.

(Para 47)

(H) States Reorganisation Act (1956), S. 115(5) — Intergration of employees — Inter se seniority of employees allotted from other State cannot be disturbed.

(Para 83)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 830 (V 55) —

(1966) 2 SCR 186, Union of India v.

P. K. Roy

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(1965) AIR 1965 Punj 401 (V 52) —

ILR (1965) 1 Punj 423 (FB).

Brijlal Goswami v. State of Punjab

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- (1964) AIR 1964 SC 1361 (V 51) =
 (1964) 2 SCR 982, State of Rajasthan
 v. Ram Saran 47
 (1961) AIR 1961 Andh Pra 229 (V 48) =
 ILR (1960) 2 Andh Pra 61, Y. Vasu-
 devarao v. State of Andhra Pradesh 55
 (1951) AIR 1951 SC 229 (V 38) =
 1951 SCJ 318, B. Venkataramana v.
 State of Madras 55
 (1951) AIR 1951 Trav-Co. 45 (V 38) =
 1950 TCLR 306, Parameswaran
 Pillai Bhaskaran Pillai v. State
 Prosecutor 55

In O. P. No. 2078 of 1966:

K. T. Harindranath, K. Ramakumar, N. V. Prabhakaran, K. Chandrasekharan and T. Chandrasekhara Menon, for Petitioner; Govt. Pleader, for Respondents Nos. 1 and 3; C. Sankaran Nair (Central Govt. Pleader), for Respondent No. 2; K. George Varghese, Thomas V. Jacob, P. C. Joseph, S. V. Nagendran, N. Krishna Pillai and P. A. Mohammed, for Respondent No. 4; T. M. Cherian, for Respondents Nos. 6 and 7; S. Easwara Iyer and L. G. Potti, for Respondent No. 6; K. A. Gopalakrishnan and A. Chandrasekhara Menon, for Respondent No. 8.

In O. P. No. 2303 of 1966:

V. Sivaraman Nair, V. M. Nayanar and K. C. Sankaran, for Petitioner; C. Sankaran Nair (Central Govt. Pleader), for Respondent No. 1; Govt. Pleader, for Respondent No. 2; T. M. Cherian, for Respondent No. 3; C. M. Devan, for Respondent No. 4.

In O. P. No. 2591 of 1966:

K. Ramakumar, P. Ramaranjan, Chandrasekharan and T. Chandrasekhara Menon, for Petitioner; Govt. Pleader, for Respondents Nos. 1 and 3; C. Sankaran Nair (Central Govt. Pleader), for Respondent No. 2; P. K. Kesavan Nair, K. N. Narayana Pillai and M. Ravinandana Menon, for Respondents Nos. 4 and 8; S. Easwara Iyer, L. G. Potti, C. S. Rajan, P. Sankarankutty Nair and E. Subramaniam, for Respondents Nos. 5 and 16; S. A. Nagendran, M. M. Cherian, N. Krishna Pillai, P. A. Mohammed and N. N. D. Pillai, for Respondent No. 6; M. Raman Menon, for Respondent No. 9; T. M. Cherian, for Respondent No. 15; A. Gopala Menon, for Respondent No. 18; C. M. Devan, for Respondent No. 21.

In O. P. No. 2600 of 1966:

A. P. Chandrasekharan, for Petitioner; Govt. Pleader, for Respondents Nos. 1, 3 and 4; C. Sankaran Nair (Central Govt. Pleader), for Respondent No. 2; P. Radhakrishnan, for Respondent No. 5; S. Easwara Iyer, L. G. Potti, C. S. Rajan, K. Subramaniam, T. L. Ananthasivan and M. Abraham, for Respondents Nos. 7, 8 and 10; S. A. Nagendran, M. M. Cherian and P. A. Mohammed, for Respondent No. 9; G. Viswanatha Iyer, for Respondent No. 11; E. M. Jacob, for Respondent No. 12;

M. Raman Menon, for Respondent No. 13; K. N. Narayanan Nair, G. R. Panicker and N. Sudhakaran, for Respondent No. 14; P. K. Shamsuddin, V. M. Kurien and E. Ebrahimbakutty, for Respondent No. 15.

In O. P. No. 2709 of 1966:

K. Chandrasekharan and T. Chandrasekhara Menon, for Petitioner; Govt. Pleader for Respondents Nos. 1, 3 and 4; C. Sankaran Nair (Central Govt. Pleader), for Respondent No. 2; P. K. Kesavan Nair and K. N. Narayana Pillai, for Respondent No. 5; S. Easwara Iyer, L. G. Potti, C. S. Rajan and P. Sankarankutty Nair, for Respondent No. 6; S. A. Nagendran, N. Krishna Pillai and P. A. Mohammed, for Respondent No. 7; E. M. Jacob, for Respondent No. 8.

In O. P. No. 2979 of 1966:

K. Ramakumar and P. Ramaranjan for Petitioner; C. Sankaran Nair (Central Government Pleader), for Respondent No. 1; Govt. Pleader, for Respondents Nos. 2 and 3; K. Velayudhan Nair and T. K. M. Unnithan, for Respondent No. 4; S. Easwara Iyer, L. G. Potti and C. S. Rajan and M. Abraham, for Respondents Nos. 5 and 8; E. M. Jacob, S. A. Nagendran, for Respondent No. 6; S. A. Nagendran, for Respondent No. 7; G. Viswanatha Iyer and K. M. Devadathan for Respondent No. 9.

In O. P. No. 3057 of 1966:

M. K. Narayana Menon, M. P. Menon, K. A. Gopala Krishnan, A. Chandrasekhara Menon and O. K. Nambodiripad, for Petitioner; C. Sankaran Nair (Central Govt. Pleader), for Respondent No. 1; Government Pleader, for Respondents Nos. 2 and 3; P. K. Kesavan Nair, K. N. Narayana Pillai and M. Ravinandana Menon, for Respondent No. 4; S. Easwara Iyer, L. G. Potti and C. S. Rajan, for Respondent No. 5; S. A. Nagendran, for Respondent No. 6; E. M. Jacob, for Respondent No. 7.

GOVINDAN NAIR, J.: The petitioner in each of these Writ Petitions was a member of the Madras State Judicial Service on 31-10-1956 the day prior to the "appointed day" for the purposes of the States Reorganisation Act, 1956 (hereinafter referred to as the Act), and they have all been allotted by orders passed by the Central Government under Sections 115(2) and 115(3) of the Act, to the Kerala State. The petitions in one form or other challenge the principles adopted in the integration of the petitioners with their compatriots in the former State of Travancore-Cochin, and these petitions were heard together.

2. The Act is a law passed by Parliament under the provisions of Articles 2, 3 and 4 of the Constitution of India and inter alia contains supplemental, incidental and consequential provisions relating to the integration of the personnel who are to form the members of the services

in the newly formed States. Kerala is a new Part A State comprising the territories mentioned in Section 5 of the Act; the territories of the existing State of Travancore-Cochin, excluding the territories transferred to the State of Madras by Section 4 of the Act; the territories comprised in Malabar district excluding the islands of Laccadive and Minicoy; and Kasargad taluk of South Kanara district. The petitioners were all serving in relation to the affairs of the State of Madras and were working in the Malabar district of the State on 31-10-56. But for a provisional order under sub-section (2) of Section 115, they would have continued to serve in connection with the affairs of the principal successor State to the Madras State, which is Madras State itself as defined in Section 2(m) of the Act. Orders were however passed under sub-section (2) of Section 115 of the Act by the Central Government requiring the petitioners to serve provisionally in connection with the affairs of the Kerala State. Orders have also been passed under sub-section (3) of Section 115 of the Act determining Kerala State as the successor State to which the petitioners should be finally allotted and fixing 1-11-56 as the date from which such allotment should take effect. These orders need not detain us as the allotment of the petitioners to the State of Kerala, though against the wishes of the petitioners, is not impugned in these petitions. What is challenged in these writ petitions, as indicated earlier, is the method of integration of the petitioners with the Travancore-Cochin personnel.

Very briefly stated the complaint is that there has not been fair and equitable treatment of the petitioners in the matter of integrating them with the Travancore-Cochin personnel. This has been elaborated with reference to the various orders of integration, the provisions of the Act, the principles adopted in the matter of integration, alleged omission to implement the settled principles and orders, and it is even alleged that the settled principles and orders have been misapplied. These will be dealt with when considering the points raised in these petitions.

3. We propose to deal with these petitions by taking up first O. P. No. 2591 of 1966, next O. P. No. 2078 of 1966 and thereafter O. P. Nos. 2600 and 2979 of 1966 as they raise similar, if not common questions; O. P. Nos. 2303, 2709 and 3057 of 1966, also together, as the points raised therein are similar.

O. P. No. 2591 of 1966

4. The contention raised in this writ petition is that respondents 4 to 21 who were holding the posts of Judicial Officers in the State of Travancore-Cochin on 31-10-1956 and who were integrated with the petitioner were not judicial officers

duly appointed in accordance with the provisions of the Constitution and that therefore they should not have been integrated with the petitioner and other persons allotted to Kerala State from the State of Madras. In dealing with this question, we will be referring to the parties as they are arrayed in this original petition as also to the exhibits in this original petition. If reference is made to any other exhibit or party in any of the other cases dealt with by this Judgment, this will be specifically stated. Out of respondents 4 to 21, 4 to 13 were appointed between 26-10-50 and 3-10-53. On 3-10-53 rules were made under Art. 234 of the Constitution and respondents 14 to 21 were those appointed in accordance with those rules between the dates 3-10-53 and 1-11-56. Respondents 4 to 19 have been ranked above the petitioner in the final integrated gradation list Ext. P10 dated 26-3-66. It is urged that respondents 4 to 19 should not find a place at all in the final integrated gradation list as they were not and cannot be treated as members of the judicial service. Alternatively it has also been contended that in any event they should not be given ranking above the petitioner and others who belonged to a validly constituted judicial service. To reckon them as members of the judicial service and rank them above the petitioner and others is neither fair nor equitable and is therefore violative of section 115 (5) of the Act. This sub-section runs thus:

"115 (5) The Central Government may by order establish one or more Advisory Committees for the purpose of assisting it in regard to —

(a) the division and integration of the services among the new States and the States of Andhra Pradesh and Madras; and

(b) the ensuring of fair and equitable treatment to all persons affected by the provisions of this section and the proper consideration of any representations made by such persons."

5. Arguments were also advanced on the questions as to whether the Central Government is the original and exclusive authority in the matter of integration of services or whether it was only an appellate authority or whether it was only an authority entitled to give directions as envisaged by section 117 of the Act leaving the matter of integration to the State Governments which are under the provisions of Articles 162 and 309 read with Entry 3 in List II of the Seventh Schedule to the Constitution entitled to make provisions in relation to its services and the members of those services. Decisions taking conflicting views were cited before us. But we consider it unnecessary to go into this question in detail as it was not

disputed before us by any of the petitioners or by the respondents in these petitions that the final authority in the matter of integration of services resulting from the States reorganisation effected by the Act is the Central Government. We will therefore proceed on the basis that the ensuring of fair and equitable treatment envisaged by sub-section (5) of section 115 of the States Reorganisation Act must be by the Central Government.

6. The gamut of the arguments in this case turned on the alleged violation of Article 234 of the Constitution. That Article is in these terms:

"234. Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State."

7. According to the petitioner rules as envisaged by the Article were framed by the Governor of the State only on 3-10-53. In relation to the appointments of respondents 4 to 13, who were appointed before 3-10-53, it is therefore urged that they have not been appointed in accordance with the rules framed under Article 234 of the Constitution. There is also the further argument that there was no properly constituted Public Service Commission in the Travancore-Cochin State before 1-11-56 and that therefore the rules, if any, that were applied were not those framed after consultation with the Public Service Commission. Even in relation to the appointments after 3-10-53 it is urged that the appointments cannot be deemed as validly made under Art. 234 because the rules were framed after consulting the members of the so-called Public Service Commission which commission was not duly or properly constituted in accordance with the provisions of the Constitution and the laws.

8. It is clear from the Article that what is required by its terms in the matter of consultation is about the rules that are proposed to be framed. This consultation must be with the State Public Service Commission and the High Court exercising jurisdiction in the State. In this respect, Art. 234 is different from Article 233; the latter requiring consultation with the High Court in the matter of appointment of each and every District Judge.

9. Rules, purporting to be under Article 234 of the Constitution, were admittedly framed and published, only on 3-10-53. Regarding the appointments that have been made to the Subordinate Judicial Service between the dates 26-1-50 and 3-10-53, the contention raised on be-

half of the State Government and the Central Government, respondents 1 and 2 to this writ petition, as well as some of the other respondents, is that the appointments in question have been made in accordance with the rules contained in what is called the Civil Courts Guide (Rules 314 and 315 thereof) which were in force in the former Travancore-Cochin as well as what is contained in Order 2 of the Standing Orders of Cochin applicable to the former Cochin State. These provisions, it is urged, are laws. It is further urged that these laws have been kept in force by sections 3 and 4 of the Travancore-Cochin Administration and Application of Laws Act (VI of 1125), and Article 313 of the Constitution. These rules which are laws will do duty for the rules that can be framed under Article 234 of the Constitution till such rules are framed. So even in the absence of rules made under Article 234, the appointments of respondents 4 to 21 cannot be challenged. Regarding the appointments made after 3-10-53 it is urged that they were in accordance with the rules under Article 234, and therefore no question of invalidity arises.

In relation to the contention that there was no properly constituted Public Service Commission in the State of Travancore-Cochin, it is urged that the Public Service Commission that has been functioning in the State had been validly appointed, and an alternative contention has also been raised by the first respondent, the State of Kerala and the respondents 6 and 8 that in these proceedings for the issue of writ of quo warranto against respondents 4 to 21, no point can be raised about the validity of the constitution of the Public Service Commission or the appointment of the members of the Commission as this will amount to a collateral attack on the Public Service Commission and its members who were admittedly discharging the functions of the Public Service Commission purporting to have been duly constituted.

10. Article 313 read with Article 366 (10) provides for the continuance of the laws in force immediately before the commencement of the Constitution "applicable to any public service or any post which continues to exist after the commencement of this Constitution, as service or post under a State so far as they are consistent with the provisions of this Constitution." And laws will include all Rules and Regulations passed or made before the commencement of the Constitution by any authority or person having power to make the rule or regulation. If the Civil Courts' Guide and the Standing Orders of Cochin are either laws or regulations made by a competent authority, then they will continue to

be in force even after the Constitution. But it is urged that neither the Civil Courts' Guide nor the Standing Orders of Cochin are laws or even Rules and Regulations purporting to have the force of law as the respective Maharajas did not even profess to exercise their law-making power in making the Civil Courts' Guide and passing the Standing Orders.

It is also urged that the provisions contained in the rules framed on 3-10-1953 are against the terms of Article 234 as they have not been framed after consultation with the Public Service Commission. We do not consider that we should deal with this question in this case or with the question as to whether the Public Service Commission had been duly constituted for we are of the view that there has been substantial compliance with the provisions of Article 234 of the Constitution in the matter of appointment of respondents 4 to 21 as contended by the first respondent and respondents 6 and 8 and that the petitioners are not entitled to question the validity or otherwise of the constitution of the Public Service Commission and the appointment of its members as this will amount to a collateral attack on the constitution of the Public Service Commission and the appointment of its members.

11. What has been done in the matter of appointments of respondents 4 to 21 has been detailed in the affidavit of the first respondent and some of the other respondents. On the 14th June, 1950, the Registrar of the Travancore-Cochin High Court wrote to the Chief Secretary to Government in these terms.

"As vacancies in the cadre of District Munsiffs are likely to arise in the near future, I am directed to request that Government may be pleased to direct the Public Service Commission to select a panel of twelve persons for appointment as District Munsiffs. The Commission may be asked to inform the Registrar of the High Court the date fixed for interviewing candidates so that a Judge of the High Court may be deputed to be present at the interview.

Till the new Rules are framed, the qualifications prescribed in Rules 314 and 315 of the Civil Courts' Guide for the post of District Munsiffs may be adopted (Relevant extract appended)."

The Public Service Commission published a notification dated 24th June, 1950 in the Travancore-Cochin Gazette, dated 4th July, 1950 extracting the relevant parts of Rules 314 and 315 of the Civil Courts' Guide. These parts extracted, detailed the qualifications prescribed in Rule 314 as also the proportion in which Munsiffs will have to be recruited from the services and the Bar. This latter

provision regarding the proportion became unnecessary because the recruitment was confined to the members of the Bar at the instance of the Travancore-Cochin High Court. At the time of the interview of the candidates, a Judge of the Travancore-Cochin High Court sat with the members of the Public Service Commission; the list of the candidates so selected was sent to the Government, and after considering the list, the Rajpramukh appointed the twelve persons mentioned in the notification C. J. 4/11946/50/CS dated 12th October, 1950 published in the Travancore-Cochin Gazette dated 17-10-1950.

12. As we indicated earlier, the consultation with the High Court and the Public Commission envisaged by Article 234 is about the rules that are to be made for the purpose of appointment of persons other than District Judges to the Judicial service. These rules can only provide for the qualifications of the eligible candidates, the age limits if any, and possibly the categories of eligible candidates from among whom the selection will have to be made. The letter sent by the Registrar of the Travancore-Cochin High Court stated specifically that the qualifications of the candidates must be those prescribed in Rules 314 and 315 of the Civil Courts' Guide. These have been stated in the notification published in the Gazette on the 4th July, 1950 by the Public Service Commission. The Public Service Commission has therefore also approved all these qualifications. The Governor mentioned in Article 234 must be read as the Rajpramukh by virtue of Article 238 (1) as Travancore-Cochin State was a Part B State at that time and the appointments have been made by the Rajpramukh in accordance with the rules regarding qualifications prescribed by Rules 314 and 315 of the Civil Courts' Guide which were accepted by him in consultation with the Public Service Commission and the High Court. We are satisfied that there has thus been substantial compliance with the provisions of Article 234 of the Constitution and the appointments made cannot be said to be invalid as infringing that Article.

13. It was suggested at the time of the arguments that the appointments made were against the provisions of Articles 15 and 16 of the Constitution in that the principle of communal rotation that was in vogue in the State and which is referred to in Rule 315 of the Civil Courts' Guide was applied in the matter of selection and appointment of the Munsiffs. There is nothing in the letter of the Travancore-Cochin High Court dated 14-6-1950 or in the notification published by the Public Service Commission inviting applications to indicate that communal

rotation was adopted in the matter of selection and appointment of Munsiffs. The letter as well as the notification made it clear that it is only that part of Rules 314 and 315 that deals with the qualifications prescribed for the candidates that has been adopted in the matter of selection. No specific averment has been made that any particular person got preferential appointment by the adoption of the principle of communal rotation and that any other person who should have obtained the place because of his superior merit lost the chance. This being a selection, confined to those who applied for the posts and the petitioner being not a person who was an applicant, we do not think he is entitled to raise this point at all. Even otherwise in the absence of specific pleadings the matter cannot be enquired into. We are also not satisfied that the principle of communal rotation was adopted in the matter of selection.

14. The only other question arising is about the existence of a validly constituted Public Service Commission and its members. By Ordinance No. VI of 1124, the United State of Travancore and Cochin Public Service Commission Ordinance, 1124, the Public Service Commission for the United State of Travancore and Cochin was constituted and provision was made for the composition of the staff of the Public Service Commission and regarding their functions. This Ordinance admittedly continued in force till the 16th January, 1950. Before its expiry, Act 1 of 1950, the United State of Travancore and Cochin Public Service Commission (Continuance) Act, 1950 was passed providing that the Public Service Commission constituted under the Ordinance VI of 1124 shall continue till the 26th day of January, 1950 "and function in the same manner and to the same extent and subject to the same conditions as heretofore." In the Travancore-Cochin Gazette dated 7th February, 1950, a notification No. S3-20679/49/CS dated 25th January, 1950 reading as under.

"His Highness the Raj Pramukh has been pleased to re-appoint Sri Rama Varma Thampuran and Sri R. V. Thomas as Members of the State Public Service Commission, on their existing salary for a term of six years with effect from the 26th January, 1950, or until they attain the age of sixty, whichever is earlier was published."

15. By another notification dated 3-3-50 published in the Travancore-Cochin Gazette dated 14-3-50 Shri Ramavarma Thampuran mentioned in the earlier notification was appointed as Chairman and Shri V. Kunhikrishnan as a member in his place. Article 315 of the Constitution enjoins that there shall be a Public

Service Commission for each State and this provision will have effect from 26-1-50, the date on which the Constitution came into force. There is no need therefore to constitute a Public Service Commission thereafter. All that is required is to appoint its members as envisaged by Article 315 of the Constitution, subject to the restrictions contained in that Article. Under this Article as far as the Travancore-Cochin State is concerned, the authority to appoint the Chairman and members of the Public Service Commission of the State is vested in the Raj Pramukh. The appointment of Shri Ramavarma Thampuran and Shri R. V. Thomas by the Raj Pramukh would therefore be a valid appointment of the members of the Commission if it was done on the 26th January, 1950. But it is urged that the notification published in the Gazette dated 7th June, 1950 is actually dated 25th January, 1950 and therefore the appointment was not under the Constitution. The respondents however urged that the notification has specifically stated that the appointments of the members mentioned therein were with effect only from the 26th January, 1950 as stated in the notification and that the notification was published in the Gazette only on the 7th February, 1950 long after the Constitution came into force and so the appointments were validly made under the Constitution. That the members appointed by the Raj Pramukh functioned as the members of the Public Service Commission and discharged effectively the duties of the Public Service Commission during the entire period 26th January, 1950 to 1-11-1956 is not disputed before us. In these circumstances, what is called the *de facto* doctrine, we consider, must apply.

This doctrine was engrafted as a matter of policy and necessity to protect the interest of the Public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law. But although these officers are not officers *de jure* they are by virtue of the particular circumstances, officers, in fact, whose acts, public policy requires should be considered valid. (See American Jurisprudence, Volume 43, Section 470 under the heading *De Facto Officers*). Apart from this, the petitioner cannot in this writ petition be permitted to raise the point that there has been no properly constituted Public Service Commission and no properly appointed members thereof as this will amount to a collateral attack on the Public Service Commission and its members. The second prayer in this petition is for the issue of a writ of *quo warranto* against respondents 4 to 21. The other prayers are incidental to this relief. There is thus no direct attack

against the members of the Public Service Commission. Even if there was a direct attack by the petitioner as a citizen the acts of the Public Service Commission have to be protected on the basis of the de facto doctrine at this distance of time. The consultation made with the members of the Public Service Commission who actually functioned before 3-10-53 when rules were framed under Article 234 of the Constitution and at the time of the framing of the rules under Article 234 of the Constitution must therefore be taken to be consultations with the Public Service Commission duly constituted. The principle that there can be no collateral attack has been dealt with by the Travancore-Cochin High Court in the decision in Parameswaran Pillai Bhaskaran Pillai v. State Prosecutor, reported in AIR 1951 Trav Co 45. After an elaborate survey of the law of the subject it was held:

"The right of a de facto Judge to hold his office is not open to question nor is his jurisdiction subject to attack in a collateral proceeding. . . . To raise the competency of the Chief Justice to hear and decide certain appeals when they were taken up for hearing or in the proceeding for leave to appeal to the Supreme Court against that judgment, or in the appeal before the Supreme Court would amount to collateral attack."

The particular case arose on an application for leave to appeal to the Supreme Court from a judgment of the Travancore-Cochin High Court and one of the grounds raised in that application was that the Chief Justice of the High Court was not validly appointed. This contention was negatived. The principle of the decision must apply to the facts of this case as well. No decision was cited before us which has taken a different view.

16. It was finally suggested that the petitioner has been discriminated in that compliance with Article 234 was insisted upon in his case and relaxed so far as the respondents 4 to 21 are concerned. This contention cannot stand as we have found that even in the case of respondents 4 to 21 Article 234 has been complied with and their appointments also have been therefore made in accordance with the provisions of that Article.

17. The orders Exts. P4 and P9 cannot be impugned. Nor is the petitioner entitled to any of the other reliefs prayed for. This writ petition fails. We dismiss this petition but direct the parties to bear their respective costs.

O. P. 2076 of 1956

18. The petitioner is also an allottee to the State of Kerala from the State of Madras consequent on the reorganisation of States under the Act. He was appointed as a Munsiff in the Madras State

under rule 11 (2) of the Madras State Judicial Service Rules. His appointment was regularised with effect from 23-6-1955. In the preliminary integrated gradation list published in the Kerala Gazette No. 24 dated 12th June, 1962, Part I, the rank of the petitioner was shown as No. 57 and those of respondents 4 to 8 over whom the petitioner claims seniority were shown as 58, 60, 61, 64 and 65 respectively. Respondents 4, 6 and 8 made representations against the ranking given to them below the petitioner in the preliminary integrated gradation list as on 1-11-1956. The claim of these respondents that they should be ranked above the petitioner was accepted by the Central Government and orders were issued accordingly.

Apparently consequent on this, when the final integrated gradation list was published in the Gazette dated 24-5-1966 the petitioner's rank was shown as No. 67 and those of respondents 4 to 8 as 60, 62, 63, 65 and 66 respectively. This list has been produced by the petitioner along with Ext. P13. Though Ext. P13 states that "if any officer aggrieved against the decisions of the Government of India which have led to the publication of the final list submits review petition/counter representation, such representation will be disposed of in accordance with the instructions issued in circulars No. SI. 2-7725/60/PD dated 16-2-1960, SI. 2-26749/PD dated 2-5-1960 and 40251/SI. 2/62/PD dated 6-7-1962," the petitioner has applied for no such review, nor has he made any counter representation, but has approached this Court for setting aside the list appended to Ext. P13 and restore the list published earlier in 1962 by which the petitioner was ranked above respondents 4 to 8.

19. Two of the main contentions raised in this writ petition are that (1) the service under rule 11 (2) of the Madras State Judicial Service Rules which commenced so far as the petitioner is concerned, on 2-2-1955, must be reckoned for the purpose of seniority in counting continuous service, and not merely the service from the date of regularisation of appointment which so far as the petitioner is concerned commenced only on 23-6-1955 and (2) that the period of training must also be counted for the purpose of seniority. The Central Government have clearly ruled that the non-regularised portion of the services of an incumbent allotted to Kerala State from Madras cannot be counted for determining the inter-state seniority of the allotted personnel vis-a-vis their compeers in the State of Travancore-Cochin for deciding their rank as on 1-11-1956. It has also been ruled that the period of training cannot be considered as part of service.

These decisions have been challenged in the other original petitions, O. P. Nos. 2600 and 2979 of 1966 and O. P. Nos. 2303, 2709 and 3057 of 1966, disposed of by this judgment and for the reasons stated therein we reject these contentions. We shall however refer to the relevant provisions of the rules that were applicable in the State of Madras, at this stage, as they have not been referred to so far, to understand what is meant by non-regularised portion of the service.

20. Rule 11 (2) of the Madras State Judicial Service Rules permits appointments being made, not in accordance with the order in which names occur in the select list, but out of turn, to meet the exigencies of the situation. Such exigencies arose in the State of Madras due to two reasons. The practice in the State of Madras was to post only such judicial officers in an area who knew the language of that area. If a vacancy occurred in a Tamil speaking area and the person to be appointed in accordance with the select list is not a person who knew Tamil, some other person lower down in the select list who knew Tamil will be appointed to that vacancy in the Tamil speaking area. This appointment may be termed loosely an out of turn appointment as the person appointed had no right to be appointed at that time because his turn had not come. Another circumstance when an out of turn appointment may have to be made can arise because of the principle of communal rotation that was applicable. A particular candidate by reason of the community to which he belonged may be entitled to preferential appointment earlier than a person or persons whose names occur above his in the select list. But he may not know the language. So an out of turn appointment will have to be made.

21. To ensure that such appointments do not work hardship to others who were higher up in the select list or who were entitled to be appointed by reason of the rule of communal rotation provision was specifically made in the rules that the appointment under rule 11 (2) will not count for probation (See rule 11 (2) and 11 (3) (ii)). That the service which did not count for probation will not be reckoned for the purpose of seniority is also specified in the rules (rule 20). But it is open by virtue of rule 20 itself to regularise the appointment from the date of the original appointment itself or from any subsequent date. This regularisation will have to be done by taking into account the number of vacancies and after considering the claims of the persons in the select list to the particular vacancy. When this is determined, a person appointed under rule 11 (2) can get a date only of a vacancy that occurred after the

vacancies which should be filled up by the persons whose names are mentioned above his in the list or those who should have been appointed earlier because of the rule of communal rotation have been filled up. From the date of that vacancy the services of that person appointed under rule 11 (2) will be regularised.

22. The appointment under rule 11 (2) is a temporary appointment and it is so stated in the rule itself. Appointment under rule 11 (3) also is a temporary appointment though this can be even of persons who do not figure at all in any select list prepared after the selection by the Public Service Commission. A reading of the rule—rule 11 (3) of the Madras State Judicial Service Rules—shows that this rule will be resorted to in cases of emergency. Suffice to say at this stage that service rendered in a temporary capacity by virtue of appointments under rule 11 (2) or 11 (3), at any rate the whole of it, did not necessarily count for the purpose of inter se seniority among the persons who belonged to the particular service in the State of Madras. The Government of India decided that this service which did not count for inter se seniority among the Madras personnel in the State of Madras and did not count for inter-State seniority in the matter of integration of the personnel that remained in the State of Madras with those that have been allotted to the State of Madras, will not count for inter-State seniority of personnel allotted from the State of Madras to the State of Kerala, for the purpose of integration with the Travancore-Cochin personnel. These rulings of the Central Government, as we indicated earlier, have been the subject-matter of serious challenge and have been dealt with in disposing of O. P. Nos. 2303, 2709, and 3057 of 1966. Counsel appearing for the petitioner has adopted the arguments advanced by counsel who argued the case in O. P. No. 3057 of 1966 and the party himself who argued his own case in O.P. No. 2709 of 1966.

23. The additional point that has been urged by counsel on behalf of the petitioner in this case was that by the application of what is called the K. L. M. Principle, the petitioner was entitled to have the date of commencement of the service of one Sri Sethu Madhavan who had also been, it is accepted on all hands, ordered by the Central Government to serve provisionally in connection with the affairs of the Kerala State. Though there is no specific averment that the said Sethu Madhavan was ordered by the Central Government finally to be allotted to Kerala State, the arguments proceeded on the basis that he had been so allotted. For this purpose reliance was placed on Ext. P5 which is in these terms:

"In exercise of the powers conferred by sub-section (3) of section 115 of the States Reorganisation Act, 1956 (37 of 1956), the Central Government hereby determines that all persons who immediately before the appointment day were serving in connection with the affairs of the State of Madras in the territories specified in clause (b) of sub-section (1) of S. 5 of the States Reorganisation Act, 1956 (37 of 1956) and who were required to provisionally serve in connection with the affairs of Kerala in the Government of India, Ministry of Home Affairs Order No. 68/3/56-SR. II dated 31st October 1956, shall be finally allotted to the State of Kerala with effect from the 1st November, 1956."

24. Though this point has not been specifically taken in the original petition we requested the learned Advocate General who appeared for the State Government to make available to us the four orders passed by the Central Government dated 24-8-1960 as well as the schedules appended to three of those orders in original to find out whether the said Sethu Madhavan had been finally allotted to the State of Kerala. These were made available and we find that the said Sethu Madhavan has not been finally allotted to the State of Kerala. This being so, there can be no question of Sethu Madhavan's date, namely 1-7-1954 being allotted to the petitioner. Such allotment of date under what has come to be known as the K. L. M. principle which came into existence in the Travancore-Cochin State by an order No. S. 5-18375/49/C. S. dated 27-9-1950 referred to in page 248 of "Important Orders issued by the Travancore-Cochin Government", cannot apply to the petitioner. We extract the relevant portion of this order.

"The relative seniority of the Travancore and Cochin personnel in any class or grade in the common seniority list will be determined with reference to the date of commencement of continuous service in the same or similar class or grade of posts subject, however, to the condition that the seniority of the Travancore personnel as between themselves or of the Cochin personnel as between themselves should not thereby be disturbed."

25. Though the said Sethu Madhavan commenced service earlier in the State of Madras he was admittedly junior to the petitioner and therefore it will become necessary for settling the inter se seniority of the petitioner vis-a-vis Sethu Madhavan to assign to the petitioner in the integrated gradation list a place above the said Sethu Madhavan. This is so because the principle settled as early as 29-12-1956 by G. O. of that date clearly provided that in effecting integration the inter se seniority of persons in either

branch that are integrated should not be affected. The question however cannot arise when there is no need to fix the inter se seniority of the petitioner vis-a-vis the said Sethu Madhavan.

26. No other point arises in this writ petition. We dismiss this writ petition but without any order as to costs.

O. P. Nos. 2600 and 2979 of 1966

27. The points raised in these petitions are practically the same and they can be formulated under the following heads:

(1) The principles accepted for the equation of posts in the matter of integration of the members of the judicial service allotted from Madras State to the State of Kerala with the members of the judicial service in the Travancore-Cochin State, also allotted to Kerala, are not fair and equitable.

(2) Realising the hardships that will result to the Madras personnel allotted to Kerala, five Posts were reserved exclusively for the 'Malabar personnel' by an order of Government dated 27-5-1958. (Ext. P7 in O. P. No. 2979 of 1966). This reservation was wrongly abolished by order dated 24-7-1961 (Ext. P11 in O. P. 2979 of 1966).

(3) 3 posts of District Magistrates and 8 posts of Sub Divisional Magistrates of executive origin in the criminal judiciary in the erstwhile Travancore-Cochin State were unjustly and unfairly kept in a separate cadre. To these 11 posts was added yet another of a District Magistrate and that even without consulting the High Court. Therefore, four posts of District Magistrates, which were interchangeable with those of Sub Judges so far as the set up in the State of Madras was concerned, and to which Munsiffs in that area could normally and legitimately aspire for promotion, were lost to the Madras personnel allotted to the State of Kerala. This reservation has resulted in further harm to these personnel by virtue of provision made by framing rules under Article 234 of the Constitution for absorption of some at least of the personnel occupying the separate cadre into the civil judiciary. As an instance, the appointment of the 5th respondent in O. P. No. 2979 of 1966 as a District Judge, is relied on.

(4) In integrating the Madras personnel with those of the Travancore-Cochin personnel, 4 persons who were officiating as Sub Judges in the State of Madras at the time of integration were also included in the list of Munsiffs, and these 4 persons being admittedly seniors to the petitioners in these original petitions and some others, while they were in Madras service, the petitioners had to surrender their longer service as Munsiffs to these

4 persons who had lesser service as Munsiffs by the application of what is known as the K. L. M. principle. The inclusion of the names of these 4 persons in the list of Munsiffs is unwarranted. The principles of equation settled postulated that those officiating as Sub Judges must be ranked with Sub Judges which was the equated post. This being so, their names should not have found a place at all among Munsiffs.

(5) The application of the K. L. M. principle is unwarranted and unjust and has resulted in inequities in that persons like the petitioners in these original petitions had to surrender part of their continuous service which resulted in their becoming juniors to some of the respondents. The K. L. M. principle should not have been applied in the matter of integration.

(6) The point that we have dealt with in the judgment in O. P. No. 2591 of 1966 that the persons appointed to the judicial service in the Travancore-Cochin State after the coming into force of the Constitution and before the framing of rules under the Constitution and before properly constituting the Public Service Commission, cannot be treated as members of the judicial service, is repeated in these petitions as well.

(7) In addition, in original petition No. 2600 of 1966 it is urged that the petitioner therein was entitled to count his war service for the purpose of determining his length of continuous service and in both these petitions it is further urged that the training period of Munsiffs must also be taken into account for determining their length of continuous service.

28. We shall deal with these points seriatim. The general principles and procedure for integration of the Travancore-Cochin

- Travancore-Cochin**
1. District Judges—I Grade Rs. 800—1000.
 2. District & Sessions Judge—II Grade Rs. 500—800.
 3. District Magistrates—Rs. 500—800.
Addl. Dist. Sessions Judges and Sub-Judges—Rs. 450—600.
 4. Sub-Divisional Magistrates—I Grade Rs. 450—600. Munsiffs and Sub-Divisional Magistrates—Grade II on Rs. 250—500.
 5. Sub-Magistrates—Rs. 200—300.

These are the only provisions that have been brought to our notice regarding the actual equation of posts in the orders passed by the Government and which have admittedly been accepted by the Central Government and the attack is against such equation.

29. Briefly stated, the arguments advanced in these original petitions as well as the other petitions yet to be dealt with (O. P. Nos. 2303, 2709 and 3057 of 1966)

core-Cochin personnel with those allotted from Madras to Kerala were settled first by an order dated 29-12-1956 (Ext. P2 in O. P. No. 2979 of 1966). The provisions in that order which should be noticed for the purpose of considering the contention that the principles have not been fair or equitable are those contained in paragraph 3 thereof which is in these terms:

"3. EQUATION OF POSTS:

Posts will be equated on a functional basis having due regard to the nature, powers and responsibilities of the posts. Nomenclature is no criterion for this purpose.

NOTE: The scale of pay will not be a criterion, but in case any glaring inequality is brought to the notice, it shall be decided by the Government on an adhoc basis in consultation with the Integration Committee."

By an order SI. 2-40451/56/PD dated 11-3-57, the State Government accepted the suggestions of the High Court for the equation of posts coming under the judicial service, the Integration Committee constituted by the Government having earlier considered the proposals of the High Court and having recommended that the suggestions of the High Court be accepted. On the basis of this order a notification dated 3rd June, 1958 was published in the Kerala Gazette publishing the order dated 27th May 1958 which is Ext. P7 in O. P. No. 2979 of 1966. The relevant part of that order runs thus:

"After careful deliberation of all the factors they are now pleased to order that the posts in the two integrating units of the department will be equated as follows in partial modification of the orders issued in their proceedings of even number dated 11-3-1957. (The order already referred to).

Madras

District Judges—II Grade Rs. 1000—1800.
District Magistrates (Judl.) Rs. 500—700 plus special pay Rs. 50.

Sub-Judges on Rs. 550—700.

District Munsiffs and Sub-Divisional Magistrates Rs. 300-700.

Sub-Magistrates Rs. 200—300.

may be summed up as follows: Section 115 (5) of the States Reorganisation Act, 1956 which provides for the establishment of one or more Advisory Committees for the purpose of assisting the Central Government in regard to the division and integration of the services among the new States of Andhra Pradesh and Madras; and the ensuring of fair and equitable treatment to all persons affected by the provisions of section 115 of the

States Reorganisation Act and the proper consideration of any representations made by such persons clearly indicates that in the matter of integration there should be fair and equitable treatment to the personnel concerned. There has been no such fair and equitable treatment because the District Munsiffs of Madras in the scale of Rs. 300-700 on the crucial date, 31-10-1956 were equated with District Munsiffs of Travancore-Cochin on the scale of Rs. 250-500. Even the Sub Judges in the Travancore-Cochin area were on that date only in the scale of Rs. 450-600. This constituted a glaring inequality in the scales of pay and in view of what is stated in the note to paragraph 3 of the order dated 29-12-1956 (Ext. P2 in O. P. No. 2979 of 1966) which we have already extracted, ad hoc arrangements should have been made in the equation of posts to remedy this glaring inequality in the scales of pay. These discrepancies, it was urged, must be taken along with the facts that the pecuniary jurisdiction of Munsiffs in the State of Madras as well as the territorial area over which they exercised jurisdiction were higher and longer respectively than those of the District Munsiffs in the Travancore-Cochin area.

If these aspects had been given due weight and had been taken into account as they should have been, the District Munsiffs in the State of Madras allotted to Kerala and some of whom were already drawing Rs. 500/- in the scale of Rs. 300-700 should not have been equated with the District Munsiffs of Travancore-Cochin area but should have been equated at least with the Sub Judges in that area. This contention is of course controverted by the State as well as the Central Government in the affidavits that have been filed in these cases as also by some of the respondents who are Travancore-Cochin personnel.

30. That the main principle that has been accepted in the matter of equation of posts is functional parity is clear from the order dated 29-12-1956 (Ext. P2 in O. P. No. 2979 of 1966). The functional parity must be with reference to the nature, powers and responsibilities of the posts is also clear from the same order. This principle, settled by Ext. P2 order, cannot be said to be at variance with what is envisaged by sub-section (5) of section 115 of the States Reorganisation Act. In fact, it is not urged before us that the principle as such violates the guarantee of fair and equitable treatment. What is urged is that the principle has not been properly applied because the nature, powers and responsibilities of the posts have not been properly evaluated. It is difficult to accept the argument that the nature of the posts held by the Dis-

trict Munsiffs in the Travancore-Cochin area on the date of integration was different from the nature of the posts held by the Munsiffs who were allotted to Kerala from the Madras State. The functions as far as we are able to see were identical. They were subject to be corrected in appeal by an appellate court and in given circumstances there was a further appeal before the High Court. They decided disputes by following practically identical procedure. Perhaps realising this aspect what was emphasised was the lack of identity in regard to the powers and responsibilities. This was elaborated with reference to the difference in the pecuniary jurisdiction of Munsiffs in the Travancore-Cochin area and the difference in the territorial jurisdiction of the two sets of Munsiffs. This aspect has been met in the affidavits of the State and Central Governments as well as in the affidavits of some of the respondents. For instance, in the counter-affidavit filed on behalf of the 2nd respondent, Union of India, in O. P. No. 2600 of 1966, this is what is stated in paragraph 3:

"The claim of the petitioner that the post of District Munsiff he was holding in Madras should have been equated with the posts of Additional District Judge in the Travancore-Cochin area is untenable. The contention of the petitioner appears to be based on the reasoning that Munsiffs in Madras exercised jurisdiction over a larger area and that their pay scales were higher. The Government of India applied their mind to those matters and concluded that the claim was untenable. Circumstances such as jurisdiction over a larger territorial area or higher scale of pay are due to various reasons. A higher rate of institution of suits will necessitate an officer for a comparatively smaller area. On the contrary, when the rate of institution of suits is lower the territorial jurisdiction of one officer can be enlarged. The scale of pay also depends upon circumstances such as the financial resources of the State and other matters. The Central Government was of the view that the difference in the area of jurisdiction, scales of pay, etc. were due to historical, geographical and administrative reasons. . . . Equation of posts was effected having due regard to functional parity and consistent with the general principles accepted in this regard.

31. Regarding pecuniary jurisdiction, the 8th respondent in O. P. No. 2600 of 1966 has pointed out in paragraph 12 of his counter-affidavit that the Munsiffs in Devicolum and Shencotta in the Travancore-Cochin area were having pecuniary jurisdiction up to Rs. 5000/-.

32. The point has also been taken in the counter-affidavits that in integrating the Travancore-Cochin Munsiffs who

were allotted to the State of Madras with the Madras personnel who were functioning as District Munsiffs in the Madras State, the equation was effected on the identical basis of the Munsiffs of the Travancore-Cochin area being treated as equivalent to the Munsiffs in the Madras area. This was admittedly done on the basis of Ext. P14 dated 17-7-1957 in O. P. No. 2709 of 1966 which settled the principles of integration in the Madras State. The relevant paragraph of that G. O. runs thus:

"(I) EQUATION OF POSTS

In absorbing transferred officers into the corresponding Madras cadres the main factors to be taken into consideration are indicated below:

a) the nature and responsibilities of the post held by the officer in T. C. State as compared with the corresponding post of Madras State;

b) the extent of the territorial jurisdiction of the post;

c) the minimum qualifications, if any, prescribed for recruitment to the post; and

d) salary of the post."

33. It is clear from this that almost all the aspects emphasised by the petitioners—territorial jurisdiction, powers and responsibilities, and salary—must be taken into account by the Madras Government before integrating the Madras personnel with the Travancore-Cochin personnel. They found after considering these aspects that the Munsiffs of Madras are to be integrated with the Munsiffs in Travancore-Cochin area.

34. We are not satisfied that the petitioners have made out a case that the principles of integration settled by order dated 29-12-1956 (Ext. P2 in O. P. No. 2979 of 1966) had been violated by the equation of the Munsiffs allotted from the Madras State to Kerala with the Munsiffs in the Travancore-Cochin also allotted to Kerala. We reject this contention.

35. Passing on to the next point urged by the petitioners it is necessary to note the order Ext. P7 in O. P. No. 2979 of 1966 dated 27-5-1958. It is by paragraph 2 of this order that certain notional posts were created. We shall read that paragraph:

"In integrating posts on the above basis and on the basis of continuous service in each category, the Government observe that there will be hardship to Malabar personnel in certain categories, in that persons who would have got a promotion by now if they had continued in Madras Service and whose juniors have already been promoted there, will have to wait for some more years to get a similar promotion in Kerala. To mitigate this to some extent the Government are pleased

to order that for purposes of integration of Travancore-Cochin personnel with those allotted from Madras as on 1-11-1956 in accordance with the equation of posts specified in paragraph 1 above, the bifurcation of Malabar will be deemed to have been effected as on 31-10-1956. So the post of a District Judge, 2 District Magistrates and 2 Sub Judges also have to be filled by Malabar personnel, thereby notionally creating vacancies of five posts of Sub Judges to be filled up exclusively by Malabar personnel on that date according to seniority. This is only for seniority and integration and will not entitle them to any arrears of pay on this account."

36. Representations were made by the Travancore-Cochin personnel against such reservation of posts on notional basis for the personnel allotted from the State of Madras. These were forwarded to the Central Government by the State Government and the Central Government after consulting the Central Advisory Committee expressed the view that there is no basis for reserving posts in the manner in which it has been done by the State Government by its order dated 27-5-1958. From the files made available to us it is seen that the Central Government have applied their mind to the question of reservation of posts and after following the procedure prescribed by the Act gave directions to the State Government. We may refer to the explanatory note to letter No. 13/2-60-CAC dated 18th February 1960. In paragraph 13 of that note, this is what is stated:

"The next point for consideration is the propriety of the action of the Kerala Government in notionally creating posts of District Judge, District Magistrates and Sub Judges and appointing Malabar Officers to such posts with retrospective effect. The Committee had objected to a similar action taken by the Kerala Government in regard to the posts of Superintendents and Assistant Secretaries in the Kerala Secretariat, where posts were created notionally and officials from the Travancore-Cochin side were appointed to such posts. The justification given for this action in respect of the judicial Department is that if these officers had remained in Madras, they would have got promotion much quicker than in Kerala. This position has been controverted by the Travancore-Cochin Judicial officers, who have stated that the Malabar officers were far below in the Gradation List of Madras and they could not have expected promotion quickly. In any case, the fact that they would have got promotion, if they had continued in Madras would not justify the creation of notional posts. The interests of these officers are fully safeguarded by specifying that they

of the long delay in launching the prosecution. It is only from this point of view to scrutinise the matter further that we have taken the three distinct categories of cases by way of illustration.

20. We may further observe that in the Supreme Court case of AIR 1967 SC 970 (Supra) and in some other cases, which we propose to discuss presently, there was evidence of the expert regarding the period during which the contents of the sample may remain intact without deterioration. It cannot be disputed that the facts of a particular case and the evidence led in one case cannot be a precedent for the facts of another case. In fact, there can be no precedent on facts, but the precedent is always on a question or proposition of law. Therefore, such cases may not be of much use except to propound propositions of law.

21. In this connection, we may advert to the observations of a Single Bench of the Gujrat High Court in *Manka Hari v. State of Gujrat*, AIR 1968 Guj 88. In that case, the Food Inspector had taken the samples on 17-1-1966 and he had added 16 drops of formalin to the contents of each sample bottle. The sample bottle had been handed over to the Public Analyst on the same day. The report of the Public Analyst was submitted on 25-1-1966. The prosecution was launched on 6-5-1966. Formalin had been added in the prescribed quantity. An argument was advanced on behalf of the accused that prejudice had been caused to the accused on account of the delay in launching of the prosecution. The Division Bench case of this Court, namely, AIR 1965 Madh Pra 180 (Supra) was cited before the learned Judge. The learned Judge distinguished the case on facts. It appears that the Supreme Court case of AIR 1967 SC 970 (Supra) had not been published at the time the judgment in the Single Bench case of Gujrat was delivered. However, the learned Judge referred to other cases. The prosecution in that case was launched on 6-5-1966, i.e. after about 4 months of the samples being taken. In that view of the matter, the question about the contents of the remaining sample bottles being examined by the Director of Central Food Laboratory could be said to be more or less of an academic nature. It was under those circumstances that the learned Judge upheld the conviction of the accused.

22. We may refer to another Single Bench case of the Patna High Court, namely, *The Chairman, Jugsalai Notified Area Committee v. Mukham Sharma*, AIR 1969 Pat 155. In that case, the Food Inspector had taken the samples on 31-5-1965. The judgment, however, does not give any indication as to when the samples were examined by the Public Analyst and when the prosecution was launched. How-

ever, the questions, relating to adding of insufficient preservatives and the prejudice to the accused on account of the delay in launching of the prosecution were argued before the learned Judge and he negatived those contentions by mainly relying on the Supreme Court case of AIR 1967 SC 970 (Supra).

23. In the present cases however, no evidence was led consisting of the testimony of an expert. Therefore, it is not possible to state with precision for what period the contents of the sample bottles might remain intact and, therefore, we may take the opinion given by the experts examined in the Supreme Court case of AIR 1967 SC 970 (Supra) and AIR 1968 Guj 88 (Supra) as indication of the probable period for which by taking precautions, the samples might be kept intact.

24. We may observe that ordinarily, milk would start deteriorating and would start becoming curd after about 1½ to 2 days and by adding preservatives, it might be kept intact at the most for a month or a month and a half. However, if more precautions are taken by keeping the contents in a refrigerator, the contents could be preserved without deterioration for a period of four to six months. But that is the limit to which milk might be preserved in good condition. It can certainly not be preserved in the same condition beyond that period. In the light of these observations, we now propose to consider the three types of illustrative cases.

25. As indicated by us earlier, the first type would be where the analysis by the Public Analyst is unduly delayed and there may be facts or circumstances to indicate a probability of the contents having deteriorated. In addition, the prosecution itself is delayed so that the right of the accused to challenge the report of the Public Analyst is defeated. In a case of this type, we may observe that the Court would have no hesitation in acquitting the accused because of the delay in conducting the analysis and the delay in launching the prosecution so as to defeat the right of the accused to challenge the report of the Public Analyst. Such a case would present no difficulty.

26. Another type of case would be where there is no undue delay in conducting an analysis and where preservatives are added in the prescribed quantity. In some of the cases mentioned by us earlier, the analysis was conducted on the same day or on the next day. In that event, adding of preservatives in the prescribed quantity would not have any material bearing and if some delay which cannot be dubbed as undue delay be caused in launching the prosecution, we do not think that the delay by itself would be fatal to the prosecution case. If the Court finds that the report of the Public Analyst

cannot be challenged on any probable ground, the question of getting the samples further examined by the Director of Central Food Laboratory, might be said to be of an academic interest and the Court will not acquit the accused merely because there has been some delay in launching the prosecution. In that event, the conviction of an accused can be upheld on the principles indicated by their Lordships of the Supreme Court in AIR 1967 SC 970 (Supra). Thus, we are clearly of opinion that a conviction cannot be set aside or an accused cannot be acquitted on a hypothetical conjectural prejudice said to have been caused to an accused by the mere fact of some delay being caused in launching the prosecution.

27. The above discussion would dispose of illustrative cases mentioned in sub-para (ii) (a) of paragraph 8 of the judgment. We may now consider a situation mentioned in sub-para (ii) (b) of the said paragraph. Different views have been expressed in different cases mentioned above. In such types of cases, the view taken in one set of cases is that the question of prejudice being caused to an accused would be more or less of an academic nature, especially when preservatives have been added or the test by the Public Analyst is conducted expeditiously. In the other set of cases, mentioned by us above, a contrary view has been expressed suggesting that an inordinate delay in launching the prosecution so as to defeat the right of the accused under Section 13 (2) of the Act would lead to an inference of prejudice being caused to the accused. As we are not required to deal with such a case in the present appeals, we would reserve our opinion for some suitable occasion.

But, we may observe that it has been specifically laid down by their Lordships of the Supreme Court in AIR 1967 SC 970 (Supra) that their Lordships should not be understood as laying down that in every case, where the right of the vendor to have his sample tested by the Director of Central Food Laboratory is frustrated, the vendor cannot be convicted on the basis of the report of the Public Analyst. What their Lordships have laid down is that it is necessary to find out if any prejudice has been caused to an accused on account of inordinate delay in launching the prosecution. We have no doubt that if prejudice is inferable in a particular case from the inordinate delay in launching the prosecution, the conviction has necessarily to be set aside. But, if no such prejudice is inferable, in that event, it is doubtful if the conviction could be set aside on account of inordinate delay in launching the prosecution even in the absence of prejudice caused to the accused. That will be the necessary corollary of the pronouncement of their Lordships

of the Supreme Court in AIR 1967 SC 970 (Supra). However, as already indicated by us, we would reserve our opinion on the question whether a long delay in launching the prosecution would be an indication of prejudice to an accused. In the present appeals, consideration of that question will be of an academic interest, as in our opinion, the present appeals squarely fall within the ambit of illustrative case No. 3 mentioned by us earlier, and it is for that reason that we do not think it necessary to have that question decided by a Full Bench in spite of there being a controversy and conflict of views on that point.

28. Then, we may consider the third type of illustrative case. Where the report of the Public Analyst may not have been unduly delayed, but no proper precautions are taken by adding preservatives in the prescribed quantity and for that reason, it may be open to the accused to challenge the report of the Public Analyst, or there may be infirmity of some other kind so that the report of the Public Analyst cannot be relied on for basing a conviction, although it may continue to be good evidence. In such a case, if the prosecution is unduly delayed, the prejudice to the accused would be obvious, if his right under Section 13 (2) of the Act stands defeated on account of the long delay in launching the prosecution. In our opinion, the Court ought to decline to base a conviction on the basis of the report of the Public Analyst. We further feel that the report of the Public Analyst, which continues to be good evidence, might be relied on where preservatives are added in the prescribed quantity and the analysis is not unduly delayed by the Public Analyst. In such a case, the question of burden of proof also might become material. But the prosecution has to establish its case beyond any shadow of doubt; while the accused might suggest a probable and reasonable explanation for not accepting the report of the Public Analyst. Non-adding of preservatives in the prescribed quantity or a long and undue delay in conducting the analysis might amount to such a reasonable and probable explanation on behalf of the accused. Therefore, where inadequate preservatives are added or where the report of the Public Analyst is inordinately delayed, no conviction, in our opinion, can be based on the report of the Public Analyst and where the launching of the prosecution is inordinately delayed, the question whether the accused made a demand for exercise of his right conferred by Section 13 (2) of the Act would be wholly immaterial, as prejudice would be inferable from the long delay in launching the prosecution, especially in view of the fact that the report of the Public Analyst cannot form the basis of conviction either

on account of insufficiency of preservatives or on account of the analysis being inordinately delayed. We may further observe that the present cases belong to this category where prejudice to the accused is obvious from the facts themselves. In such an event, it is not for the accused to say positively that the contents of the sample could have or, in fact, had deteriorated. But the burden would be on the prosecution to satisfy the Court that the contents remained intact in spite of such an infirmity. The position, however, will be different if there be no infirmity of the kind indicated by us.

29. To conclude, we are of opinion that where the analysis by the Public Analyst is inordinately delayed and the launching of the prosecution also is inordinately delayed, prejudice to the accused being obvious, conviction cannot be based on the report of the Public Analyst. Where, however, the analysis by the Public Analyst is not inordinately delayed and the preservatives are added in the prescribed quantity, the mere fact of some delay in launching the prosecution will not entitle the accused to claim an acquittal and the report of the Public Analyst can form the basis of conviction. Lastly, we are of the opinion that where report of the Public Analyst is not unduly delayed, but there is an infirmity in the prosecution case by failure to add the prescribed quantity of preservatives to the samples, prejudice to the accused being obvious, no conviction can be based on the report of the Public Analyst. The same result will follow if in addition to insufficiency of preservatives, the analysis by the Public Analyst is inordinately delayed.

30. We have already indicated that it is not necessary for us to consider the illustrative case No. (ii) (b) mentioned in paragraph 8 of the judgment. Therefore, we would reserve our opinion on that aspect for some suitable occasion, nor do we think it necessary to refer the said question for consideration by a Full Bench as it would be of an academic interest so far as the present appeals are concerned.

31. As already indicated by us earlier the present cases belong to the third category, where prejudice to the accused would be obvious from the fact that preservatives were not added in the prescribed quantity. Although, the analysis by the Public Analyst may have been conducted with a reasonable time, launching of the prosecution was unduly delayed and the respective respondent's right conferred by Section 13 (2) of the Act stood defeated on account of such delay; with the result that the respective accused could not challenge the report of the Public Analyst on account of laches on the part of the prosecution. In the view that we take, we do not think that an

interference with the acquittal of the respective respondent would be warranted in the present appeals. Therefore, we dismiss these appeals.

Appeals dismissed.

AIR 1970 MADHYA PRADESH 131 (V 57 C 27)

K. L. PANDEY AND A. P. SEN, JJ.

Manoharlal Verma, Petitioner v. State of Madhya Pradesh and others, Non-applicants.

Misc. Civil Case No. 91 of 1968, D/- 5-1-1970, against order of P. V. Dixit C. J. and K. L. Pandey, J. in Misc. Petn. No. 180 of 1965, D/- 10-1-1968.

(A) Civil P. C. (1908), Ss. 114 and 151 — Judicial or quasi judicial proceedings — No inherent power to review apart from statute — Statute not providing for review — Power cannot be assumed to exist—1961 MPLJ 944 & AIR 1966 Madh Pra 43 (FB) & AIR 1953 SC 1909, Rel. on. (Para 2)

(B) High Court Rules and Orders — M. P. High Court Rules, Chap. 1, Rr. 3 and 4 — Order of High Court passed by two Judges on Writ Petition — One of them retiring — Review against order — Order 47, Rule 5, Civil P. C. does not in terms apply — Review must be heard by Bench of two judges and not by the remaining judge in view of R. 3 — Even if R. 3 does not apply it should be heard by bench of two judges as provided by R. 4 especially when the Chief justice has directed and constituted a bench for hearing it — (Civil P. C. (1908), O. 47, R. 5).

(Para 3)
Cases Referred: Chronological Paras
(1966) AIR 1966 Madh Pra 43 (V 53)
= 1966 MPLJ 170 (FB), Thakur
Himmatsingh v. Board of Revenue 2
(1962) Misc. Petn. No. 10 of 1962,
D/- 5-12-1962 = 1963 Jab LJ 88,
Deorao Krishnarao Jadhao v.
Board of Revenue 2
(1963) AIR 1963 SC 1909 (V 50),
Shivdeo Singh v. State of Punjab 2
(1961) 1961 MPLJ 944 = ILR (1960)
Madh Pra 253, Rajaram v. Rani
Jamt Kunwar Devi 2
(1922) AIR 1922 PC 112 (V 9) =
49 Ind App 181, Chhajju Ram v.
Neki 3

Ram Kumar Verma, for Applicant;
A. R. Choubbe, for Non-applicants.

PANDEY J.:— This is an application for review of a final order passed by a Division Bench of this Court in Miscellaneous Petition No. 180 of 1965 dated January 10, 1968, to which one of us (Pandey, J.) was a party. The other Judge, Dixit C. J., has now retired. The

precise question for consideration in this situation is whether, if an application for review lies, it should be heard by Pandey, J. sitting singly or by a Division Bench of this Court or by a still larger Bench.

2. The general law is that, in judicial and quasi-judicial proceedings, there is, apart from the statute, no inherent power of review and, therefore, when the statute does not provide for review, the power of review cannot be assumed to exist: *Rajaram v. Rani Jamit Kunwar Devi*, 1961 MPLJ 944; *Deorao Krishnarao Jadhao v. Board of Revenue*, Misc. Petn. No. 10 of 1962, D/-5-12-62 (reported in 1963 Jab LJ 88) and *Thakur Himmatsingh v. Board of Revenue*, 1966 MPLJ 170 = (AIR 1966 Madh Pra 43 (FB)). There was a difference of opinion on the question whether an order passed by the High Court under Art. 226 of the Constitution could be reviewed in the absence of any provision authorising it so to do. However, in *Shivdeo Singh v. State of Punjab*, AIR 1963 SC 1909 the Supreme Court observed that the power of review to prevent miscarriage of justice or to correct grave and palpable errors inhered in every Court of plenary jurisdiction and that there was nothing in Article 226 of the Constitution to preclude the High Court from exercising it. Thus the point is no longer open to doubt or debate.

3. The Rules framed by this Court for regulating its proceedings under Article 226 of the Constitution do not provide for review of any order passed in those proceedings. However, Rr. 3 and 4 of Chapter I of the Rules of this Court provide as follows:

"3. In cases not provided for by Order XLVII, R. 5 of the Code of Civil Procedure, an application for a review of a decree or order shall be heard:—

(a) if the decree or order, review of which is applied for, is passed by a Judge alone, by a Bench of two Judges;

(b) if the said decree or order was passed by a Bench of two or more Judges, by a Bench consisting of as many Judges as the Bench of whose decree or order review is applied for.

4. Save as provided by law or by these rules or by special orders of the Chief Justice, all matters shall be heard and disposed of by a Bench of two Judges."

It is true that when such a situation arises in a case covered by O. 47, R. 5 of the Code of Civil Procedure, the application for review must be heard and disposed of by the remaining Judge sitting alone: *Chhajju Ram v. Neld*, AIR 1922 PC 112. But Order 47, Rule 5 does not proprio vigore apply to proceedings under Article 226 of the Constitution, to which the principles underlying some of the provisions of the Code have been applied by analogy. That being so, the provisions of Order 47, Rule 5 cannot be invoked in derogation of Rr. 3 and 4 of this Court.

It is obvious that, in this case, the order as such is not covered by O. 47, R. 5. That being so, the application for review must be heard by a Bench of two Judges as provided by Rule 3. Even if the matter is regarded as one to which Rule 3 does not apply, it must still be heard by a Bench of two Judges as provided by R. 4, more particularly for the reason that my Lord the Chief Justice has so directed and constituted this Bench.

4. The case will now be posted in the usual course for bearing the parties on merits.

Order accordingly.

AIR 1970 MADHYA PRADESH 132 (V 57 C 28)

P. K. TARE AND K. L. PANDEY, JJ.

Narayan Chandra Mukherji, Petitioner v. State of Madhya Pradesh, Bhopal and others, Respondents.

Misc. Petn. No. 41 of 1965, D/- 21-7-1969.

(A) States Reorganisation Act (1956), Section 115 (5) — Central Government alone has exclusive power to effectuate integration of services in newly formed States — It can take all manner of assistance in this matter from State Government, including preparation of provisional gradation list — There would be no unauthorised delegation of power if Central Government exercises control over activities of State Government and ultimate integration is done with sanction and approval of Central Government. AIR 1969 Punj 34 and AIR 1965 Guj 23 (FB). Dissented from. (Constitution of India, Article 245.)

Under Section 115 (5) of the States Reorganisation Act, the Central Government is the sole repository of the power to effectuate the integration of services in the new States and the States of Andhra Pradesh and Madras. AIR 1961 Mys 210. Rel. on: AIR 1969 Punj 34, AIR 1965 Guj 23 (FB). Dissented from.

(Para 27)

For the work of integration of services the Central Government can take all manner of assistance from the State Government, including the preparation of provisional gradation lists and there will be no unauthorised delegation of statutory power so long as, the Central Government exercises general control over the activities of the State Government in regard to the integration of services; and the ultimate integration is done with the sanction and approval of the Central Government. AIR 1968 SC 850, Foll.

(Para 28)

The provisional gradation prepared by the State Government is not therefore,

open to challenge on the ground that, that work could not be entrusted to the State Government, but the position would be different in regard to the final gradation list not prepared with the sanction and approval of the Central Government. If the State Government itself confirms a provisional gradation list made by it and publishes it as rules made by it under the proviso to Article 309 of the Constitution, its character as a gradation list made by the State Government is not altered by the consideration that it incorporates also the decisions of the Central Government under clause (b) of Section 115 (5) of the Act on representations made to it by the affected persons. In such circumstances, the final gradation list cannot be regarded as one made by the authority named for the purpose in Section 115 (5) of the Act. (Para 28)

It is true that, speaking generally, the executive power of a State extends to all matters enumerated in the State list, including State public services over which the State Legislature has power to make laws and the expression "State public services" in Entry 41 is wide enough to include the integration of these services. But there are provisions such as Articles 3, 4, 73 (1) proviso and 162 in the Constitution which make the exercise of this power subject to other provisions of the Constitution. The States Reorganisation Act, 1956, was enacted by Parliament which derived its power so to do under Articles 3 and 4 of the Constitution. Therefore, the executive power of the Central Government in regard to matters covered by that Act, including the State public services, will have a subordinating and impairing effect on the executive power exercisable by the State in regard to those matters. Therefore, it cannot be contended that the Government of a recognised State alone has exclusive power to effectuate the integration of its services. (Para 17)

(B) States Reorganisation Act (1956), Section 115 (5) (b) — Government servant aggrieved by provisional gradation list has statutory right of representation — Refusal to supply details of service in matter of equation of posts is denial of reasonable opportunity to represent his case — Rejection of representation by Central Government and also final gradation list published subsequently is vitiated — Fairness is one of the attributes of natural justice — (Constitution of India, Articles 226 and 311).

Any person who is affected by the provision of Section 115 has a statutory right of representation to the Central Government. A final gradation list prepared by, or with the sanction of, the Central Government is the foundation of a right of representation under Cl. (b) of Sec-

tion 115 (5) of the Act. In a common gradation list, civil servants of several administrative units with dissimilar designations, varying duties, functions and jurisdiction and differing conditions of service are brought together. Further, civil servants of one unit are ignorant of the service details of those of other units and it is only on the basis of these service details that an aggrieved civil servant can make an effective representation against the provisional gradation list. Indeed, this was realised at an early stage and the notification publishing the provisional gradation list expressly provided that a civil servant desirous of making a representation against the provisional gradation list could obtain any relevant information about the service details of any person included in that gradation list.

(Paras 31, 32)

Fairness is one of the attributes of natural justice and it implies that, where there is a right of representation the material on which such representation could be made should, on demand be made available to the aggrieved person. Even apart from this, this is implicit in the statutory right itself, for it envisages a reasonable opportunity of making representation and not merely an empty formality of showing that an opportunity was afforded. Therefore, refusal of the State Government to give information on these points to a civil servant aggrieved by the provisional gradation list is denial of a reasonable opportunity to him to make a representation against the provisional gradation list. This by itself without more, vitiates the order of the Central Government rejecting his representation as also the final gradation list subsequently published by the State Government.

(Para 32)

(C) States Reorganisation Act (1956), Section 115 (5) (b) — Right of a civil servant to make representation to Central Government — Not exhausted by making one representation.

A person who is affected by the provisions of Section 115, has a statutory right of representation to the Central Government. The authority named in Section 115 for effectuating the division and integration of services is the Central Government. Therefore, strictly speaking, it is only the ultimate act done with the approval of the Central Government which can be foundation of a right of representation under clause (b) of Section 115 (5) of the Act. In so far as that clause requires the Central Government to ensure fair and equitable treatment to all persons affected by the provisions of the section, the right of representation is not exhausted by making only one representation. The work of integration is a complex process and its effectuation involves several stages. The statutory right

of fair and equitable treatment implies that an aggrieved civil servant should be able to make representations from time to time. (Para 30)

(D) States Reorganisation Act (1956). Section 115 (5) — Integration of services under — Powers of Central Government are quasi judicial — It must give reasons for its order rejecting the representation of a civil servant — Even if the powers be regarded as administrative, the Central Government is obliged to deal with the matter in conformity with rules of natural justice — Person concerned should be given reasonable opportunity to represent his case — But personal or oral hearing is not an essential postulate of natural justice — (Constitution of India, Articles 226, 311).

While rejecting the representation made by a civil servant in the matter of integration of service the Central Government must give reasons for its order. Having regard to the nature of powers conferred on the Central Government under Section 115 (5) of the Act relating to the integration of services, the serious consequence likely to arise from the exercise of those powers on the rights of civil servants and the requirement that, in this matter, the Central Government must ensure to them fair and equitable treatment and also properly consider any representation made by them, it is clear that the powers are quasi judicial. Even if the functions be administrative, reasons must be given for the order if so required by the statute. Case law discussed. (Paras 33, 35)

Under the provisions of Section 115 (5) the Central Government has been given legal authority to deal with the integration of services which involves determination of questions relating to equation of posts and fixation of inter se seniority in gradation lists. Such determination is bound to affect the rights of numerous public servants drawn from several administrative units. These public servants had vested rights in the units to which they formerly belonged. In larger sense, there would be a lis between a public servant who claims that his post should be equated with those of a higher grade and others who oppose it. The same thing may be said about the determination of relative seniority. In any event, it is not essential for a statutory function to be quasi judicial that there should be a lis in the strict sense. It is equally true that it is not expressly provided in the Act that, in this matter, the Central Government must act judicially, but there are indications in the Act which clearly point in that direction. The Central Government is enjoined to ensure to the civil servants fair and equitable treatment and, this by itself, implies that it must act in a quasi judicial manner ensuring to the civil

servants fairness in the proceedings and a determination of the questions involved on objective considerations. The duty to act judicially, envisaging observance of rules of natural justice, should be inferred whenever power is given to an authority or body of persons to determine questions affecting the rights of citizens. (Paras 34, 35)

Even if the powers be regarded as administrative, the Central Government is obliged to deal with the matter relating to the integration of services, involving as it does, serious consequences in conformity with the rules of natural justice. The rules of natural justice are not enacted rules. The question whether, in a given case, the requirements of natural justice have been met depends upon the facts and circumstances of the case and the procedure therein adopted in the background of the statute and the rules framed thereunder. Case law discussed. (Para 36)

One of the essentials of rules of natural justice is that the person concerned should have a reasonable opportunity to represent his case. This opportunity must provide an occasion to correct or contradict any statement relevant to the matter. Unless the recommendations of the advisory committee contained any relevant statement of fact prejudicial to the civil servant which he did not already have an opportunity of contradicting or correcting, he was disentitled to have access to those recommendations for presenting his case. An opportunity for a personal or oral hearing, is not an essential postulate of natural justice. Case law discussed. (Para 36)

(E) Civil P. C. (1908). Pre. — Interpretation of Statutes — Doubtful meaning — Meaning of doubtful word is known by company it keeps and by reference to words associated with it.

Where there is a doubt about the meaning of the words of a statute, it is found not so much in a strictly grammatical or etymological propriety of language, nor even in its proper use as in the subject or in the occasion on which they are used and the object to be attained. The meaning of a doubtful word is known by the company it keeps and is ascertainable by reference to the words which are associated with it. It is a well established rule that associated words are understood in a cognate sense, taking, as it were, their colour from each other. The sense and meaning of a statute can be gathered only by comparing one part with another and by viewing all parts together as one whole and not one part only in isolation. AIR 1958 SC 353 Rel on. (Para 22)

(F) States Reorganisation Act (1956), Ss. 116(2), 115(7) — Under S. 116(2) State Government is empowered to pass in relation to any allocated servant, any order affecting his continuance in any post or

office previously held by him — Provisional arrangement may prejudice the public servant — But that is only a temporary disadvantage which is expected to be corrected at the time of final arrangement.

(Para 37)

(G) States Reorganisation Act (1956), S. 115 (7) — Protection under — Provisional gradation list — Public servant placed on lower pay scale cannot contend that new pay scales are to his disadvantage — He has option to retain his old pay scale.

(Para 37)

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C. P. Sen, for Petitioner; K. K. Dubey Govt. Advocate, for Respondents.

PANDEY J.:— This is a petition under Article 226 of the Constitution to call up and quash by certiorari three orders: (i) one dated 15 May 1963 by which the State Government provisionally absorbed the petitioner as from 1 November 1956, on a post borne on the cadre of Overseers Electrical/Mechanical for purposes of the Unification of Pay Scales and Fixation of Pay on Absorption Rules, 1956; (ii) another dated 1 April, 1964 by which the petitioner was intimated that the Central Government had rejected his representation dated 29 December, 1961 against the provisional combined gradation list and (iii) the third dated 4 June, 1965 by which the gradation list was made final as published in the M. P. Rajpatra Extraordinary dated 18 June, 1965. The petitioner has further claimed a writ of mandamus or any other suitable writ or order directing that the post formerly held by him in the erstwhile State of Bhopal be equated with posts higher than those held by Overseers and his pay scale be refixed accordingly.

2. The facts giving rise to this petition may be shortly stated. Immediately before 1 November, 1956, when the main provisions of the States Reorganisation Act, 1956, (hereinafter called the Act) came into force, the petitioner was employed as a confirmed Superintendent (Mechanical) in the permanent establishment of the Public Works Department of the erstwhile Part C State of Bhopal. In accordance with the provisions of Sections 115 (1) and 116 (1) of the Act, he was deemed to have been allotted to the new State of Madhya Pradesh and was also likewise deemed to have been appointed in that State to the same post which he continued to hold till June 1963.

3. By a notification No. 6057-4189-XIX-E, dated 30 September 1961, the State Government published the provisional combined gradation list of Class III (Executive) posts in the Buildings and Roads and Irrigation Establishment of the Public Works Department of the new State of Madhya Pradesh. In that notification, the principles formulated for equation of posts and also for determination of relative seniority for the purpose of effectuating integration of services of the various units of the new State were set out as follows:

"I. In the matter of equation of posts:
(i) where there were regularly constituted similar cadres in the different integrating units, the cadres will ordinarily be integrated on that basis; but

(ii) where, however, there were no such similar cadres, the following factors will be taken into consideration in determining the question of posts—

(a) nature and duties of a post;

(b) powers exercised by the officers holding a post, the extent of territorial or other charge held or responsibilities discharged;

(c) the minimum qualifications, if any, prescribed for recruitment to the post; and

(d) the salary of the post.

II. In the matter of determining relative seniority:—

(a) such seniority will be determined on the basis of the length of continuous service, whether temporary or permanent, in a particular cadre (excluding periods for which an appointment is held in a purely stop-gap or fortuitous arrangement);

Provided that the inter se seniority of Government servants drawn from the same unit will not ordinarily be disturbed; and

(b) other factors being equal, seniority will be determined on the basis of age."

4. It was also stated in the aforesaid notification that, in accordance with those principles for equation of posts, the post of Superintendent (Mechanical) of the Bhopal unit, which was held by the petitioner, was equated with the posts of Overseer (Electrical/Mechanical), Divisional Artificer (Diploma-holder) and Mechanical Subordinate of the Mahakoshal unit and Overseer (Mechanical) of the Madhya Bharat and Vindhya Pradesh units. Further, the petitioner was assigned position No. 22 (last position) in the list of seniority of persons holding these equated posts in Category II.

5. The same notification added:

"It is further notified that any Government servant feeling aggrieved by these provisional decisions is by virtue of Section 115 (5) of the States Reorganisation Act entitled to make a representation to the Central Government within one month from the date of publication of these orders in the Gazette. The representation should be addressed to the Special Secretary to Government, Madhya Pradesh, General Administration (Integration) Department, and should be sent by registered post so as to reach him within the specified period. Every such representation will be duly considered by the Advisory Committee constituted by the Central Government for the purpose under Section 115 (5) *ibid* and it will be forwarded for final orders to the Central Government with their recommendation.

Note 1:— A Government servant desirous of submitting a representation may obtain any relevant information about the service details of any person or persons included in the gradation list by making an application to the Under Secretary, General Administration (Integration) Department for obtaining copies of relevant documents on payment of the requisite copying fee.

Note 2:— The time taken in obtaining copies will be excluded in computing the period specified above for submitting representation."

6. This notification was sent to the petitioner by his official superior on 23 November 1961. Even before that, by an application dated 6 November 1961, the petitioner had asked for information about the service details of persons holding the equated posts. By memo No. 6808/XIX/E, dated 6 November 1961, he was intimated that information as regards duties, powers, territorial charges, appointment orders, confirmation orders, technical and other qualifications, rules for fixing seniority etc. could not be supplied. The petitioner then applied for copies of the proforma, referred to in the aforesaid memo dated 6 November 1961, relating to two government servants placed in a higher category and, after obtaining them, submitted a representation dated 29 December 1961 claiming that his post should be equated with the posts mentioned in Category I of the provisional gradation list and that his seniority should be so fixed in that category that he is assigned the third place in that list. By memo No. 2235/55/XIX/E, dated 1 April 1964, the State Government intimated to the petitioner that his representation was rejected by the Government of India in consultation with the State Advisory Committee. Subsequently by the notified order No. 2582-3423-XIX-E-65, dated 4 June 1965, the provisional gradation list was made final and was published in the M. P. Rajpatra Extraordinary dated 18 June 1965.

7. Even when the aforesaid representation dated 29 December 1961 was under consideration, the State Government issued an order No. 3090/618/XIX/E, dated 15 May 1963 whereby—

(1) as from 1 November 1956, the petitioner was provisionally absorbed against a post of overseer electrical/mechanical and included in the cadre of overseers electrical/mechanical for purposes of the Unification of Pay Scales and Fixation of Pay on Absorption Rules, 1959; and

(2) it was directed that he would be deemed to be holding that post in an officiating/temporary capacity in the unified scale until further orders.

8. The petitioner has mainly challenged the order of the Central Government rejecting his representation against the provisional gradation list, the final gradation list dated 4 June 1965 and the order dated 15 May 1963 relating to fixation of pay *inter alia* on the following grounds:

(i) By Section 115 (5) of the Act, the Central Government has been constituted the sole authority (a) to make division and integration of services among the new States; (b) to ensure fair and equitable treatment to all persons affected by the provisions of the section and also (c) to

ensure proper consideration of any representation made by such persons. The Central Government is not competent to delegate these statutory powers and duties to any other authority either in the Union or in the State. Even so, it delegated the work of integration of services of the new State of Madhya Pradesh to the State Government with the consequence that the combined gradation lists prepared by the latter were incompetent, illegal and of no effect.

(ii) By refusing to supply to the petitioner information about the service details of the persons included in the provisional combined gradation list such as duties, powers, territorial charges, appointment orders, confirmation orders, technical and other qualifications etc., the State Government denied to him a fair opportunity to make representation.

(iii) The order of the Central Government on the petitioner's representation, as communicated by the State Government by memo No. 2235/55/XIX/E, dated 3 April 1964, to the effect that the representation was rejected in consultation with the State Advisory Committee is no order in the eye of law because it is not a speaking order in that it does not give any reasons therefor and it was also passed in disregard of the rules of natural justice after taking into account the recommendations of the State Advisory Committee without disclosing those recommendations to the petitioner and also without affording to him an opportunity of being heard against them.

(iv) By the impugned order dated 15 May 1963, which was passed *ex parte* without affording to the petitioner an opportunity of being heard against it and also in disregard of the protection afforded by Section 115 (7) of the Act, the State Government demoted the petitioner to a lower post and placed him on a lower scale of pay with the consequence that he suffered enormous loss in emoluments as disclosed in Annexures XIV to XX.

9. In the return filed on 5 July 1965 on behalf of the State Government, the Central Government and the Secretary to the State Government in the Public Works Department, it was stated that, under the provisions of the Act, the responsibility for integrating the services of the successor State was that of the successor State itself and the Central Government was authorized only to see that the allocated servants were treated fairly and their representations were properly heard. There was, in regard to this authority of the Central Government, no delegation. It was not disputed that the petitioner had applied for service details of the persons included in the combined gradation list such as duties, powers, territorial charges, appointment orders, con-

firmation orders, technical and other qualifications and information relating to these details were not supplied to him because they did not constitute "relevant information." However, there was, by reason of refusal to supply what was not relevant information, no denial of a fair opportunity to make representation against the provisional combined gradation list. The order passed by the Central Government on the petitioner's representation was not a judicial order and it was not, therefore, necessary to give reasons for its rejection. That being so, the order does not suffer from any of the defects attributed to it by the petitioner. Finally, in regard to provisional absorption of the allocated government servants and fixation of their pay scale, the matter was entirely within the jurisdiction of the successor State and there was no question of giving to them any opportunity of making any representation in the matter because it was open to them, at their option, to retain their old scales of pay.

10. When the case came up for hearing before us on 21 August 1968, the judgment of the Supreme Court in *Union of India v. P. K. Roy*, AIR 1968 SC 850 had been reported. In view of the law laid down in that case, the learned Government Advocate, who appeared for the respondents, found himself unable to support the position taken in the return, requested for and obtained an adjournment for taking steps to amend the return and subsequently applied for leave so to do. The amendments sought to be made disclose a complete change of front. While it was claimed in the return that the work of effectuating the integration of services in the successive State was the responsibility of that State itself and the Central Government was authorised only to see that the allocated servants were treated fairly and the representation made by them were properly considered, *an endeavour has now been made by the proposed amendments to show inter alia that it was at the instance of the Central Government and, in accordance with the principles formulated by it, that the work of integration of services was done by the successor State and then "the equation of posts and the fixation of grades was done as indicated below and the same was approved by the Central Government"*.

Not unexpectedly, the petitioner opposed the application for amendment as not made in good faith and also as trying to introduce, as an afterthought, a new, totally different and altogether inconsistent case in order to bring it within the rule laid down in AIR 1968 SC 850 (Supra). In view of the forthright stand taken in the return filed in this case both by the State Government and the Central Government to the effect that the work of effectuating the integration of services was

the responsibility of the successor State and also in the background of the instructions issued by the Central Government from time to time in regard to the matter, we entertained some doubt about the correctness of the statement that, in this particular case, approval of the Central Government was obtained "to the equation of posts and the fixation of grades". We, therefore, directed that the relevant communications by which such approval was sought and obtained be produced before us.

11. We have indicated that, in this matter, the Central Government had issued instructions from time to time. It will be recalled that, on 6th and 7th December 1956, there was a conference of the Chief Secretaries and other representatives of States in New Delhi. The Central Government had proposed that a committee presided over by a Joint Secretary of the Central Government would deal with the integration of the State service personnel. All the State representatives, who did not accept that proposal, prevailed upon the Central Government to leave the work of integration entirely to the State Governments and also to give them freedom to devise their own machinery for the purpose. Even so, the Central Government decided to retain with it the work of attending to representations that might be made by service personnel affected by the reorganisation of States. So, the Central Government sent to the State Governments concerned the letter No. 62/2256-SR II, dated 3 April 1957 conveying the following decisions:

"3. After taking into consideration the views expressed by the State representatives in the matter, the Government of India have now decided that the work of integration of services should be dealt with by the State Governments themselves in the light of the general principles already devised and agreed to at the summer Conference of Chief Secretaries. They hope that in devising the appropriate machinery for handling the work of integration of service personnel the State Government will pay due regard to the need for constituting the machinery in such a manner as would inspire confidence among persons drawn from different units.

4. It has also been decided that Advisory Committees should be established under the provision quoted in paragraph 1 above for assisting the Central Government in dealing with all representations from service personnel affected by reorganisation as follows:—

(i) a committee at the Centre to deal with all representations from persons belonging to State Services composed of a member of the Union Public Service Commission as Chairman and a retired High Court Judge and a senior administrator serving or retired, as Members.

(ii) a Committee in respect of each of the reorganised States of Andhra Pradesh, Bombay, Kerala, Madhya Pradesh, Madras, Mysore, Punjab and Rajasthan to deal with representations from members of the Services other than State Services, composed of a Member of the State Public Service Commission as Chairman and a Deputy Secretary of the Government of India and a nominee of the State Government as Members:

The last-mentioned Committee may co-opt as may be necessary nominees of the Administrative Secretary in the State Government and the Head of the Department concerned to assist it in the disposal of cases relating to each Department. Necessary steps are being taken to appoint Members of the above Committees accordingly.

... ..

5. The State Governments are requested to give these arrangements necessary publicity among the service personnel concerned and also take steps to forward to the Government of India all such representations along with a brief statement of each case for being considered by the Committee."

12. It will be readily seen that, according to the aforesaid decisions, the work of integration was left to be dealt with by the State Governments themselves in the light of certain general principles formulated and already agreed to at an earlier conference. That is how it was understood by the Mysore State Government which prepared the provisional and final gradation lists without any reference to the Central Government: *M. A. Jaleel v. State of Mysore*, AIR 1961 Mys 210. The Bombay Government too proceeded so to do and adopted a resolution dated 25 October 1957 in connection with equation of posts. The Central Government, however, directed a reconsideration of the 'resolution' when a number of affected persons made representations to it: *A. J. Patel v. State of Gujarat*, AIR 1965 Guj 23 (FB). Even in this State, the decision conveyed by the letter dated 3 April 1957 was understood in the same sense and the State Government prepared provisional and final gradation lists. However, since the State Government had been advised that, under Section 115 (5) of the Act, the entire responsibility for the integration of services was that of the Central Government and, therefore, that Government should publish the final gradation list, clarification was sought on the point. In the letter No. 2552/I-Integ. dated 10 July 1959, addressed to the Central Government, the State Government stated inter alia as follows:—

"The State Government are advised that since under Section 115 (5) of the States Reorganisation Act, the entire responsi-

bility for the integration of services is that of the Central Government the final list should be published by the Central Government. Since this will involve a lot of work at the Central Government's level, an alternative solution seems to be that these lists be published by us after duly incorporating the orders passed by the Central Government and it may be specified in the preamble that they are published under the authority of the Central Government."

In the letter No. 9/10/59-SR(S) dated 11, November 1959 sent in reply, a copy of which was forwarded to each of the concerned State Governments, the Central Government, while refraining from saying anything about the extent of its responsibility under Section 115 (5) of the Act for the integration of services, conveyed its decision about the procedure to be followed for publishing the final common gradation lists as follows:

"I am directed to refer to State Government's letter No. 2552/I-Integration, dated the 10th July, 1959, on the above subject and to say that the Government of India have decided as follows:—

(1) As regards procedure for publishing Common Gradation lists, the Government of India agree that the State Government will publish the final common Gradation Lists in its Official Gazette, after following the procedure indicated herein:

(i) The State Government has to Satisfy itself that the following steps have been taken before it decides to publish the Common Gradation Lists.

(a) that the Government of (Name of the State) effected the integration of services of the (Name) Department/Establishment and prepared the provisional Common Gradation Lists in accordance with the principles laid down by the Central Government;

(b) that the Government of (Name of the State) published in the Official Gazette of the State the said provisional Gradation lists and afforded an opportunity to the service personnel affected to represent to the Government of India under Section 115 (5) of States Reorganisation Act, 1956.

(c) that the representation, if any, of officers affected had been decided in consultation with the Central Advisory Committee State Advisory Committee as envisaged under Section 115 (5) of States Reorganisation Act, 1956 and

(d) that the above-mentioned decisions have been correctly incorporated in the final Common Gradation Lists.

(ii) The State Government will prefix to the notification publishing final Common Gradation Lists a preamble (copy enclosed). The preamble directed to be prefixed reads:

"In exercise of the powers conferred by the proviso to Article 309 of the Constitution and in accordance with the decisions of the Government of India under the provisions of Section 115(5) of the States Reorganisation Act, 1956 (Central Act 37 of 1956), the Governor of (name of the State) is pleased to publish the final gradation list of the (name) establishment/department, which shall be in force retrospectively from the 1st November, 1956."

Quite apart from the consideration that the decision was, unlike those conveyed by the letter dated 3 April 1957, not given any publicity and is, therefore, not generally known to the service personnel, it is obvious that, in regard to the undertaking of responsibility for the integration of services, this procedure does not show any advance on the position disclosed in the earlier letter dated 3 April 1957, for the Central Government indicated that it would only decide the representation of persons aggrieved by the provisional combined gradation list and required that those decisions should be correctly incorporated in the final list. As to the rest, the final gradation list was directed to be published by the State Government under its rule making power exercisable under the proviso to Art. 309 of the Constitution. It may be noted here that the State Government's proposal that the final gradation list be published under the authority of the Central Government was not accepted. Subsequently, explaining this, the Central Government stated in its letter No. 9/10/59-SR(S) dated 12 March 1960, which reads as follows:

"I am directed to refer to the State Government's letter No. 123-3163/I-Integ., dated 8th January, 1960, on the above subject and to say that subject to the specific obligations cast on the Central Government under sub-sections (2) to (5) and the proviso to sub-section (7) of Section 115 of the States Reorganisation Act, persons in the State Services continue to belong to the State services and the directions, if any, given under Sec. 117 of that Act have to be complied with only by the State Government. In confirming the gradation list, as modified, if necessary, with reference to the decisions of the Central Government on representations made by any of the affected persons, the State Government may be said to regulate the conditions of service of their servants. Consequently, there seems to be no objection to invoking the proviso to Article 309 in the preamble, indicating at the same time that the final list is in accordance with the decisions of the Government of India under Section 115 (5) of the States Reorganisation Act, although no rule as such is framed for the purpose."

13. In order to complete the picture, it is necessary to refer to two other letters which disclose the thinking of the Central Government in a somewhat contrary direction. In the letter No. 9/10/59-SR(S) dated 25th July 1960, the Central Government stated:

"I am to state further that the States Reorganisation Act casts the responsibility for integration of services on the Central Government and that the presumption made by the State Government that, in the case of the departments where no representations have been received against the equation of posts or the provisional combined gradation list, no question of any direction from the Central Government arises, and that, the gradation list may therefore be finalised without any reference to the Central Government is not wholly correct even though for practical purposes the approval of the Government of India to the equation of posts and combined gradation list may be presumed in such cases. But in cases where the State Government desire to have the specific approval of the Government of India for any particular equation of posts or for finalisation of the provisional gradation list, it is requested that the relevant information may be furnished to the Government of India."

Again, after the judgment of the Mysore High Court in AIR 1961 Mys. 210 (supra) was delivered on 13th March 1961, the Central Government sent to each of the State Governments concerned a letter dated 11th October 1961 as under:

"A question has been raised whether in respect of any provisional common gradation lists where no appeals were preferred by any of the employees against the said common gradation lists, the approval of the Central Government can be presumed and the final gradation lists published by the State Government with the preamble suggested by the Government of India in their letter No. 9/10/59-SR(S) dated the 11th November 1959, addressed to the Government of Madhya Pradesh and copies endorsed to the State Governments or whether the lists should be formally sent to the Government of India for approval before publication. The matter has been considered and it has been decided as Section 115(5) of the States Reorganisation Act, 1956, confer powers in regard to integration of services exclusively on the Central Government. It will be necessary for the State Government to obtain the specific approval of the Central Government even in respect of provisional gradation lists in regard to which no representations have been received, before publishing them as final gradation lists. I am directed to request that action may kindly be taken accordingly."

14. This vacillating attitude of the Central Government in regard to the extent of its responsibility under Section 115(5) of the Act for the integration of services was reflected in some cases in which that Government was required to appear. So, in the case of AIR 1968 SC 850 (supra), the Solicitor General submitted that the power of effectuating the integration of services was not exclusively conferred on the Central Government under Section 115(5) of the Act and that the power of the State Government in the matter remained unaffected except to the extent that it was obliged to carry out the direction given in the matter by the Central Government. However, in AIR 1965 Guj 23 (FB) (supra), the Attorney General had argued that the power of integration vested solely and exclusively on the Central Government under Section 115(5) of the Act.

In *Union of India v. G. M. Shankarajah*, Civil Appeals Nos. 1439 and 1416 of 1967, D/- 16-10-1968 (SC), the Mysore State, in which (as indicated by the Supreme Court) the Central Government had delegated its powers under Section 115 of the Act, prepared a provisional common gradation list. Certain objections raised in regard to the list were decided by the Central Government on the recommendations of the Advisory Committee constituted by it under Section 115(5) of the Act. These were challenged in several writ petitions heard by the Mysore High Court. The Central Government took the stand that the function entrusted to it under the Act was purely administrative, that it was not justiciable, that no question of violation of the principles of natural justice could arise and the impugned decisions were final. However, the High Court allowed the Central Government to take "a somersault on what the case of the Government till then was" and to contend successfully that the decisions, though they purported to be final, were only provisional, that the affected persons had a right to make representations against it, that those representations would be considered by the Central Government with the assistance of the Advisory Committee and, therefore, the Central Government would arrive at a final decision.

In the appeal filed by the Central Government against the decision of the Mysore High Court, an unsuccessful endeavour was made in the Supreme Court to withdraw the admission that the earlier decisions on the objections raised in regard to the list were provisional and not final on the ground that it was an erroneous concession made on a question of law. The Supreme Court pointed out that it was not, in fact, an admission of that nature. It is remarkable that, in

all this, the Central Government displayed a deplorable lack of consistency. It is all the more so when regard is had to the consideration that it appertains to a matter of vital importance to thousands of members of the public service in several States who are affected by the reorganisation brought about by the provisions of the Act.

15. We have already indicated that the Central Government had belatedly accepted the position that the provisions of the Act cast upon it the exclusive responsibility for effectuating the integration of services in the affected States. In this connection, we may refer to the Central Government's letters dated 25th July 1960 and 11th October 1961, which we have already noticed. The instructions in the earlier letter are, however, ambiguous because it was stated that "in cases where the State Government desire to have the specific approval of the Government of India for any particular equation of posts or for finalisation of the provisional gradation list, it is requested that the relevant information may be furnished to the Government of India". These instructions appear to give the State Government liberty to obtain or not to obtain such specific approval. But the letter dated 11th October 1961 is unequivocal. It reads:

"The matter has been considered and it has been decided, as Section 115(5) of the States Reorganisation Act, 1956, confer powers in regard to integration of services exclusively on the Central Government, it will be necessary for the State Government to obtain the specific approval of the Central Government even in respect of provisional gradation lists in regard to which no representations have been received, before publishing them as final gradation lists. I am directed to request that action may kindly be taken accordingly."

It is implicit in this letter that such specific approval is essential in regard to other provisional gradation lists also. Indeed the letter may well be regarded as containing directions under Section 117 of the Act which, by their own force and independently of Section 115 (5) thereof, obliged the State Government to act in conformity therewith. That being so, the State Government could not disregard those directions without rendering invalid any action so taken by it.

16. In the instant case, when we directed that the relevant communications, whereby approval of the Central Government was obtained to "the equation of posts and the fixation of grades", be produced before us, all that could be shown to us was a letter No. 233(19)/63-SR(S) dated 23rd December 1963 from the Central Government approving the recommendations of the State Advisory

Committee on certain representations made against the provisional gradation list. Thus, unlike the gradation list in the case of AIR 1968 SC 850 (supra) which the Government of India had "approved subject to certain modifications in the equation and changes proposed in accordance with the decision on the individual representations (paragraph 9)", the gradation list in this case was not approved by the Central Government, which dealt only with the representations against the provisional gradation list, leaving the work of integration to be dealt with by the State Government itself, as envisaged by its earlier decisions communicated by the letter No. 66/22/56-SR.II dated 3rd April 1957.

It will be recalled that, when it was argued in AIR 1968 SC 850 (supra) that, by this letter the Central Government really abdicated its functions and left the work of integration to the State Government, the Supreme Court pointed out that it related only to the preliminary work of preparation of gradation lists (paragraph 10). But in this case nothing more was done for, as shown, the consideration of the representations was in accordance with the decisions of 1957, which had left the work of integration of services to be dealt with by the State Government themselves. In the circumstances, we decline to grant leave to introduce in the return the proposed amendments which have no basis in facts.

17. One of the main questions for consideration in this case is whether, under Section 115 of the Act, the Central Government alone has exclusive power to effectuate the integration of services in the various States affected by the provisions of the Act. This question was raised before the Supreme Court in two cases. In AIR 1968 SC 850 (supra), their Lordships, without deciding the question, assumed for the purpose of that case that sub-sections (3), (4) and (5) of Section 115 of the Act read together, conferred on the Central Government exclusive power in regard to the integration of the services. In Civil Appeals Nos. 1439 and 1416 of 1967, D/- 16-10-1968 (SC) (supra), the question was again left open. In these circumstances, it is argued that, under Articles 162 and 246(3) read with Entry 41 of List II of the Constitution, the State Government alone has exclusive power to effectuate the integration of its public services. In our opinion, this is not entirely correct.

It is true that, speaking generally, the executive power of a State extends to all matters enumerated in the State List, including "State public services" over which the State Legislature has power to make laws and the expression "State public services" in Entry 41 is wide enough to include the integration of these

services. But there are three provisions in the Constitution which make the exercise of this power subject to other provisions of the Constitution.

It is expressly enacted in the main clause of Article 162 that the exercise by the State Government of its executive power is "subject to the provisions of this Constitution". Again, the language of the proviso to that Article, applying as it apparently does to matters enumerated in the Concurrent List, is wide enough to include within its ambit any other matter with respect to which the Legislature of a State and the Parliament have concurrent power to make laws. That being so, any "supplemental, incidental and consequential provisions" relating to public services of newly formed States in any law made by Parliament relating to reorganisation of States under Articles 3 and 4 of the Constitution will have an overriding effect and the "executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof". Finally, the proviso to Article 73(1) of the Constitution which lays down that the executive power of the Union shall not extend to "matters with respect to which the Legislature of a State has also power to make laws" lifts this inhibition in regard to any matter expressly so provided (i) in the Constitution or (ii) in any law made by Parliament.

The States Reorganisation Act, 1956, was enacted by Parliament which derived its power so to do under Articles 3 and 4 of the Constitution. Therefore the executive power of the Central Government in regard to matters covered by that Act, including the State public services, will have a subordinating and impairing effect on the executive power exercisable by the State in regard to those matters. In view of these provisions, we are unable to accept the contention that the government of a reorganised State alone has exclusive power to effectuate the integration of its services. Indeed, this extreme position was not taken even in the case of AIR 1968 SC 850 (supra) and all that was contended there by the Solicitor General was that, under Section 115(5) of the Act, the power of integration was not exclusively conferred on the Central Government, but the power of the State Government in the matter, which remained unaffected, had to be exercised subject to the directions of the Central Government. If, as contended, the State Government had exclusive power in the matter, there could be no question of taking, and acting in accordance with, the directions of the Central Government. To explain this, it is argued that the Central Government

derived, under the relevant provisions of the Act, no more than a power to give such directions leaving the State Government's power to integrate its services otherwise unaffected. The contention is grounded on the opinion expressed by the Gujarat High Court in AIR 1965 Guj 23 (FB) (supra) which dissented from a contrary conclusion reached by the Mysore High Court in AIR 1961 Mys 210 (supra). To ascertain which of the two views is acceptable to us, it is necessary to consider the scope and effect of the relevant provisions, namely, Sections 114 to 118 of the Act.

18. Section 114 of the Act deals with All India services and is not relevant for this case. So is Section 118 which relates to the State Public Service Commission. Sections 115, 116 and 117, which are material, are reproduced below:

"115(1). Every person who immediately before the appointed day is serving in connection with the affairs of the Union under the administrative control of the Lieutenant-Governor or Chief Commissioner in any of the existing States of Ajmer, Bhopal, Coorg, Kutch and Vindhya Pradesh or is serving in connection with the affairs of any of the existing States of Mysore, Punjab, Patiala and East Punjab States Union and Saurashtra shall, as from that day, be deemed to have been allotted to serve in connection with the affairs of the successor State to that existing State.

(2) Every person who immediately before the appointed day is serving in connection with the affairs of an existing State part of whose territories is transferred to another State by the provisions of Part II shall, as from that day, provisionally continue to serve in connection with the affairs of the principal successor State to that existing State, unless he is required by general or special order of the Central Government to serve provisionally in connection with the affairs of any other successor State.

(3) As soon as may be after the appointed day, the Central Government shall, by general or special order, determine the successor State to which every person referred to in sub-section (2) shall be finally allotted for service and the date with effect from which such allotment shall take effect or be deemed to have taken effect.

(4) Every person who is finally allotted under the provisions of sub-section (3) to a successor State shall, if he is not already serving therein be made available for serving in that successor State from such date as may be agreed upon between the Governments concerned, and in default of such agreement, as may be determined by the Central Government.

(5) The Central Government may by order establish one or more Advisory

Committees for the purpose of assisting it in regard to—

(a) the division and integration of the services among the new States and the States of Andhra Pradesh and Madras; and

(b) the ensuring of fair and equitable treatment to all persons affected by the provisions of this section and the proper consideration of any representations made by such persons.

(6) The foregoing provisions of this section shall not apply in relation to any person to whom the provisions of Section 114 apply.

(7) Nothing in this section shall be deemed to affect after the appointed day the operation of the provisions of Chapter I of Part XIV of the Constitution in relation to the determination of the conditions of service of persons serving in connection with the affairs of the Union or any State:

Provided that the conditions of service applicable immediately before the appointed day to the case of any person referred to in sub-section (1) or sub-section (2) shall not be varied to his disadvantage except with the previous approval of the Central Government.

116. (1) Every person who immediately before the appointed day is holding or discharging the duties of any post or office in connection with the affairs of the Union or of an existing State in any area which on that day falls within another existing State or a new State or a Union territory shall, except, where by virtue or in consequence of the provisions of this Act such post or office ceases to exist on that day, continue to hold the same post or office in the other existing State or new State or Union territory in which such area is included on that day, and shall be deemed as from that day to have been duly appointed to such post or office by the Government of, or other appropriate authority in, such State, or by the Central Government or other appropriate authority in such Union territory, as the case may be.

(2) Nothing in this section shall be deemed to prevent a competent authority, after the appointed day, from passing in relation to any such person any order affecting his continuance in such post or office.

117. The Central Government may at any time before or after the appointed day give such directions to any State Government as may appear to it to be necessary for the purpose of giving effect to the foregoing provisions of this Part and the State Government shall comply with such directions."

19. Sub-section (1) of Section 115 provides for statutory allotment of certain persons serving in some States to the suc-

cessor States. Sub-section (2) of that section enacts that certain other civil servants shall be deemed to be allotted to the principal successor State and to provisionally continue to serve in that State. Sub-section (3) empowers the Central Government to determine the successor State to which the civil servants referred to in sub-section (2) shall be finally allotted and sub-section (4) provides for giving effect to such orders of the Central Government. It is not difficult to see that these elaborate provisions had to be made in regard to allotment of civil servants because, in the first instance, it was in part final and in part provisional. The important point is that, for the final allotment of persons serving provisionally in the successor State, as provided in sub-section (2) *ibid*, exclusive power had to be given to an impartial outside authority like the Central Government for the obvious reason that it could not be done either by any existing State, which was disestablished or dismembered by the provisions of the Act or even by any successor State.

20. It is, however, argued that the exclusive power to effectuate the integration of services in the newly formed States is not given to the Central Government, either directly or in words sufficiently wide in amplitude to express such an intentment. That the power has not been given directly is undoubtedly true, but we do not agree that such power cannot be inferred as flowing by necessary implication. We have, therefore, to ascertain from the language of Sec. 115(5) and other relevant provisions of the Act whether the power is impliedly conferred. From a plain reading of sub-section (5) *ibid*, it is obvious that the Central Government is empowered to establish one or more advisory committees for the purpose of assisting it 'in regard to'—

- (i) the division of services among the affected States;
- (ii) the integration of services in all those States;
- (iii) the ensuring of fair and equitable treatment to all persons affected by the provisions of Section 115; and
- (iv) the proper consideration of any representations made by such persons.

Now, it is not possible to conceive of any authority being empowered by an enactment to obtain assistance in regard to an act which it is not authorised to do. It follows by necessary implication that the Central Government is authorised to do all those acts in regard to which it is enabled to seek assistance from advisory committees. The reason of the rule is that whenever anything is authorised to be done by law, there is necessarily included in that authority every power the denial of which would render the grant of the authority ineffective. And what is

necessarily implied from the language of a statute is as much a part of it as if it were especially and expressly written in it.

21. The further submission is that this authority could at the most be implied "in regard to" the integration of services in the new States and the States of Andhra Pradesh and Madras and the intentment arising from this language does not extend to constituting the Central Government the sole authority for effectuating the integration of services in those States. The precise contention is that the power given to the Central Government "in regard to" integration is not, and should not be construed to be, the same as, or as wide as, the one given "for the purpose of integration". We are unable to accept this contention for several reasons. In the first place, it appears to us that perhaps the draftsman did not make in sub-section (5) repetitive use of the expression "for the purpose of" in close proximity with a view to avoiding inelegant drafting. Secondly, the true meaning of the expression "in regard to" has to be gathered from the collocation and context in which it has been used and it bears in sub-section (5) the same meaning as the expression "for the purpose of". Thirdly, even if the expression "in regard to" merely refers to the subject-matter in connection with which provision has been made for obtaining assistance from advisory committees, the content of the subject-matter has to be ascertained and it is not enough to vaguely say, as was done in the majority opinion delivered in AIR 1965 Guj 23 (FB) (*supra*), that the Central Government has "certain functions" to perform in connection with the integration of services.

Finally, we do not find anything in the provisions of Sections 115 and 117 of the Act to lend support to the argument that the exercise of the powers under Section 115(5) in regard to integration is limited to giving directions in connection therewith under Section 117. It is true that Section 117 generally empowers the Central Government to give such directions to any State Government as may appear to it to be necessary for giving effect to the provisions of part X, including Section 115(5), but that is an additional power conferred for the purpose of effectuating the exercise of the power given to the Central Government *inter alia* in regard to the integration of services under the aforesaid Section 115(5) and throws no light on the content of the power under the last-mentioned provision. So, in AIR 1965 Guj 23 (FB) (*supra*), Desai C. J., who delivered the majority opinion, observed:

"A reliance was placed upon the provisions contained in Section 117 which em-

son whereby the assessee could claim to be assessed and taxed as such either under the Income-tax Act, Wealth Tax Act or the Expenditure Tax Act. We therefore, answer the question in the affirmative and in favour of the assessee with costs. Counsel's fee Rs. 250.

Answered in the affirmative,

AIR 1970 MADRAS 257 (V 57 C 68)

ALAGIRISWAMI, J.

P. Pattabiraman, Appellant v. Parijatham Ammal, Respondent.

Second Appeal No. 80 of 1965, D/- 25-11-1968 against decree of City Civil Court (Prl.), Madras in A. S. No. 185 of 1963.

Hindu Succession Act (1956), S. 14(1) and (2) — Property given to Hindu widow under compromise decree for her lifetime in lieu of maintenance and residence — Widow not having any right to the property under Hindu Women's Rights to Property Act (1937) — Property is governed by S. 14(2) and not by S. 14(1). (1968) 1 Andh WR 65, Dissented from.

For sub-sec. (2) of S. 14 to apply, it is an essential condition that the instrument which limits or restricts the estate should itself be the source of foundation. If the instrument, be it a decree or order or award, or deed of partition, merely declares the pre-existing title of the Hindu woman to any particular property sub-sec. (2) would not take the property out of the coverage of sub-sec. (1). But where a female Hindu takes the property under an instrument of the kind specified in sub-sec. (2) and not by virtue of any antecedent legal right or title in the property, any restriction placed on the property will have its full effect. AIR 1962 Cal 438 & AIR 1963 Mad 50 & AIR 1964 Mad 387 & AIR 1967 Mad 429, Rel. on. (Para 3)

Where a Hindu widow, having no right to the property under Hindu Women's Rights to Property Act 1937, is given under a compromise decree, the right to enjoy property during her lifetime in lieu of maintenance and residence — then the property will fall under S. 14(2). The right to maintenance can in no sense be described as a right to or in the property and it cannot, therefore, be said that the compromise decree under which she got a share of the property for life is one merely recognising her pre-existing right. The compromise decree itself is the source of her claim to the property and, therefore, effect will have to be given to the terms of the compromise decree

under Sec. 14(2). ILR (1967) 1 Mad 68, Rel. on; (1968) 1 Andh WR 65, Dissented from. (Para 4)

Cases Referred: Chronological Paras
(1968) 1968-1 Andh WR 65, Chinna-kada v. Subbamma 4
(1968) 81 Mad LW 399 = (1969) 1 Mad LJ 181, Dharma Udayar v. Ramchandra Mudaliar 3
(1967) AIR 1967 Mad 429 (V 54) = (1967) 1 Mad LJ 454, Gurunatha Chetti v. Navaneethamma 3
(1967) ILR (1967) 1 Mad 68, Santhanam v. Subramania 2
(1965) AIR 1965 Andh Pra 66 (V 52) = 1964-2 Andh WR 470, Gadam v. Venkataraju 4
(1965) AIR 1965 Mad 451 (V 52) = 1965-2 Mad LJ 104, Kaliammal v. Andiammal 3
(1964) AIR 1964 Mad 387 (V 51) = ILR (1964) 1 Mad 570, Rangaswami v. Chinnammal 3
(1963) AIR 1963 Mad 50 (V 50) = ILR (1962) Mad 832, Sampath Kumari v. Lakshmiammal 3
(1962) AIR 1962 Cal 438 (V 49), Sasadhar Chandra v. Tara-sundari 2
(1961) S. A. No. 470 of 1961 (Mad), Guruswami Naicker v. Guruswami Naicker 3

K. S. Champakese Iyengar and K. C. Srinivasan, for Appellant; S. Sitarama Iyer and K. Srinivasan, for Respondent.

JUDGMENT:— The plaintiff in the suit is the appellant. The suit related to a portion of a house. The house originally belonged to one Venkatarajalu Naidu and his son Manavala Naidu. Manavala Naidu predeceased his father leaving his widow Lakshmikanthammal. Venkatarajalu Naidu died on 7-11-1934, leaving behind him his widow Rajammal and daughter Kupammal. Rajammal died in 1938. The appellant is the son of Kupammal. Lakshmikanthammal filed O.S. 1344 of 1940 against Kupammal for her maintenance and other reliefs. The suit was compromised and a compromise decree was passed under which Lakshmikanthammal was given the right to enjoy the suit property during her lifetime in lieu of maintenance and residence. Parijathamammal her daughter the first defendant was given the right to reside in the property till her marriage. Lakshmikanthammal subsequently died and Parijathamammal continues to reside in the suit property and collect rents. The suit was, therefore, filed for declaration of the appellant's title and recovery of possession. Both the Courts below have held against the appellant.

2. The question for decision is whether the property got under the compromise decree by Lakshmikanthammal falls under S. 14(1) or 14(2) of the Hindu Suc-

cession Act. The lower appellate Court referred to the decision in *Sasadhar Chandra v. Tarasundari*, AIR 1962 Cal 438, wherein it was pointed out that a property is said to be acquired when, prior to the acquisition, the person acquiring it had no interest in the property and even in the case of a decree, if prior to the date of the decree, the Hindu female had title and all that the decree did was to declare the title of the female Hindu in the suit property, the female Hindu cannot be said to have acquired the property under the decree and her right was merely declared but where the acquisition made was in respect of the property in which the person had no interest previously sub-sec. (2) of Sec. 14 would apply. The lower appellate Court realised that strictly speaking *Lakshmi-kanthammal* cannot be said to have had a title to the property before the decree. But it thought that because she had a right to maintenance from the profits of the property, that amounted to a right in the property and on that basis held that Sec. 14(2) of the Act did not apply, but only S. 14(1) of the Act. I may straightway refer to the decision in *Santhanam v. Subramania*, ILR (1967) 1 Mad 63, where it was pointed out that the contention that where a female Hindu was given property in lieu of maintenance, it was merely declaratory of her pre-existing right cannot be accepted and that the right to maintenance could in no sense be described as a right to or in the property. It was further pointed out that the pre-existing right was not to the property obtained under the compromise decree, but only to a right to maintenance and the two rights were not identical and hence when in lieu of maintenance some of the properties of the joint family were obtained, it was a new acquisition, though in consideration of the right to maintenance.

3. In *Sampath Kumari v. Lakshmi-ammal*, ILR 1962 Mad 832 = (AIR 1963 Mad 50) a Bench of this Court held that the word acquired in sub-sec. (2) meant acquired for the first time. In *Rangaswami v. Chinnammal*, ILR (1964) 1 Mad 570 = (AIR 1964 Mad 387) another Bench of this Court took the view that a decree, which is merely declaratory of a pre-existing right, is not within the purview of sub-sec. (2). *Jagadisan, J.* in *Guruswami Naicker v. Guruswami Naicker*, S.A. No. 470 of 1961 (Mad) was also of the same view. He held that the word "acquired" in sub-sec. (2) indicated that it had a restricted meaning and that a property could be said to be acquired when prior to the acquisition, the person acquiring it had no interest in the property. In *Kallammal v. Andiammal*, AIR 1965 Mad 451, one *Kallappa Gounder* died leaving behind him his widow,

his daughter, his mother, step-mother, his sister and his sister's son and he had given directions to his wife to divide his properties and in pursuance of such direction a partition arrangement was arrived at, in and by which certain properties were allotted to the widow and her daughter and it stated that the widow would get only a life estate and after her life-time, it was to go to her daughter. *Venkatadri J.* pointed out that even without this partition deed, the first defendant could have inherited the properties of her husband on his death and, therefore, it is very difficult to say that she got the properties under the partition deed, that she should be deemed to have inherited the properties on the death of her husband and after the passing of the Act, she became the absolute owner of the properties. The ratio of this decision is that where a female Hindu had already a right in certain properties a subsequent document or instrument which merely recognises or states the effect of such right, would not bring it under Sec. 14(2). In *Gurunatha Chetti v. Navaneethamma*, (1967) 1 Mad LJ 454 = (AIR 1967 Mad 429), *Natesan, J.* held that for sub-sec. (2) to apply, it is an essential condition that the instrument which limits or restricts the estate should itself be the source or foundation of the female's title in the property; that if she has an existing right in the property, the interposition of an instrument will not affect the operation of sub-clause (1) on the property, that if the instrument, be it a decree or order or award, or deed of partition, merely declares the pre-existing title of the Hindu woman to any particular property, sub-sec. (2) would not take the property out of the coverage of sub-sec. (1), and that where a female Hindu takes the property under an instrument of the kind specified in sub-sec. (2) and not by virtue of any antecedent legal right or title in the property, any restriction placed on the property would have its full effect. I have also taken a similar view in *Dharma Udayar v. Ramachandra Mudaliar*, (1968) 81 Mad LW 399. The purport of these decisions is that where an instrument merely declares the pre-existing title of a Hindu female, sub-sec. (2) would not apply; but where the instrument is the origin of the title and not merely one which declares or recognises an antecedent title, sub-sec. (1) would apply.

4. I do not think that the decision in *Gadam v. Venkataraju*, AIR 1965 Andh Pra 66, really holds anything to the contrary. In that case, a clause in the maintenance deed executed by an adoptive son in favour of his adoptive mother was as follows:

"Chellamma during her lifetime, can raise the crops and shall enjoy the fruits

and she cannot contract any debts on the security of the said lands."

It was held that the document evidenced a family settlement, in that, the differences between the parties were resolved and the pre-existing rights of each other recognised that as such, it was not a new right that was conferred upon the widow under the document and therefore, Section 14(1) applied. Certain observations found in that decision to the effect that the adoptive mother had a right to be maintained by the adopted son out of the estate and it is pursuant to that right that her claim to maintenance was settled, cannot be held to show that the Bench was of the view that even where the only rights that a Hindu female had, was a right to maintenance, that amounted to a pre-existing right in the property. The later portion of the judgment, where the Bench points out that differences between the parties were resolved and the pre-existing rights of each other, recognised and it was not a new right that was conferred upon the widow under the document, clearly shows that the basis of the decision was that the document merely recognised a pre-existing right. The decision of a learned single Judge of the Andhra Pradesh High Court in *Chinnakada v. Subbarma*, (1968) 1 Andh WR 65 that where the widow of a Hindu coparcener got certain properties with a life estate in lieu of her maintenance, Sec. 14(1) applies and not Sec. 14(2), cannot be said to lay down the law correctly. The maintenance deed in that case was dated 6-7-1928. It was not a case to which the provisions of the Hindu Women's Rights to Property Act, 1937, applied. If that Act had applied, the widow would have been entitled to have her husband's share divided and allotted to her to be enjoyed for life. In such a case, it could be said that when a compromise deed or a compromise decree allots the husband's share for the maintenance of the widow it merely recognised the pre-existing right of hers under the Hindu Women's Rights to Property Act 1937 and that the document or the decree was not the source of her right. It was on that basis that Natesan J. came to the conclusion that the estate obtained by the widow in the case before him was governed by Sec. 14(2) and not Sec. 14(1) because the 1937 Act did not apply. The present case is also one where Lakshmi-kantammal did not have any rights under the Hindu Women's Rights to Property Act 1937, and it cannot, therefore, be said that the compromise under which she got a half share of the property for life was one merely recognising her pre-existing right. The compromise decree itself was the source of her claim to the property and, therefore, effect would have to be given to the terms of the compro-

mise decree under Sec. 14(2) of the Act. It follows, therefore, that the Courts below were in error in holding that Section 14(1) of the Act applies to the facts of this case.

5. The second appeal is allowed and the suit will stand decreed. The appellant will get his costs in all the three Courts from the first respondent. Leave granted.

Appeal allowed.

AIR 1970 MADRAS 259 (V 57 C 69)

VEERASWAMI, J.

M. Krishnan, Petitioner v. Pankaj Jethalal Sha, Respondent.

Civil Revn. Petn. No. 548 of 1968, D/25-10-1968, against Order of Motor Accidents Claims Tribunal, North Arcot, Vellore in I. A. No. 35 of 1968.

Motor Vehicles Act (1939), S. 110-C (2) — Powers of Motor Accidents Claims Tribunal under — Tribunal has power to have evidence recorded on commission — Tribunal should exercise that power in accordance with principles settled by Court in light of the related provisions of Civil P. C. — It is only in very extraordinary circumstances that a party to a litigation will be allowed to be examined on commission. (Paras 1, 2)

N. R. Raghavachari, for Petitioner, R. Shanmugham, for Respondent.

ORDER:— The only point in this petition is whether the Motor Accidents Claims Tribunal possesses the power to appoint a Commission for recording evidence of a witness in Bombay. The Tribunal held that it had the power in view of Sec. 110-C (2) of the Motor Vehicles Act. In my view, the Tribunal was right. No doubt, Rule 18 of the Madras Motor Accidents Claims Tribunal Rules, 1951 does not mention Order XXVI of the Civil Procedure Code. Even so, sub-section (2) of Sec. 110-C is sufficiently wide to include the power. It speaks of the power of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses. The substance of this power is that, for the purpose of disposing of a claim before it, the Tribunal will have all the powers related to taking of evidence on oath and of enforcing attendance of witnesses, including the power to have evidence recorded on commission.

2. But the power so entrusted to the Tribunal should be exercised in accordance with the principles settled by courts in the light of the related provisions in the Civil Procedure Code. It is only in very extraordinary circumstances that a party to a litigation will be allowed to be

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examined on commission, as for instance, sickness disabling the movement of the party from attending Court or Tribunal to give evidence. Mr. Raghavachariar says the Tribunal has not applied its mind to this aspect in including within the scope of the commission examination of the claimant at Bombay. While the view of the Tribunal that it has power to appoint a Commission to record evidence is confirmed, it is directed to consider whether, in the light of what has been stated supra, the Tribunal would still think that the claimant can be examined on commission. Subject to this observation, the Civil Revision Petition is dismissed, but with no costs.

Petition dismissed.

AIR 1970 MADRAS 260 (V 57 C 70)

ALAGIRISWAMY, J.

The Management of Sree Meenakshi Mills Ltd., Petitioner v. The Presiding Officer, Labour Court, Madurai and another, Respondents.

Writ Petn. No. 979 of 1967, D/- 7-7-1969.

Industrial Disputes Act (1947), S. 25-C — Claim to lay off compensation by Badli Workmen who have completed one year's continuous service — Lay off spread over the whole of the establishment — No possibility of relating the badli workmen who would have been employed if the permanent workers who had been laid off had not been so laid off — Claim not maintainable. (Para 6)

Cases Referred: Chronological Paras
(1969) W. P. No. 1309 of 1966, D/- 28-2-1969 (Mad) 3

(1965) 1965-1 Lab LJ 92 (Mad).
Laxmi Mills Co. Ltd. v. Labour Court 3

(1964) AIR 1964 Guj 231 (V 51) —
1964-2 Lab LJ 235, Girdharlal Laljibhai v. Nagrashna 3

S. Gopalratnam, for Petitioner; B. R. Dolla, S. Ramasubramanian and G. Venkataramana, for Respondents.

ORDER:— The Petitioner is the Meenakshi Mills Ltd., Madurai. Respondents 2 to 4 are badli workmen working in those Mills. A badli is one who is employed generally in the place of a permanent operative during his absence. During the period 1-11-1965 to 22-4-1966 there was a power-cut of 25% in the supply to all industrial establishments including the petitioner, and consequently the petitioner was obliged to reduce its production at all levels. The respondents filed applications under Sec. 33-C (2) of the Industrial Disputes Act before the Labour Court, Madurai, for computation

of the lay off compensation payable to them under Sec. 25-C of the Act, and the Labour Court has held that all of them are entitled to such compensation. This writ petition is filed to quash those orders.

2. Two of the 23 workmen gave evidence that they had been working for more than 240 days in every year for the past 6 and 12 years respectively. In respect of the other 21 workers, though there was no evidence, the Labour Court has stated that it was admitted before it that the other 21 also had been so working. But this has been disputed before this Court by the petitioner, and the petitioner has applied for considering it as one of the grounds. But it is pointed out on behalf of the respondents that in the counter filed before the Labour Court the petitioner had not specifically denied the contention that the other 21 workmen also had worked for more than 240 days in a year. The consideration of the question before this Court would therefore have to proceed on the footing that all the 23 workmen had worked for more than 240 days in a year. If a man so works he is said to have one year of continuous service.

3. This question becomes one of importance because the Explanation to Section 25-C of the Act reads as follows:—

"Badli workman means a workman who is employed in an industrial establishment in the place of another workman whose name is borne on the muster rolls of the establishment, but shall cease to be regarded as such for the purposes of this section, if he has completed one year of continuous service in the establishment."

Under that section whenever a workman whose name is borne on the muster rolls of an industrial establishment and who has completed not less than one year's continuous service under an employer is laid off, he shall be paid by the employer for all days during which he is so laid-off, except for such weekly holidays as may intervene, compensation which shall be equal to fifty per cent of the total of the basic wages and dearness allowance that would have been payable to him had he not been so laid off. The expression "lay off" is defined in Sec. 2 (kkk) as follows:—

"Lay off (with its grammatical variations and cognate expression) means the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the break-down of machinery or for any other reason to give employment to a workman whose name is borne on the muster roll of his industrial establishment and who has not been retrenched."

It may be useful even at this stage to keep in mind the fact that this definition

when it mentions the muster roll means the muster roll of permanent employees. A badli workman is one who is employed for work in the place of a permanent operative during his absence. Take for instance a case where an industrial establishment concerned is working in full strength. Suppose in such an establishment a badli workman who has one year's continuous service offers himself for work and is not given employment. Can he be said to be laid off? He cannot be. I think this argument is correct. From the definition the expression 'lay off' it is obvious that only where any workman is refused employment on any of the grounds mentioned in that clause can it be said that there has been a lay off. Now if the mill is working in full strength it cannot be said that there has been a lay off even though a particular badli workman might not be given any employment on any particular day because there were no absentees among the permanent workmen whose place he can take. Such a position creates no problems at all. In fact Kailasam, J., in W. P. No. 1309 of 1966 (Mad) disposed of by him on 28-2-1969 dealt with the case of a worker belonging to this very mill and held that a badli workman who had completed one year of continuous service in the establishment and who was denied work on the ground that there was no absentee amongst the permanent workmen is not entitled to lay off compensation. This is also the view of a Bench of the Gujarat High Court in *Girdharlal Laljibhai v. Nagrashna*, (1964) 2 Lab LJ 235=(AIR 1964 Guj 231).

4. Take again the case of an industrial establishment the whole of whose permanent labour force is completely laid off due to any of the reasons mentioned in Sec. 2 (kkk). In that case, I think, all the badli workmen who fall within the explanation to Section 25-C would be entitled to lay off compensation also. Section 25-C begins by saying "whenever a workman (other than a badli workman) who has completed one year of continuous service in the establishment." The contention on behalf of the petitioner is that each individual badli workman who claims lay off compensation, even in those circumstances should establish that but for the lay off he would have been given employment. That would be, in the case of any establishment, an almost superhuman task. Even in ordinary day members of the labour force of an industrial establishment may be absent or a few might be absent because of illness; a few might have gone for a funeral; and others might have gone to attend a wedding. Some of these naturally are contingencies which cannot be provided for or expected in advance. I should think that when the explanation to Sec. 25-C was put in it was

on the ground that when a workman had been continuously working in a year within the course of which he has been working for 240 days it is reasonable to presume that in the ordinary circumstances he would be provided with employment and therefore when the whole industrial unit is working he would also have got employment. That presumption would apply when the whole of the industrial unit had ceased working and all its workmen laid off. In such circumstances there is no difficulty about the holding that badli workmen who fall within the explanation to Sec. 25-C would be entitled to lay off compensation. That is more or less the reasoning in the decision in 1965-1 Lab LJ 92 (Mad).

5. Take again the case of certain departments of an industrial unit which are shut down due to any of the circumstances mentioned in Sec. 2 (kkk). The badlis who are relatable to those departments in which the labour force has been laid off completely might also be able to show that but for the shut down they would have been able to get employment and therefore claim compensation. Such a case does not produce any problems either.

6. But cases like the present produce problems which are very difficult if not impossible of solution. Take an industrial establishment with a labour force of 1000 and suppose that due to power cut or other similar reasons 100 permanent workmen are laid off. And suppose again there are 100 badlis who had worked continuously for a year. Now these 100 badlis are relatable to the total labour force of 1000. To say that because a part of the labour force of the industrial establishment has been laid off all the badli workmen should be paid lay off compensation may not be correct, because even if all the hundred permanent workmen had not been laid off the hundred badli workmen would not have got work. At the same time it is not possible to say who among these 100 badli workmen with continuous service would have been given employment if there had been no lay-off and who would not have been. In the present case it is not stated that any particular departments were completely shut down and all the workmen were laid off. The lay off seems to have been spread over the whole of the mills, and it is not possible to relate the badli workmen who would have been employed if the permanent workers who had been laid off had not been so laid off. In the circumstances, I am afraid no useful purpose will be served by the Labour Court entering into the question as to who among the badli workmen with continuous service would have been employed had there been no lay off in the industrial

establishment. Unfortunate as it may seem there seems to be no solution to the problem. Whether the legislature will be able to find one it is not possible to say. For the present the matter should rest there.

7. Therefore the writ petition will have to be allowed and the order of the Labour Court quashed. No costs.

Petition allowed.

AIR 1970 MADRAS 262 (V 57 C 71)

ISMAIL, J.

In re Sister Gemma, Petitioner.

Original Petn. Nn. 16 of 1969, D/- 14-2-1969

Guardians and Wards Act (1890), S. 17 — Appointing a guardian for the purpose of transferring the custody of minor to a third party outside the jurisdiction of the Court — Powers and functions of Court in respect of — Court can appoint guardian for such purpose in very rare and exceptional circumstances.

Normally a Court exercising powers and functions in respect of guardians and minors does not appoint a guardian for the purpose of transferring the custody of the minor concerned to a third party, that too outside the jurisdiction of the Court. But that is not an inflexible rule of law, and exceptions are sometimes made to the rule, but such exceptions are and ought to be very rare. AIR 1937 Mad 51, Relied on. (Para 2)

So where a petitioner, in charge of a Mercy Home, who is custodian of a minor who was sent to the Mercy Home by Police authorities as unclaimed, an orphan and destitute files a petition for her appointment as the guardian of the person of the said minor and to permit and authorise her to transfer the child to France to be taken care of, maintained and educated by a citizen of France who had expressed such desire and had also given an undertaking to repatriate the minor at her cost to India when necessary then such is a very rare and exceptional circumstance which will warrant and justify the Court appointing the petitioner as the guardian of the person of the minor and authorising her to transfer the child to France to be taken care of and maintained and educated. (Para 3)

Cases Referred: Chronological Paras (1937) AIR 1937 Mad 51 (V 24) =

ILR 1937 Mad 383, Rajah of Vizianagaram v. Secy. of State	2
(1837) 2 My and Cr 31 = 40 ER 552, Campbell v. Mackay	2
(1801) 6 Ves Jun 363 = 31 ER 1095, Mountstuart v. Mountstuart	2
A. Dorairaj, for Petitioner.	

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JUDGMENT:— This petition has been presented under Ss. 4, 10 and 17 of the Guardians and Wards Act 1890 and clauses 17 and 20 of the Letters Patent. The petitioner is a member of a Christian Religious congregation known as the Salesian Missionaries of Mary Immaculate. The members of the congregation are devoted to social work and care of the needy, destitute and sick persons who are unable to look after themselves. The petitioner as a member of the said congregation is at present in charge of the Mercy Home at Kilpauk, Madras which looks after and caters for the abandoned and incurably sick. In the course of her work in the Mercy Home, the petitioner came into the custody of Noel Sanderchan, the minor. She was sent to the Mercy Home as unclaimed, an orphan and destitute by the Sub-Inspector of Police, G. 3, Kilpauk, Madras 10, on 29-12-1967, as having been picked up at Kilpauk Garden road. At the time of her admission the minor was stated to be 5 days old, said to have been born on 24-12-1967. By virtue of the fact that the child was admitted to the Mercy Home, the petitioner has been the de facto guardian of the said minor to the knowledge of the police authorities from 29-12-1967 onwards. In August 1966, a citizen of France by name Madame Basdevant expressed a wish to take charge of the minor, maintain, educate and protect her. At the instance of the petitioner, she appeared before the Embassy of India at Paris and in the presence of the Third Secretary gave an undertaking to bear the cost of the passage of the said minor from India to France, to provide for her during her stay in France and to repatriate her at her cost to India, when necessary. The said undertaking has been attested by the Consular section of the Embassy of India, Paris. It is under these circumstances, the present petition has been filed for the appointment of the petitioner as the guardian of the person of the said minor Noel Sanderchan and to permit and authorise the petitioner to transfer the child to France to be taken care of, maintained and educated by Madame Basdevant residing at No 110 Ave Jean Batiste Clement, Boulogne Paris, France.

2. The petitioner and the relief claimed in the petition are somewhat peculiar. Normally a Court exercising powers and functions in respect of guardians and minors does not appoint a guardian for the purpose of transferring the custody of the minor concerned to a third party, that too outside the jurisdiction of the Court. But that is not an inflexible rule of law. It was pointed out by Venkataramana Rao J. in Rajah of Vizianagaram v. Secretary of State for India, ILR 1937 Mad 383 = (AIR 1937 Mad 51):

"It is a recognised principle of English Courts that an infant should not be sent out of their jurisdiction. Of course, it is not an inflexible rule and there are exceptions to it. But it is an invariable rule; vide *Mountstuart v. Mountstuart*, 1801-6 Ves Jun 363 = 31 ER 1095. In *Campbell v. Mackay*, 1837-2 My & Cr 31 = 40 ER 552, Lord Cottenham L. C. delivered himself to the same effect at p. 553 (40 ER); 'in the case of 1801-6 Ves Jun 363, Lord Eldon appears to have said that the Court never makes an order for taking the infant out of the jurisdiction. Subsequent decisions show that exceptions are sometimes made to the rule, but such exceptions are and ought to be very rare. Since I have held the Great Seal I have had reason to lament that the rule has not been more strictly adhered to'."

3. Bearing this principle in my mind, the question for consideration is whether there are exceptional and rare circumstances present in this case justifying this Court appointing the petitioner herein as the guardian of the minor in question and authorising her to transfer the child to France. The most striking feature of this case is that the child is a destitute and there is nobody to care for it and nobody to claim it. Under these circumstances, obviously it will be in the interests and for the welfare of the minor that the petitioner should be appointed as guardian and should be authorised and enabled to transfer the child to France to be taken care of and educated and provided for by Madame Basdevant who had expressed a wish to do so and who had also given an undertaking that she will repatriate the child back to India, whenever necessary, at her cost. This constitutes indisputably a very rare and exceptional circumstance which will warrant and justify this Court appointing the petitioner herein as the guardian of the person of the minor and authorising her to transfer the child to France to be taken care of and maintained and educated by Madame Basdevant. For this reason, I allow this petition and appoint the petitioner herein as the guardian of the person of the minor Noel Sanderchan and permit and authorise the petitioner to transfer the said minor to France to be taken care of, maintained and educated by Madame Basdevant, residing at No. 110, Ave Jean Batiste Clement, Boulogne, Paris, France.

Petition allowed.

AIR 1970 MADRAS 263 (V 57 C 72)

ALAGIRISWAMI, J.

Panchayat Board, Karumandi-Chellipalayam, Petitioner v. The Director of Rural Development, Madras and others, Respondents.

Writ Petn. No. 1645 of 1966, D/- 23-4-1969.

Panchayats — Madras Panchayats Act (35 of 1958), S. 104 — Panchayat whether can only be Panchayat within whose jurisdiction market is being held — Nexus between market and Panchayat — Objection to payment to Panchayat having no such nexus.

When Sec. 104 speaks of the income being apportioned between the Panchayat Union Council and the Panchayat or the payment of a contribution in respect thereof to the Panchayat or the Panchayat Union Council as the case may be, the Panchayat referred to can be only the Panchayat within whose jurisdiction the market is being held. There must be some nexus between the market and the Panchayat in order to justify the payment of contribution to or the apportionment between that Panchayat and the Panchayat Union. Objection can, therefore, be legitimately taken to payment to a Panchayat which has no nexus with the market. (Para 2)

R. Ganesan, for Petitioner; R. Krishnamurthi, for Govt. Pleader and V. Shanmugham, for Respondents.

ORDER:— The petitioner is the Panchayat Board, Karumandi Chellipalayam in Coimbatore Dist. The area comprised within this Panchayat Board was originally part of the Perundurai Panchayat Board. Till 1957, a weekly market was being held within the area of what is now the Perundurai Panchayat Board. In that year, it was shifted to the area which now lies within the jurisdiction of the petitioner Panchayat Board. It is classified as a Panchayat Union market. Under S. 104 of the Madras Panchayats Act, 1958, the Government have the power to apportion the income derived from Panchayat Union markets between the Panchayat Union Council and the panchayat or order the payment of a contribution in respect thereof to the Panchayat or the Panchayat Union Council, as the case may be. In 1960, the contribution payable under this section was ordered to be paid to the petitioner Panchayat Board and it was fixed at 30 per cent. It was accordingly being paid for some years. In 1965, an order had been passed raising the contribution to 40 per cent and dividing it between the petitioner Panchayat Board and the Perum-

dural Panchayat Board. It is against this order that this writ petition is filed.

2. I am of opinion that the petitioner Panchayat Board is entitled to succeed. When S. 104 speaks of the income being apportioned between the Panchayat Union Council and the Panchayat or the payment of a contribution in respect thereof to the Panchayat or the Panchayat Union Council as the case may be, the Panchayat referred to can be only the Panchayat within whose jurisdiction the market is being held. There must be some nexus between the market and the Panchayat in order to justify the payment of contribution to or the apportionment between that Panchayat and the Panchayat Union. There is no such nexus in this case between the Perundurai Panchayat Board and the market. To hold otherwise on the ground that the singular includes plural, would mean that it would be open to the Government to direct the payment of a portion of the contribution not merely to the Perundurai Panchayat Board but to any number of Panchayat Boards within the jurisdiction of the Perundurai Panchayat Union. Of course, the petitioner Board has no right to claim that any particular percentage of the income should be paid to it. It cannot object if the Panchayat Union Council makes any payment to the Perundurai Panchayat Board except to a portion of the contribution or apportionment under S. 104.

Therefore, if the Government, instead of fixing the portion payable to the Panchayat Board at 40 per cent and ordering it to be divided equally between the petitioner-Panchayat Board and the Perundurai Panchayat Board had merely fixed it at 20 per cent or even 10 per cent and ordered it to be paid to the petitioner Board, the petitioner Board can have legally no grievance. The right of the petitioner Board to object to any portion of the contribution or an apportionment under Sec. 104 arises from the fact that such contribution or apportionment is payable only to the Panchayat within whose jurisdiction the market is held, or as I already pointed out, the Panchayat which has a nexus with the market. As a payment is made to the Panchayat which has nexus with the market, no objection could be taken to the payment to any other Panchayat having a similar nexus. But objection could be legitimately taken to payment to a Panchayat which has no nexus with the market. It follows, therefore, that the petitioner is entitled to succeed in this writ petition. It is unnecessary to point out again that it is open to the Government to restrict the percentage of contribution payable and make it payable only to the petitioner-Panchayat Board, in which case,

the petitioner can have legally no grievance. There will be no order as to costs. Petition allowed.

AIR 1970 MADRAS 264 (V 57 C 73)

K. VEERASWAMI, C. J. AND
K. N. MUDALIAR, J.

M/s. Pannalal Ramkumar and Co., Coimbatore, Petitioner v. The Income-tax Officer, City Circle II, Coimbatore, Respondent.

Writ Petn. No. 1728 of 1969, D/- 18-6-1969.

(A) Constitution of India, Art. 226 — Income-tax Act (1961), Ss. 184, 264 — Application for writ of certiorari to quash the order of Income-tax Officer — Other adequate remedy open to the petitioner — No interference by High Court.

Where the petitioner has a right of revision to the Commissioner of Income-tax, under the Act against an order dismissing application for registration under Section 184(4) and has failed to resort to it without any cause, the High Court will refuse to issue rule nisi. (Para 2)

(B) Income-tax Act (1961), S. 184(4) — Registration in Form 11 and 11-A — Provision in S. 184(4) is mandatory — (1962) 46 ITR 458 (All), Dissented from.

Where the application for registration is made out of time, it is for the assessee to show cause for the delay and not for the Income-tax Officer to call upon the assessee to show cause for it. (1962) 46 ITR 458 (All), Dissented from.

(Para 2)
Cases Referred: Chronological Paras (1962) 46 ITR 458 (All), Haji Md.

Khalil Md. Farooq v. I-T. Officer 2
S. Padmanabhan, for Subbaraya Aiyar, Sethuraman and Padmanabhan, for Petitioner.

K. VEERASWAMI, C. J.:— This is to quash an order of the Income-tax Officer, City Circle II(1), Coimbatore, dated 28-2-1969. By that order he dismissed an application for registration in Form 11, as well as in Form 11-A, which were filed only on 3-3-1967, on behalf of the assessee firm. The occasion for the applications was that there was a change in the Constitution. The Income-tax Officer felt that in the absence of any sufficient cause shown, the applications having not been filed before the end of the previous year for the assessment year, in respect of which the registration was sought, they should be dismissed.

2. We are not inclined to issue a rule nisi. Our reasons are two-fold. One is the assessee undoubtedly has a right of revision to the Commissioner under the provisions of the Act and there is no

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reason why he cannot resort to it. That remedy is quite adequate. The second reason is that sub-sec. (4) of Sec. 184 is mandatory and required that the application shall be made before the end of the previous year for the assessment year in respect of which registration was sought. The section has a proviso which gives a discretion to the Income-tax Officer to excuse the delay, but only if he is satisfied that there was sufficient cause for the delay. It follows that the applicant, who should have known that the applications were out of time, should satisfy the Income-tax Officer that there was sufficient cause for the delay. We do not think that having regard to the terms of the statutory provision which we just now read, the assessee can take up the stand that the Income-tax Officer before rejecting the applications, must give an opportunity to show cause. The position is that the applications having been filed out of time, it was incumbent on the assessee to show cause why the delay should be excused, not that it was incumbent on the Income-tax Officer to call upon the assessee to show cause. Natural justice is not an abstract proposition, but follows closely the scheme of the statutory provision.

3. Our attention has, however, been invited to Haji Md. Khalil Md. Farooq v. Income-tax Officer, (1962) 46 ITR 458 (All). That was a case under the old Act and the learned single Judge considered that natural justice required that the Income-tax Officer should give an opportunity to show cause why the application should not be dismissed. With respect, we are unable to share this view. As we said, the petitioner himself was the applicant and he is expected to know the law which makes it clear that if the application had not been made within the time specified, it could only be entertained if sufficient cause is shown for the delay to the satisfaction of the Income-tax Officer. The assessee cannot convert his default into an occasion for pleading natural justice asking for an opportunity. On that view, the petition is dismissed.

Petition dismissed.

AIR 1970 MADRAS 265 (V 57 C 74)

VEERASWAMI AND RAMAPRASADA
RAO, JJ.

Sarvshri G. Annamalai Chettiar and another, Appellants v. The Controller of Estate Duty, Madras (Revenue), Respondent.

Tax Case No. 160 of 1965 (Refd. No. 84 of 1965), D/- 25-2-1969.

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Estate Duty Act (1953), S. 21(1) — Deceased domiciled in India at the time of death — Outstandings and land compensation to be received in foreign country — No exemption from Estate Duty.

The outstandings, due to the deceased domiciled in India at the time of his death, comprising of moveable property outside India are clearly dutiable. There may be restriction due to the impossibility of their repatriation but that does not exclude them from the principal value of the deceased's estate. Similarly the compensation that the deceased of Indian domicile at the time of his death is entitled to receive from the foreign Govt. for lands notified during his life time for being taken over would be includible in computing the principal value of his estate. AIR 1953 Mad 185, Disting and Explained. (Paras 1 & 5)

Cases Referred: Chronological Paras (1953) AIR 1953 Mad 185 (V 40)=

1952-2 Mad LJ 243, Rangarao

Bahadur v. State of Madras 3 (1979) 28 ER 1259=1 Bro C C 497,

Fletcher v. Ashburner 3

Vedantham Srinivasan, for Appellants;
J. Jayaraman, for Respondent.

VEERASWAMI, J.:— This is a reference under Section 64(1) of the Estate Duty Act, 1953. One A. Ar. Annamalai Chettiar died on August 9, 1957 leaving a will dated April 24, 1957, in and by which he bequeathed his estate in favour of his grandsons, who are the accountable persons. They filed a return showing the principal value of the estate that passed on the deceased's death at Rs. 1,57,090. The Assistant Controller, however, fixed the principal value at Rs. 1,81,185. Two items, among others, were in dispute. (1) a sum of Rs. 77,227 outstanding due to the deceased in Burma in the course of his money lending business and (2) includibility, in the principal value of compensation in respect of a part of the lands notified in Burma and taken over. The Revenue has taken the view that since the only restriction in respect of the outstandings was about repatriation of funds, there is no sufficient reason why they should be excluded in computing the principal value of the deceased's estate. As regards the right to receive compensation, the Revenue repelled the contention for the accountable persons that it should be considered as a benefit arising out of the lands. The question in the circumstances which has been referred to us by the Central Board of Direct Taxes is:

"Whether, on the facts and in the circumstances of the case, the Board were correct in holding that the following properties are chargeable to estate duty as property passing on the death of the deceased under the Estate Duty Act, 1953—

(1) the compensation receivable from the Government of Burma in respect of all the agricultural lands or any part of such lands which the deceased owned in Burma;

(2) the amount of Rs. 77,227 representing the movable property of the deceased in Burma."

Though the question has been framed in that manner, the answer to it really turns on whether the two items could be included in computing the principal value of the estate of the deceased. In our opinion the outstandings being movable property and the deceased domiciled as he was in this country at the time of his death, the outstandings are clearly dutiable under the provisions of the Estate Duty Act, Section 21(1) is clear on the question. For the accountable persons the argument, however, is that the outstandings are not marketable in Burma and that they could not also be realised. But that involves investigation into the facts. The statement of the case does not provide the necessary facts. As a matter of fact, the Assistant Controller records in his assessment order that there was no material to show that any of these outstandings could not be recovered and constituted bad debts, but, on the other hand, the accountable persons themselves in filing their return had deducted certain debts claimed to be bad and it was not their case that any of the foreign outstandings constituted bad debts. As to the marketability of the outstandings, the Revenue at all stages has found that the only restriction in regard to them pertained to their impossibility of repatriation. But that by itself, is not sufficient to accept the contention of the accountable persons to exclude the outstandings from the principal value of the deceased's estate.

2. On the other item, it seems that deceased owned 4,530 acres of agricultural land, of which 656-71 acres were notified under the laws of Burma for being taken over. In respect of this extent of land, a sum of Rs. 2,500, was admittedly payable as advance compensation to the deceased. The Assistant Controller directed that the immovable property, which was not under notification, should be excluded from the computation of the principal value but the extent which was under notification and in respect of which the deceased was entitled to compensation should be included in it. On that view he directed the accountable persons to inform the officer as to when compensation would be received so that it should be taken into account and the assessment re-opened under Section 62 read with Section 53 (4) of the Act. The Central Board of Taxes took a similar view.

3. The contention before us is that compensation received in such circumstances is a benefit derived from land and, therefore, should be regarded as immovable property situate outside the territories of India not liable to Indian estate duty. In support of this contention, our attention has been invited to *Ranga Rao Bahadur v. State of Madras*, (1952) 2 Mad LJ 243 = (AIR 1953 Mad 185) and also *Fletcher v. Ashburner* reported in (1779) 28 ER 1259 (Vide *White and Tudor's Leading Cases on Equity*, 9th Edition, Vol. 1, page 325). We do not think that these authorities support the accountable persons. (1952) 2 Mad LJ 243 = (AIR 1953 Mad 185) was concerned with the claims of maintenance holders against the compensation paid in respect of an impartible estate notified and taken over under the provisions of Madras Act 26 of 1948. It was held that merely because the estate was converted into compensation, there was no justification for the view that the nature of the property underwent a change on its conversion into money. We are of the view that this case is an authority only for the proposition that where third parties' rights or liabilities interact on immovable property converted into money, in respect of and for the purpose of such rights or liabilities, the nature of the property as immovable property is preserved, notwithstanding its conversion into money. In (1779) 28 ER 1259 (vide *White and Tudor's Leading Cases on Equity*, 9th Edition, Vol. 1, page 325), also a similar proposition was enunciated. This is what we have in that case:

"Where money is paid into Court, the produce of real estate converted by compulsory powers under Acts of Parliament, as under the 69th section of the Lands Clauses Consolidation Act, it in general remains in Court subject to the rights of the parties interested in it to have it re-invested in land and is to be considered as money or personal estate in Court, subject to a trust to be invested in land, and therefore, impressed with the quality of real estate, until some act is done by the owner showing his election to take it as personality."

It is obvious that this passage does not mean that when a land, which is compulsorily acquired, is converted into money compensation therefor, such money or compensation irrespective of circumstances, continues to have its character as immovable property. Where immovable property is subject to a liability or a right and it is converted into compensation, for the purpose alone of such liability or right the compensation is impressed with the quality of real estate. Even there, the owner may by an act of his, elect to consider it as personality. That is all the ratio of (1779) 28 ER 1259 (Vide *White*

and Tudor's Leading Cases on Equity, 9th Edition, Vol 1, page 325). We are not told in this reference, and it does not appear from the statement of the case, that the compensation paid or payable for the land notified is subject to any right or liability inhering in any third party. At his death the deceased undoubtedly had a right to receive the compensation for the extent of the land which had been notified during his life-time. That right, in our view, is movable property.

4. Property is no doubt defined by the Estate Duty Act but the definition does not help in deciding the question before us. Rule 7 (b) of the Rules framed under Section 21 (2) of the Act shows that even the interest of a simple mortgagee in the hypotheca is treated as movable property for the purpose of the Act. The same provision further shows that only the interest of a mortgagee in possession will be considered as immovable property. That we think is an indication that unless the deceased had a direct interest in the land in the shape of possession thereof, merely because under the general law he has interest as a mortgagee in the hypotheca, such interest cannot be considered to be immovable property.

5. We answer the question against the accountable persons but make it clear that it is only the compensation that the deceased was entitled to receive in respect of lands notified during his life-time for being taken over that would be includible in the principal value of the estate of the deceased, and that the sum of Rs. 77,227 was rightly included in such principal value. The Revenue is entitled to costs. Counsel's fee Rs. 250.

Reference answered.

AIR 1970 MADRAS 267 (V 57 C 75)

SOMASUNDARAM, J.

K. Narayanaswami Reddiar. Appellant v. T. Kolandaivelu Chettiar and another, Respondents.

Criminal Appeal No. 831 of 1967, D/- 24-9-1969.

(A) Criminal P. C. (1898), Ss. 476 to 479-A (6) — Prosecution for perjury — Magistrate discharging the accused not considering it expedient to launch prosecution — If documents establishing perjury are brought to notice of Court after judgment, S. 479-A would not apply and sub-section (6) will not bar proceedings under Ss. 476 to 479 — Where however, no new material is placed before Court to prove perjury bar under sub-sec. (6) will operate.

Where a Magistrate, who tried a case, had all the materials before him, when he passed the order of discharge discharging the accused under Section 253 (1), Criminal P. C., and did not consider it necessary or expedient to launch proceedings against the complainant for preferring any false complaint or for perjury, but after the judgment, documents, which would establish the falsity of the evidence of the witness, are brought to the notice of the Court, Section 479-A, Criminal P. C. will not apply and sub-section (6) of the section will not operate as a bar for proceeding under Ss. 476 to 479, Criminal P. C. AIR 1960 Mad 77 & AIR 1966 SC 1863, Rel. on.

Where, however, no new material was placed subsequently to show that the complaint, which was filed, was false or the evidence, which was given amounted to perjury:

The bar under Section 479-A, Cl. 6, Criminal P. C. would come into operation. (Para 3)

(B) Criminal P. C. (1898), S. 476 — Perjury — Complaint should be filed in interest of justice — Not proving a case is not tantamount to proving that complaint was false — When complaint for perjury should be filed explained.

If a complaint for perjury is to be filed under Section 476 it is to be in the interest of justice. Merely because a complainant has failed to bring home an offence is not always the same as saying that it has been proved that the complaint given by him was false. The bare fact that subsequently it was noticed that false evidence was given in a proceeding, by itself, will not be sufficient for concluding the expediency of prosecution. Before launching prosecution, one has to bear in mind that hundreds of actions are tried yearly in which the Court finds the evidence irreconcilably conflicting and therein one or the other side must have wilfully and deliberately perjured. The Courts do not often pronounce on the falsity of evidence, when coming to findings. If prosecution has to be launched in every case and particularly at the instance of the opposite party, then there will be no limit to litigation between the parties. This aspect of the matter must make the Court pause and consider the expediency of prosecution in a particular case with reference to its facts and not launch prosecution at instance of parties in every case where perjury is discovered. AIR 1966 Mad 456, Rel. on. (Para 4)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 1863 (V 53) =
1967 Mad LJ (Cri) 259. Kuppas
Goundan v. M. S. P. Rajesh 3
(1966) AIR 1966 Mad 456 (V 53) =
1966 Mad LJ (Cri) 67 = 1966 Cri
LJ 1457. Rangaswami Reddiar v.
Gunnammal

(1960) AIR 1960 Mad 77 (V 47) =

1960 Cri LJ 251, Kashi Thevar

v. Chinniah Konar

3

N. Natarajan, for Appellant; G. Gopalaswami, for Respondents. Nos. 1 and 2; S. Jagadeesan, for Public Prosecutor, for State.

JUDGMENT:— This appeal is directed against the order passed by the learned 6th Presidency Magistrate, Saidapet Madras in M. P. No. 32 of 1967 on his file declining to launch prosecution as requested by the appellant, against the respondents for offences under Sections 211 and 193 of the I. P. C. The appellant and the first respondent are, film financiers. The second respondent, Vallinayagam, wanted an amount of Rs. 25,000 for financing his productions. Respondent No. 1, Kolandaivelu Chettiar, who had already advanced amounts was short of money on a particular date and he advanced only Rs. 17,500. The appellant who was then present offered to pay the balance of Rs. 7,500 to the second respondent and for that purpose he requested the first respondent to execute a promissory note in favour of one Krishnaswamy Reddiar his nominee for Rupees 7,500. Believing his representations the promissory note was executed, but the amount was not paid. The promissory note was also not returned. Respondent No. 1 filed the complaint against the present appellant for cheating within the meaning of Section 420, I. P. C. and deposed to these facts as P. W. 1. P. W. 2 Vallinayagam stated that the amount was not paid to him. The appellant, in defence, pleaded that the promissory note said to have been executed by the said first respondent to Krishnaswamy Reddiar had nothing to do with the production of the picture "Anbulla Athan", and added, that he did not know as to why P. W. 1 executed a promissory note. He further stated that no promissory note was executed by P. W. 1 to anyone at any time at his instance. Observing that the evidence adduced on the side of the complainant was not altogether satisfactory and holding that at the worst the matter would amount only to a breach of promise, the learned Magistrate, discharged the appellant under Section 253 (1), Criminal P. C. This was on the 10th of March, 1967. Thereupon, on 6-4-1967 the appellant filed a petition under Section 476, Criminal P. C. before the learned Magistrate requesting him to file a complaint against the present respondents for having filed a false complaint and given false evidence in Court. The petitioner was absent on 28-8-1967 and the learned Magistrate dismissed the application stating that there was no ground for sanctioning the prosecution. The correctness of this order is now canvassed in the present appeal.

Under Section 476, CL (1) of the Criminal Procedure Code.

"When any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in Sec. 195, sub-section (1) CL (b) or CL (c), which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court".

2. Under Section 479-A, Criminal P. C. where a witness has intentionally given false evidence in judicial proceedings, if the Court feels, that for the eradication of the evils of perjury and in the interests of justice, it is expedient that such witness should be prosecuted, the Court shall, at the time of the delivery of the judgment, record a finding to that effect stating its reasons therefor and if it so thinks fit, after giving him an opportunity, to make a complaint thereof, in writing, and forward the same to a Magistrate of the First Class.

3. The Magistrate, who tried this case, had all the materials before him, when he passed the order of discharge under Section 253 (1), Criminal P. C. Obviously, he did not consider it necessary or expedient to launch proceedings against the respondents for preferring any false complaint or for perjury. Where after the judgment documents, which would establish the falsity of the evidence of the witness, are brought to the notice of the Court, Section 479-A, Criminal P. C. will not apply and sub-section (6) of the section will not operate as a bar for proceeding under Sections 476 to 479, Criminal P. C. Vide Kasi Thevar v. Chinniah Konar, AIR 1960 Mad 77 and Kuppa Goundan v. M. S. P. Rajesh, 1967 Mad LJ (Cri) 256 = (AIR 1966 SC 1863). No material was placed subsequently by the appellant to show that the complaint, which was filed, was false or the evidence, which was given amounted to perjury. The materials were there even at the time when the learned Magistrate passed the order of discharge. Petitioner does not base his claim for launching proceedings against the respondents on any new material, but only on the materials available from the evidence of P. W. 1 and P. W. 2 and the documents already filed. Therefore, in these circumstances, the bar under Section 479-A, CL 6, Criminal P. C. would come into operation.

4. Even otherwise this is not a case where a complaint should be filed in the interests of justice. The matter relates to the execution of a promissory note. The executant says that he executed it believing certain representations: The appellant avers that he had nothing to do with

the promissory note. It is said that suits were instituted on the promissory note and that they are pending. To say that the complainant has not proved his case under Section 420, I. P. C. is not always the same as saying that it has been proved that the complaint given by him was false. "The bare fact that subsequently it was noticed that false evidence was given in a proceeding, by itself, will not be sufficient for concluding the expediency of prosecution. Before launching prosecution, one has to bear in mind that hundreds of actions are tried yearly in which the Court finds the evidence irreconcilably conflicting and therein one or the other side must have wilfully and deliberately perjured. The Courts do not often pronounce on the falsity of evidence when coming to findings. If prosecution has to be launched in every case, and particularly at the instance of the opposite party, then there will be no limit to litigation between the parties. This aspect of the matter must make the Court pause and consider the expediency of prosecution in a particular case with reference to its facts and not launch prosecution at the instance of parties in every case where perjury is discovered." Vide 1966 Mad LW (Cri) 67 = (AIR 1966 Mad 456) Rangaswamy Reddiar v. Gunnammal. The learned Magistrate has correctly dismissed the petition stating that there was not sufficient ground for taking any action against the respondents. The appeal fails and the same is dismissed.

Appeal dismissed.

AIR 1970 MADRAS 269 (V 57 C 76)

PALANISWAMY, J.

Al. Ar. Alagappa Chettiar, Applicant v. Pl. Ct. Palaniappa Chettiar, Respondent.

Applns. Nos. 179 and 556 of 1968, D/- 8-8-1969.

Civil P. C. (1908), O. 33, R. 1 — Suit in forma pauperis — Intentional suppression of property owned by plaintiff, to show his pauperism — Plaintiff, held, not entitled to sue as pauper.

It is the duty of a petitioner to file an accurate verified statement of his properties and failure to do so disentitles the party from suing as pauper. Any intentional departure from good faith whatever may be the motive for the suppression must result in the dismissal of the petition for permission to sue as a pauper. Where it is clear that the plaintiff attempted to play fraud on the Court by suppressing his interest in a property by showing that he did not realise anything by sale of that property subsequent to the date of the presentation of the petition the plaintiff

cannot succeed. The question whether the omitted item of property is substantial or is of little value is beside the point. AIR 1945 Mad 296; AIR 1943 Mad 11, Rel. on. (Para 4)

Cases Referred:	Chronological	Paras
(1966) O. S. No. 26 of 1966 (Mad)		3
(1955) (1955) 2 Mad LJ 638, Murugan v. Shivaraman		3
(1954) AIR 1954 Mad 537 (V 41) = 1954-1 Mad LJ 26, Ramkrishna Chetti v. Govindammal		4
(1945) AIR 1945 Mad 296 (V 32) = 1945-1 Mad LJ 53, Chellammal v. Muthulakshmi		4
(1943) AIR 1953 Mad 11 (V 30) = 1942-2 Mad LJ 345, Kuppuswami Naidu v. Varadappa Naidu		4
N. C. Raghavachari and N. S. Varadachalam, for Appellant; C. R. Ganesan, for Respondent.		

ORDER:— The point for consideration in this application taken out by the plaintiff under O. 14, R. 12 of the Original Side Rules is whether he is a pauper within the meaning of Order 33, Rule 1 of the Civil Procedure Code. The Master, against whose order this application has been filed, held against the plaintiff holding that he had intentionally and fraudulently suppressed his interest in a house property at Madurai and that on account of such suppression the plaintiff is not entitled to sue in forma pauperis though he is not possessed of sufficient means to pay the court-fee. The suit is for declaration of the plaintiff's title to the suit property. The court-fee payable comes to about Rs. 40,000 (to be accurate Rs. 39,451-50 P.). The case of the plaintiff is that apart from his interest of 1/8th share in some lands, which share, according to him, is worth only about Rs. 2,000, he has no other property. The defendant alleged in his counter statement that the plaintiff had several properties. He also filed a supplemental counter affidavit stating that the plaintiff had certain shares in a building in Madurai and had deliberately and fraudulently suppressed it in his petition and affidavit. The Master held that the value of the plaintiff's share in the immoveable properties admittedly belonging to the plaintiff was about Rs. 13,000. He did not accept the defendant's contention that the plaintiff had any cash or interest in any compensation amount. But he, however, accepted the case of the defendant that the plaintiff deliberately and fraudulently suppressed his interest in the house property at Madurai.

2. After the defendant filed his counter statement pointing out that the plaintiff had a share in a house property at Madurai, the plaintiff did not seek the leave of the Court to file a reply statement controverting that allegation. The

supplemental counter statement was filed on 22-9-1967. The plaintiff sold away his share in the Madurai house property on 23-11-1967 in favour of one Ramanathan Chettiar and others for Rs. 9,500. Several prevaricating statements were made by the plaintiff in evidence, when his attention was drawn to that sale. At first he denied that he sold any property after the filing of the counter statement. He subsequently said that the Madurai house property belonged to his joint family and his entire share had been attached by some creditors. He further said that about 7 or 8 days before he gave evidence, some of the creditors attached his share in the house property. When he was questioned specifically he had to admit that he sold his share, but he qualified it by saying that he had to sell it at the instance of some creditors. He also said that he did not realise any amount out of the sale and that the creditors had taken away the amount. When his attention was drawn to the recital in the sale deed that he had received the entire consideration of Rupees 9,500 in cash in the presence of the Sub-Registrar, he admitted the receipt of the amount but said that he did not realise a single paisa and stated that the creditors took away the money from him. When he was asked why he had not disclosed this either in the petition or in his reply statement and why he did not file a supplemental reply he said that since the property had been attached by the creditors and taken away by them he had not stated that in the petition.

3. To show that the entire consideration of Rs. 9,500 realised by him had been taken by his creditors, the plaintiff examined P. W. 2 a close relation to show that he paid Rs. 5,000 to P. W. 2. That payment is said to have been made in discharge of a promissory note Exhibit B-1 which is of the year of 1947 and which is said to have been kept alive by periodical payments. The Master rightly disbelieved this story of payment by the plaintiff to P. W. 2. It is thus clear that the plaintiff deliberately and fraudulently suppressed his interest in the house property not only in the petition but also in his affidavit and also in his reply affidavit. The question in these circumstances is whether this omission disentitles him from suing as a pauper. Mr. Ravhavachari, appearing for the plaintiff relied upon the decision in *Murugan v. Sivaraman*, (1955) 2 Mad LJ 638, in support of his contention that every suppression of asset cannot be taken to mean that it was deliberate for the purpose of avoiding payment of court-fee and that what the plaintiff realised was only Rs. 9,500 whereas the court-fee payable by him is about Rs. 40,000 and that the amount so realised should therefore, be held to be insignificant. In the case cited

above, the plaintiff was found to have not disclosed the existence of a pair of bulls worth Rs. 120, whereas the court-fee payable by him was Rs. 329-15-0. In that case, it is observed that one test to find out whether the omission is mala fide and deliberate is whether the intention was to conceal the omitted items, because if that were included, the Court would find that the petitioner has means to pay the court-fee, and if the omitted item is insignificant compared with the quantum of court-fee payable, it cannot be said that the omission was deliberate and mala fide. *Rajamannar, C. J.*, who delivered the judgment was not prepared to believe the uncorroborated and doubtful testimony of P. W. 1 as regards the alleged suppression of the existence of a pair of bulls. It is not the principle laid down there that the only test is to find out the value of the omitted item vis-a-vis the court-fee payable irrespective of all other considerations. In a recent decision of a Bench in *O. S. A. No. 26 of 1966 (Mad)* following the above Bench decision it was held that the non-disclosure of the possession of some jewels was not mala fide, that the value of the jewels was not substantial and that the suppression was not with a view to escape payment of court-fee. In *Ramakrishna Chetti v. Govindammal*, (1954) 1 Mad LJ 26 = (AIR 1954 Mad 537) the omission was to disclose the provident fund amount under the bona fide impression that the fund did not belong to the plaintiff. It was held that the non-disclosure did not disentitle him from suing as pauper.

4. In *Chellammal v. Muthulakshmi*, (1945) 1 Mad LJ 53 = (AIR 1945 Mad 296) it is laid down that it is the bounden duty of the petitioner to file an accurate verified statement of his or her properties and that failure to do so would disentitle the party from suing as pauper. This decision approved the dictum of *Chandrasekhara Ayyar, J. in Kappaswami Naidu v. Varadappa Naidu*, (1942) 2 Mad LJ 345 = (AIR 1943 Mad 11) where the learned judge has pointed out that, any intentional departure from good faith whatever may be the motive for the suppression must result in the dismissal of the petition. In the instant case it is clear beyond doubt that the plaintiff attempted to play fraud on the Court by suppressing his interest in the house property in Madurai and trying to show that he did not realise anything by sale of that property subsequent to the date of the presentation of the petition the plaintiff cannot succeed. It has been pointed out in *Chellammal v. Muthulakshmi*, AIR 1945 Mad 296 = (1945) 1 Mad LJ 53 that if there had been fraud on the Court the question whether the omitted item of property is substantial or is of little value is beside the point. Therefore, there is no

substance in the repeated submission of Mr. Raghavachariar that the amount realised by the plaintiff was only Rs. 9,500 as against the court-fee of Rs. 39,251-50 payable on the plaint. The Master was right in holding that the omission was deliberate and mala fide. The application fails and is dismissed with costs. A month's time given for paying the court-fee.

Application dismissed.

AIR 1970 MADRAS 271 (V 57 C 77)

FULL BENCH

RAMAKRISHNAN, KAILASAM AND
VENKATARAMAN, JJ.

Parasurama Odayar, Appellant v. Appadurai Chetty and others. Respondents.

A. A. A. O. No. 5 of 1962, D/- 20-6-1969.

(A) Civil P. C. (1908), S. 141, O. 5, R. 19, O. 21, R. 66; O. 48, R. 2 — Execution proceedings — Service of notice under O. 21, R. 66 — Order 5, Rule 19 applies.

There is no provision in O. 21 as to the manner of service of the notice under O. 21, R. 66 and hence O. 48, R. 2 will apply, which means that the provisions of O. 5 relating to the manner of service will apply even to the notice issued under O. 21, R. 66. Hence, the provisions of O. 5, R. 19 will apply. (1895) ILR 17 All 106 (PC) & AIR 1962 SC 1886, Ref.

(Para 10)

(B) Civil P. C. (1908), Pre., O. 5, R. 19 — Interpretation of statutes — Use of "shall" and "may" in same provision.

Where the Legislature has used the words "shall" and "may" in the same provision, that itself is an indication, that the word "shall" has been used in a mandatory sense. AIR 1968 SC 178, Rel. on.

(Para 11)

(C) Limitation Act (1963), Arts. 127, 123, 137 — Limitation Act (1908), Arts. 166, 164, 169, 181 — Starting point under Article 166 — From date of sale and not from date of J. D.'s subsequent knowledge — Contrast with position under Arts. 164 & 169 of 1908 Act — Cases of application under O. 9, R. 13, Civil P. C. also referred in this connection — (Civil P. C. (1908), O. 9, R. 13) — (Limitation Act (1908), Arts. 164 and 169).

Where the Legislature simply mentioned "the date of the sale" as the starting point in Art. 166 of the Act of 1908, (or Art. 127 of the new Act), it would not be open to the Court to add words substituting the date of the judgment-debtor's subsequent knowledge as the starting point but preserving the period of thirty days.

(Para 16)

In Arts. 164 and 169 of Act of 1908 knowledge becomes a material factor only when the summons or notice was not duly

served. But there are no such words in Art. 166 even in a case where the notice was not duly served. In such a case Article 166 was not meant to apply at all and the residuary Art. 181 (corresponding to Art. 137 of the Act of 1963) would apply. AIR 1961 SC 1500 & AIR 1963 SC 1604, Expl.

(Para 16)

(Reference also made to cases under O. 9, R. 13, Civil P. C. in this connection).

(D) Civil P. C. (1908), O. 5, R. 19; O. 21, R. 66; O. 21, R. 90 — Limitation Act (1963), Art. 127 — Limitation Act (1908), Article 166 — Application to declare ex parte execution sale void — Application filed beyond 30 days from date of sale — Defence of bar of limitation under Art. 166 — Strict compliance with provisions of O. 5, R. 19 must be proved — Express declaration of due service required. AIR 1940 Mad 213 & AIR 1943 Mad 55 & AIR 1944 Mad 193, Overruled.

Per Venkataraman, J. (Ramakrishnan & Kailasam, JJ. concurring):

Where the judgment-debtor files an application to have the execution sale declared void and the application is filed beyond thirty days from the date of the sale, if the decree-holder or the auction-purchaser wants to defeat the application by urging that the application should have been filed within thirty days of the date of the sale under Art. 166 of the Limitation Act of 1908 (or the corresponding Art. 127 of the Act of 1963), for the reason that the summons had been duly served by affixture on the judgment-debtor as required by O. 5, R. 19, it is necessary that there should have been strict compliance with the provisions of O. 5, R. 19 by the executing Court when it proceeded to hold the sale in the absence of the judgment-debtor. In particular, where the return of the process-server under R. 17 of O. 5 has not already been verified by the affidavit of the serving officer the Court shall examine the serving officer on oath or cause him to be so examined by another Court touching his proceedings. It should also declare expressly that the summons has been duly served, though the exact form of that declaration may be in any convenient form, such as "it is declared that the defendant has been duly served", or "it is declared that the service is sufficient" or simply "defendant duly served" or "service sufficient." What is important is that the endorsement of the Court itself should indicate that the presiding officer has applied his mind and considers that the summons has been duly served. Case law discussed. AIR 1940 Mad 213 & AIR 1943 Mad 55 & AIR 1944 Mad 193, Overruled.

(Para 45)

Cases Referred: Chronological Paras (1968) AIR 1968 SC 178 (V 45) — 1968 Cri LJ 231, Jamatraj v. State of Maharashtra

- (1967) AIR 1967 Mad 5 (V 54) = 1966-1 Mad LJ 81, Ellappa Naicker v. Arumuga Servai 44
- (1964) AIR 1964 Cal 241 (V 51). Chaturbhuj v. Clive Mills Co. 44
- (1963) AIR 1963 SC 1604 (V 50) = 1964-1 SCR 971, Slate of Punjab v. Quisar Jehan Begum 4, 47
- (1962) AIR 1962 SC 1886 (V 49) = 1963-2 SCR 499, Bhushayya v. Ramakrishnayya 10
- (1962) AIR 1962 Andh Pra 156 (V 49) = 1961 Andh LT 136, Venkataramayya v. Venkata-mutharao 38
- (1961) AIR 1961 SC 1500 (V 48) = 1962-1 SCR 676, Harishchandra v. Dy. Land Acquisition Officer 4, 47
- (1955) AIR 1955 SC 425 (V 42) = 1955-2 SCR 1, Sangram Singh v. Election Tribunal, Kotah 41
- (1953) AIR 1953 Mad 528 (V 40) = 1953-1 Mad LJ 302, Anaithalayan v. Marudhamuthu 44
- (1952) AIR 1952 Cal 10 (V 39) = ILR (1952) 1 Cal 196, Ganeshmal v. Kesoram Cotton Mills 44
- (1952) AIR 1952 Cal 781 (V 39), Tripura Modern Bank v. Bansen & Co. 44
- (1950) AIR 1950 Assam 6 (V 37) = 54 Cal WN 92, Sampatlal v. Ball-prasad 43
- (1950) AIR 1950 Mad 341 (V 37) = 1949-2 Mad LJ 748, Adisesha Aiyar v. Papammal 37
- (1949) AIR 1949 Mad 396 (V 36) = 1948-2 Mad LJ 574, Manicaka Goundan v. Krishna Goundar 44
- (1948) AIR 1948 Mad 301 (V 35) = 1948-1 Mad LJ 422, Ammani Ammal v. Sabhapathi Pillai 36
- (1944) AIR 1944 Mad 193 (V 31) = 1944-1 Mad LJ 36, Adhilakshmi Amma v. Srinwasa Gounder 34, 53, 56
- (1943) AIR 1943 Bom 340 (V 30) = 45 Bom LR 695, Ved and Co. v. Hayeem 42
- (1943) AIR 1943 Mad 55 (V 30) = 1942-2 Mad LJ 558, Govinda Krishna v. Sankaralinga 8, 33, 52
- (1943) AIR 1943 Sind 188 (V 30) = ILR 1943 Kar 256, Gokuldas v. Dilsukhram 44
- (1940) AIR 1940 Mad 213 (V 27) = 1939-2 Mad LJ 926, Venkataraman Varu v. China Bapanna 8, 31, 33, 52
- (1937) AIR 1937 Mad 84 (V 24), Ramanadhan v. Veerappa 8, 26, 51, 54
- (1937) AIR 1937 Mad 219 (V 24) = 1937 Mad WN 184, Gopal Chettiar v. Mariasui Pillai 47
- (1936) AIR 1936 Mad 812 (V 23) = 71 Mad LJ 317, Palaniappa v. Thaipanai 8, 27, 52
- (1935) AIR 1935 Mad 438 (V 22) = 42 Mad LW 39, Viswanatha v. Mutugappan 8, 25
- (1934) AIR 1934 Lah 985 (2) (V 21), Tehal Singh v. Chanchal Singh 41
- (1933) AIR 1933 Mad 406 (V 20) = 64 Mad LJ 637, Ramaswami Chettiar v. Chinappa Chetti 8, 23, 54
- (1933) AIR 1933 Mad 466 (V 20) = 64 Mad LJ 629, Azagappa Chetti v. Ramnatha Chettiar 8, 23, 26, 27, 31, 37, 51, 52, 54
- (1932) AIR 1932 Oudh 326 (V 19) = 9 Oudh WN 896, Harcharan v. Md. Azizullah 40
- (1931) AIR 1931 Mad 813 (V 18) = ILR 55 Mad 223 = 61 Mad LJ 920, Gyanammal v. Abdul Hussain 47
- (1929) AIR 1929 Lah 334 (V 16) = 30 Pun LR 38, Farangu v. Harikishan 40
- (1927) AIR 1927 Mad 813 (V 14) = 26 Mad LW 481, Sundararajulu v. Narayana Swami 23, 55
- (1922) AIR 1922 Mad 417 (1) (V 9) = 15 Mad LW 77, C. P. Peringadi Abdul Rahimhanaji v. M. Birama-ntavida Karuvantakath Moidin 22
- (1918) AIR 1918 All 331 (V 5) = 43 Ind Cas 632, Champat Singh v. Mahavir Prasad 39
- (1914) AIR 1914 Mad 153 (V 1) = 1914 Mad WN 63, Mahomed Mera Rowther v. Kadir Mera Rowther 30, 54
- (1914) AIR 1914 Mad 159 (1) (V 1) = 1 Mad LW 1 = 1914 Mad WN 79, Vellayappa Chetti v. Veerappa Chetti 21
- (1909) 19 Mad LJ 31 = 3 Ind Cas 474, In re Shrikrishna Das 28, 50
- (1908) 18 Mad LJ 96, Venkobachar v. Raghavendrachar 20
- (1895) ILR 17 All 106 = 22 Ind App 44 (PC), Thakur Prasad v. Sk. Fakir Ullah 10

K. Parasaran for R. Shanmugham, for Appellant; V. V. Raghavan, for Respondent.

OPINION OF FULL BENCH

VENKATARAMAN J.:— This Full Bench has been constituted to resolve the conflict of observations in Bench decisions of this Court concerning the effect of non-compliance with the provisions of O. 5, R. 19, Civil P. C. relating to the service of summons.

2. The reference arises out of an application, E. A. 120 of 1960, filed by one Parasurama Odayar, the judgment-debtor in O. S. 10 of 1956 on the file of the District Munsif, Arni, to have it declare that the execution sale of his property which took place on 22-7-1959, in execution of the said decree was null and void. The property which was sold was about three acres in extent with a well and electric motor pump set. A sum of about Rs. 500 was due on the security of the property to the Government in respect of

a loan which had been taken. The property was sold for a sum of Rs. 11 subject to the above encumbrance and the purchaser was one Seshadri Iyengar, the second respondent in E. A. 120 of 1960. The notice of sale sent by registered post was returned as refused and the subsequent notice sent through the Court for the hearing on 19-1-1959 is said to have been affixed to the outer door of the house of Parasurama Odayar on 26-12-1958 by the process server on account of the absence of Parasurama Odayar from the village. On 19-1-1959 the notice in the execution petition was as follows—

"Respondent absent, Court notice affixed. Respondent called, absent. Set ex parte."

The sale was fixed on 18-3-1959. It finally took place on 22-7-1959 and was confirmed on 28-8-1959.

3. Parasurama Odayar alleged that he came to know of the sale only on 20-1-60 and he filed the application E. A. No. 120 of 1960 on 22-1-60 to have the sale set aside. He averred that he had no notice whatever of the sale and that the sale conducted without notice to him was void. He claimed that the property was worth Rs. 10,000 initially, the upset price was Rs. 9,000 subject to the encumbrance of Rs. 500 and urged that the sale was conducted fraudulently and with a material irregularity and had resulted in substantial injury to him. The application was resisted by the auction purchaser. The learned District Munsif, who enquired into the petition, rejected his contentions and dismissed the petition. The judgment-debtor's appeal to the learned District Judge also failed. The Courts below found that he had notice of the sale, that there was sufficient compliance with the provisions of O. 5, R. 19, Civil P. C., that since he had notice of the sale, he had to set aside the sale within 30 days under Art. 166 of the Limitation Act, 1908, and that the sale could not be said to be void. The judgment-debtor preferred A. A. O. 5 of 1962 and it came on for hearing before Kailasam, J.

4. At the outset it was pressed upon the learned Judge that property worth Rs. 10,000 had been sold for Rs. 511. The learned Judge apparently felt impressed by the contention, but held that even so, the application would have to be filed under O. 21, R. 90, Civil P. C. within a period of thirty days from the date of sale as required by Art. 166 of the Limitation Act of 1908. To get over that bar, it was urged on behalf of the judgment-debtor that the starting point of limitation mentioned as the date of the sale in Art. 166 should be construed as the date of the judgment-debtor's knowledge of the sale, which was 20-1-1960 according to him. This contention was sought to be

sustained by a reference to the decisions of the Supreme Court in Harishchandra v. Deputy Land Acquisition Officer, 1962-1 SCR 676 = AIR 1961 SC 1500 and State of Punjab v. Quisar Jehan Begum, 1964-1 SCR 971 = AIR 1963 SC 1604. Those were cases relating to the period within which the party dissatisfied with the award of compensation by the Collector under the Land Acquisition Act could ask the Collector to make a reference to the Civil Court. Where a party is not present at the time of making of the award and notice is not given to him of the award under Section 12 (2) of the Act, the Act gives him six months from the date to move the Collector. It was held that the literal and mechanical construction would not be appropriate, and that knowledge of the party affected by the award, actual or constructive being an essential requirement of fair-play and natural justice, the expression must be construed as meaning six months from the date of knowledge of the Collector's award." With reference to this contention, Kailasam, J. pointed out that, on the facts there was the finding of the Courts below that the judgment-debtor came to know of the sale at least on 20-11-1959. What happened was that the decree-holder, after the impugned sale, filed the next execution petition, E. P. 301 of 1959, to realise the balance of the decretal amount. Notice thereof was served on the judgment-debtor on 20-11-1959 and he paid the balance amount. The learned Judge accepted the finding of fact that he had knowledge of the date of the sale at least on 20-11-1959, and, since the petition was filed more than thirty days thereafter, it would be time-barred if Art. 166 applied.

5. It was then contended on behalf of the judgment-debtor that the sale was void ab initio, because there was no service of notice under Order 21, Rule 66, that it did not require to be set aside at all and that consequently Art. 166 of the Limitation Act would not apply and the residuary Art. 181 would apply, providing for a period, of three years from the time when the right to apply accrued. If this contention was correct, there could be no doubt that the application was in time. In support of this contention what was urged on behalf of the judgment-debtor was that there was no compliance with the provisions of O. 5, R. 19, Civil P. C. in the Court's endorsement of 19-1-1959, already quoted. In order to explain this contention, it is necessary to quote O. 5, Rr. 17 and 19:—

"17. Where the defendant or his agent or such other person as aforesaid refused to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant and there is no agent empowered

to accept service of summons on his behalf nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

19. Where a summons is returned under R. 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit."

6. What was contended before Kallasaam, J., on behalf of the judgment debtor was that in two particulars there was no compliance with the provisions of O. 5, R. 19: firstly, there was no affidavit of the serving officer (process server) before the Nazir and consequently the Court was bound to examine the process server on oath but that was not done; secondly, the Court did not declare that the summons had been duly served. The facts bearing on these contentions are these. After the alleged refusal of the postal notice, the execution petition was adjourned to 19-1-1959 and two notices were issued. The first was the notice under Order XXI, Rule 68(2) (which says that the terms of the proclamation of sale shall be settled after notice to the decree-holder and the judgment-debtor), and the other was the notice of an application by the decree-holder to reduce the upset price. The summonses are Exs. B-6 and B-9. Both of them were affixed on 26-12-1958 to the outer door of the house of the judgment-debtor. The endorsements are similar. It is sufficient to note the endorsement in Ex. B-6. There is first the endorsement dated 26-12-1958 of the Karnam to the following effect:—

"On enquiry made about the defendant mentioned in the notice, he is not to be found. It is learnt from the neighbours and the women of the house that he has gone to Odukathur or Vellore taluk and the date of his return is not known. Hence the summons is affixed to the outer door of his residential house." Below there is a 'return' dated 5-1-1959 of the process server, Kuppuswami, stating—

"I made enquiries on 26-12-1958 about the defendant herein in Nadukuppam village in Arni taluk. It was learnt from the neighbours that he had gone to Odukathur of Vellore taluk and that his date of return was not known. Hence copy of the summons was affixed to the outer door of his residential house with the Karnam as a witness." There is an endorsement of the Nazir to the following effect—

"P.S.A. Defendant absent, affixed." It is stated before us that "P.S.A." means "Process server affirmed". Before Kallasaam J., what was stated was that the words meant "party solemnly affirmed", but that makes no difference. The point made on behalf of the appellant and accepted by Kallasaam J. was that these words would only mean that the process server solemnly affirmed the facts stated in the return before the Nazir, but under Order V, Rule 19 besides that, an affidavit of the serving officer was necessary, but no such affidavit was taken by the Nazir and therefore it was incumbent on the court, under the first part of Order V, Rule 19, to examine the serving officer on oath. That, however, was not done. The learned Judge accepted this contention observing:—

"There is no verification by the serving officer and the words written and initialled by the Nazir will not have the effect of the serving officer verifying the return by affidavit."

Secondly, it was urged before Kallasaam J., that there was no declaration by the executing Court that the summons had been duly served as required by the second part of Order V, Rule 19. We have already quoted the endorsement dated 19-1-1959, on the execution petition, namely "respondent absent. Court notice affixed. Respondent called, absent. Set ex parte". It is here necessary to explain that the words "respondent absent. Court notice affixed" refer to what happened in the village on 26-12-1958 and the further words "respondent called absent, set ex parte" refer to what happened in the Court on 19-1-1959. The point which was made on behalf of the judgment-debtor was that there was no declaration by the executing Court, as required by Order V, Rule 19 "that the summons had been duly served."

7. Kallasaam J. dealing with the first aspect, expressed himself thus:—

"The rule (Order V, Rule 19) requires that the Court shall examine the serving officer on oath, if the return has not been verified by the affidavit of the serving officer. It also requires that the Court must either declare that summons has been duly served or order such service as it thinks fit. No decision has been cited before me as to the consequence of

failure of the Court to examine the serving officer, when the return is not verified by affidavit. As the word 'shall' is used, unless contrary intention appears, it must be taken that the rule is mandatory and failure to observe the rule will render the service void."

8. On the second aspect, the learned Judge expressed himself thus:—

"Regarding the failure by the Court to declare summons duly served or not, there is conflict of authorities." The learned Judge went on to point out the conflict of authorities.

8-A. Thus in two Bench decisions in *Azagappa Chetty v. Ramanatha*, 64 Mad LJ 629=AIR 1933 Mad 466 and *Ramanadhan v. Veerappa*, AIR 1937 Mad 84, it was held that, where there was no declaration by the Court under Order V, Rule 19, in the previous execution petition, the judgment-debtor would not be precluded by the doctrine of constructive res judicata in the later execution petition, from putting forward his objections to the execution. These decisions were followed by single Judges in three decisions, namely, *Ramaswami Chettiar v. Chinnappa Chetty*, 64 Mad LJ 637 = (AIR 1933 Mad 406), *Viswanatha v. Mutugappan*, AIR 1935 Mad 438=42 Mad LW 39 and *Palaniappa v. Thailvanai*, 71 Mad LJ 317=AIR 1936 Mad 812. As against these, there are two Bench decisions in *Venkataramayan Varu v. China Bapanna*, 1939-2 Mad LJ 926 and *Govinda Krishna v. Sankaralinga*, 1942-2 Mad LJ 558=AIR 1943 Mad 55, where it was held that, though the provisions of Order V, Rule 19 are mandatory, the Court could spell out an implied declaration that the summons had been duly served and that the absence of such an express declaration does not involve as a necessary consequence a finding that summons had not been duly served. *Kailasam J.*, felt that it was difficult to reconcile these views and observed:—

"In view of this conflict, it is desirable that there should be an authoritative decision on the point. The question whether non-compliance of the requirements under Order V, Rule 19 would make the service of summons ineffective or not has to be considered. The matter will be placed before my Lord the Chief Justice as to posting it before a Bench or a Full Bench". That is how the matter has come before us.

9. It will be noted that the appeal itself has not been referred to us and has therefore to go back to *Kailasam J.* for decision after the expression of the opinion by the Full Bench on the question referred. The question referred is whether the non-compliance of the requirements of Order V, Rule 19 would

make the service of summons ineffective or not, and this question has to be considered with reference to the application filed by the judgment-debtor to avoid the sale (to use a colourless expression).

10. At the outset we have to dispose of a preliminary point made by *Sri V. V. Raghavan*, the learned counsel for the second respondent-auction purchaser, that in respect of such an application in execution proceedings, Order V, Rule 19 would not in terms apply, that therefore the Court was not bound to see whether the provisions had been strictly complied with, and that it was enough if it was satisfied that the provisions had been substantially complied with. In support of this contention the learned counsel relies on two decisions, one of the Privy Council in *Thakur Prasad v. Sheikh Fakir Ullah*, 17 All 106 (PC) and *Bhusayya v. Ramakrishnayya*, 1963-2 SCR 499=AIR 1962 SC 1886 at 1892. These decisions have interpreted S. 141 C.P.C., 1908 and the corresponding S. 647, C.P.C. of 1882. Sec. 141 says that the procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction. What is pointed out in these decisions is that, in respect of execution proceedings, there is Order XXI which provides a detailed procedure, and consequently the general procedure prescribed elsewhere in the Code cannot be made applicable to execution proceedings. But this contention of the learned counsel overlooks the provisions of O. XLVIII, Rule 2 which says that "all orders, notices, and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons". There is no provision in Order XXI as to the manner of service of the notice under Order XXI, Rule 66 and hence O. XLVIII, Rule 2 will apply, which means that the provisions of Order V relating to the manner of service will apply even to the notice issued under Order XXI, Rule 66. Hence, the provisions of Order V, Rule 19 will apply.

11. In answering the reference about the effect of the non-compliance with the provisions of Order V, Rule 19, we must remember that we are not answering the question in the abstract, but in relation to an application to have the execution sale declared void. We will have to remember further that the question has been raised by the appellant in order to contend that Art. 166 of the Limitation Act of 1908, prescribing a shorter period of limitation of thirty days from the date of the sale did not apply to him and that consequently the residuary Art. 181 applied. This being the context in which the effect of the non-compliance with the provisions of Order V, Rule 19 has to be

considered, it will be necessary to have an idea as to how the appellant can contend that Art. 166 would not apply, if Order V, Rule 19 was not strictly complied with. When Art. 166 of the Limitation Act of 1908 or the corresponding Art. 127 of the new Limitation Act of 1963 prescribes a period of thirty days from the date of the sale for making the application to set aside the execution sale, it assumes that the judgment-debtor knew of the date of the sale, either actually or constructively and would therefore be in a position to make the application within thirty days of the date of the sale. If he was personally served with the notice under Order XXI, R. 66, there could be no difficulty in fixing him with knowledge of the date of the sale; even if he chooses to be absent from the Court in response to the notice under Order XXI, Rule 66, the law will say that it was his duty to be present and that he had constructive notice of the date of the sale. But it may not be possible always to effect personal service of the notice of the sale (meaning thereby the notice under Order XXI, Rule 66). Indeed, if personal service were to be insisted on the judgment-debtor, he might evade personal service and a premium could be put on such evasion. That is why the law has prescribed under O. V, R. 19 that even if the notice is served by affixure, the Court could declare that he has been duly served or alternatively the Court could order substituted service under O. V, R. 20. In either case, the Court is enabled to proceed further despite the absence of personal service and despite the possible absence of the judgment-debtor. In such a case, the law will say that the judgment-debtor had constructive notice and would expect the judgment-debtor to file the application within thirty days from the date of the sale. But, since it is possible that, in spite of the declaration of due service of the Court under O. V, R. 19 or of substituted service under O. V, R. 20, the judgment-debtor may not have actually known of the date of the sale, it should be open to him to satisfy the Court that actually he did not have notice of the sale and did not even otherwise know of the sale, and that the application of Art. 166 would take away his valuable right. At this stage it is pertinent to recall the observations of their Lordships of the Supreme Court in *Sangram Singh v. Election Tribunal, Kotah*, 1955-2 SCR 1 at p. 9—(AIR 1955 SC 425 at p. 429)—

"Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect

their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle." But apart from the above right of the judgment-debtor himself, it should be clear that in order that the executing Court may initially have jurisdiction to proceed with the execution, despite the absence of personal service, the executing Court should strictly comply with the provisions of Order V, Rule 19 (if it wants to hold under that provision that there has been due service). The imperative nature of the provisions of O. V, Rule 19 should therefore be obvious. This is also borne out by the use of the word "shall" in the two parts of Order V, Rule 19, as contrasted with the use of the word "may" in the rule. Where the Legislature has used the words "shall" and "may" in the same provision, that itself is an indication, that the word "shall" has been used in a mandatory sense. That has been pointed out by their Lordships of the Supreme Court in *Jamatraj v. State of Maharashtra*, AIR 1968 SC 178 construing S. 540, CrI. P. Code. That runs—

"Any Court may, at any stage of any enquiry, trial or other proceeding under this Code, summon any person or a witness, or examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

Their Lordships pointed out—

"The section is in two parts. The first part gives a discretionary power, but the latter part is mandatory. The use of the word 'may' in the first part and of the word 'shall' in the second firmly establishes this difference."

12. Now let us consider the rule more closely. The first part says that, where a summons has been returned under Rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath or cause him to be so examined by another court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit. Thus it says that, where the return under Rule 17 has not been verified by the affidavit of the serving officer, the Court shall examine him on oath and it is mandatory. If there is an affidavit, it means that the serving officer has tat-

ed something on oath and, if the statement turns out to be false he could be prosecuted. That itself would put him on guard and make him adhere to the truth as far as possible and would minimise the chances of a false return of service. It is with the same object that the Court is required to examine him on oath where he has not verified the return by an affidavit before the prescribed officer (Nazir). We know of numerous instances where defendants and judgment-debtors come to the Court and state that the process server has not come to their place at all and that the alleged affixture is a myth; and there are several cases where such a contention of the defendant or judgment-debtor has been accepted by the Courts. Such a danger would be minimised if the Court adheres to the provisions of Order V, Rule 19. If it makes it a point to question the serving officer as to what he did when he went to the village and what attempts he made to get at the defendant, there is no doubt that the service would be more real and effective than it would be otherwise. We cannot really over-emphasise the importance of this provision. Very often there is room for thinking that the Court does not even look into the return, but simply says "Service sufficient, defendant absent; set ex parte". That defeats the salutary purpose for which the detailed provisions have been enacted with anxiety by the Legislature.

13. Sri V. V. Raghavan, the learned counsel for the auction-purchaser was alive to the importance of the affidavit, but sought to contend that, since the process server was affirmed by the Nazir, according to the letters "P.S.A.", it must be taken that what was affirmed was an affidavit. We ruled that such an argument was not open to him before the Full Bench, because the referring Judge has himself held that there was no affidavit in this case, and that point has not been referred to us for decision again. The only question referred is what the effect of the want of affidavit is and we have already indicated our opinion that it is essential.

14. For the reasons already indicated, it is clear that the Legislature intends that there should be an express declaration by the Court that the summons has been duly served, though the exact form of that declaration may be in any convenient form, such as, "It is declared that the defendant has been duly served", or "It is declared that the service is sufficient", or simply "defendant duly served", or "service sufficient". What is important is that the endorsement of the Court itself should indicate that the presiding officer has applied his mind and considers that the summons has been duly

served. It is also desirable that before making such a declaration the Court indicates why it makes such a declaration. For instance, it may be that three different process servers had gone on different occasions and on every one of those occasions the judgment-debtor was absent and the Court feels that the judgment-debtor must really have come to know of the matter. Apart from the fact that the use of the word "shall" by the legislature in the concluding part of the rule in contrast with the use of the word "may" in the earlier part of the rule itself indicates that the legislature meant the concluding part of the rule, "shall either declare that the summons has been duly served", to be mandatory, we must emphasise what we have already stated, namely, that since after such declaration of due service the decree-holder wants to contend that the judgment-debtor has had constructive notice of the date of the sale and should therefore have filed the application to set aside the sale within thirty days under Art. 166, it is obvious that strict compliance with the provisions of Order V, Rule 19 is necessary before the decree-holder can limit the judgment-debtor to the shorter period of limitation.

15. At this stage, however, I must point out that the contention initially urged before Kailasam J., on behalf of the judgment-debtor that the starting point under Art. 166 of the Limitation Act of 1908 would be the judgment-debtor's knowledge of the sale would have a material bearing on the question we are now considering, whether strict compliance with Order V, Rule 19 is necessary. It may be noted that the initial contention that the judgment-debtor's subsequent knowledge of the date of sale would be the starting point was put forth as a matter of construction of Art. 166 itself, irrespective of the question whether there was due service of notice under Order XXI, Rule 66 within the meaning of Order V, Rule 19 that is to say, the argument proceeded on the footing that even if there had been due service, and Art. 166 applied, the starting point of limitation would be the judgment-debtor's subsequent knowledge of the date of sale. If that contention were correct, it could be urged (on behalf of the decree-holder or the auction purchaser) that the Court need not at all bother whether there had been strict compliance with the provisions of Order V, Rule 19, because, whether there was strict compliance or not, the starting point of limitation would be the judgment-debtor's subsequent knowledge of the date of the sale.

16. In my opinion, however, Art. 166 of the Limitation Act of 1908 cannot be construed as initially contended for be-

fore Kailasam J., on behalf of the judgment-debtor. The only words used in Column 3 were "the date of the sale" and there were no words making the judgment-debtor's subsequent knowledge of the date of the sale as a relevant criterion for the starting point. It is well to remember that the Limitation Act of 1908 (and this is also true of the Act of 1963) contains several Articles (e.g., 32, 48, 90,

164, 169) which mention knowledge as a material factor for the starting point of limitation, but others like Art. 137 do not mention it. Obviously the legislature intended that in the latter provisions subsequent knowledge would not be a material factor in fixing the starting point of limitation. In particular we may contrast Art. 166 with Arts. 164 and 169 of the Act of 1908.

Description of application 1	Period of limitation 2	Time from which period begins to run 3
164. By a defendant, for an order to set aside a decree passed <i>ex parte</i> .	Thirty days	The date of the decree or, where the summons was not duly served, when the applicant has knowledge of the decree.
169. For the re-hearing of an appeal heard <i>ex parte</i> .	Thirty days	The date of the decree in appeal or where notice of the appeal was not duly served, when the applicant has knowledge of the decree.

Thus in Arts. 164 and 169 knowledge becomes a material factor only when the summons or notice was not duly served. But there are no such words in Art. 166 even in a case where the notice was not duly served. This is a clear indication that even in a case where the notice was not duly served and the judgment-debtor came to know of the date of the sale only subsequently, the limitation was not thirty days from the date of the subsequent knowledge. At the same time it should be clear that in such a case where the notice was not duly served, it would be unreasonable to apply Art. 166 and oblige him to apply within thirty days of the date of sale. The solution for this difficulty is simple, namely, that in such a case Art. 166 was not meant to apply at all and the residuary Art. 181 would apply. Similarly under the Act of 1963 Art. 127 (corresponding to Art. 166 of the Act of 1908) would not apply and the residuary Art. 137 (corresponding to Art. 181) would apply. Where the Legislature simply mentioned "the date of the sale" as the starting point in Art. 166 of the Act of 1908, (or Art. 127 of the new Act), it would not be open to the Court to add words substituting the date of the judgment-debtor's subsequent knowledge as the starting point but preserving the period of thirty days. To add such words make the words "the date of the sale" thoroughly useless, because in every case the judgment-debtor would by-pass the provision and file the application within thirty days of his subsequent knowledge. If that was the intention of the Legislature, it could simply have enacted the third column of Art. 166 as "the date of the judgment-debtor's knowledge of the sale."

17. The decisions of the Supreme Court in 1962-1 SCR 676-AIR 1961 SC

1500 and 1964-1 SCR 971-AIR, 1963 SC 1604 cannot, therefore, be extended to the fixation of the starting point under Art. 166 of the Limitation Act of 1908 or the corresponding Art. 127 of the Limitation Act of 1963. Those decisions will have to be understood with reference to the fact that under the Land Acquisition Act, very often the Collector makes the award without fixing the date before hand, and consequently the party may not be present when the award is made. That is why S. 12 of the Land Acquisition Act itself requires that in such a case the Collector shall give immediate notice of the award to the party interested. If such notice is issued, he is given six weeks from the receipt of the notice for making the application for reference to the civil court; but where no notice is issued under S. 12 (2), he is given six months from the date of the Collector's award, and in such a case it stands to reason that the period of limitation should count from the date when the party gets notice of the award, actually or constructively. The situation before the executing court is, however, entirely different, because here notice is given even before the holding of the sale under O. XXI R. 66 and the date of sale is fixed after such notice. Once that notice is served, actually or constructively, the law presumes that the judgment-debtor knows of the sale and sees no injustice in his being required to file the application to set aside the sale within thirty days of the date of the sale. If, however, he proves that in spite of the presumption of law actual or constructive, he did not factually have notice, the law will come to his rescue by saying that Art. 166 would not apply to him at all and that the residuary Art. 181 would apply. Instances where the judgment-debtor may satisfy the Court that he had

actually no notice of the sale are given in *Gyanammal v. Abdul Hussain Sahib*, ILR 55 Mad 223=61 Mad LJ 920=(AIR 1931 Mad 813) for instance that the summons was not really served upon him, but on somebody else — one such instance is *Gopal Chettiar v. Mariasusai Pillai*, 1937 Mad WN 184=(AIR 1937 Mad 219) or that what was served was not the summons in the suit, etc. Similarly several cases are collected in the AIR Commentaries on the Civil Procedure Code 1963 Edn. under Order IX, Rule 13, Note 18, where in an application to set aside the ex parte decree on the ground that the summons was not duly served, the Court actually examined all the materials and circumstances of the case to see whether in fact the defendant had been duly served.

18. I may sum up this portion of the case by observing that, since it is not possible to construe Art. 166 of the Limitation Act of 1908 as giving thirty days to the judgment-debtor from the date of the subsequent knowledge of the sale and the law will oblige him to file the application within thirty days of the date of the sale where he has notice, actual or constructive, it is necessary that there should be strict compliance with the provisions of Order V, Rule 19, before the decree-holder or the auction-purchaser can invite the Court to hold that in law there was constructive notice under Order XXI, Rule 66 to the judgment-debtor.

19. The above conclusion of ours about the imperative nature of the provisions of Order V, Rule 19 in a later application by the judgment-debtor to have the execution sale declared void is supported by several decisions cited by Sri K. Parasaran, though they are not direct decisions in the sense of the question having been considered in an application to have the execution sale declared void. We shall consider the decisions chronologically, as far as possible.

20. Taking first the Madras decisions, *Venkobachar v. Raghavendrachar*, (1904) 18 Mad LJ 96 was a decision rendered, in 1908, with reference to S. 82, C. P. Code, 1882 (corresponding to Order V, Rule 19 of the C.P.C. of 1908) and Art. 169 of the Limitation Act, 1877. It was an application for rehearing of an appeal heard ex parte. Art. 169, as it then was, prescribed a period of thirty days from the date of the decree in appeal. The application was filed more than thirty days later and was dismissed by the District Judge on that ground. In the appeal the judgment of the Bench was this:—

"The District Judge has dismissed the application as barred by limitation. The appellant's case is that he never had any notice of the appeal. The return on the

notice is that it was tendered to the younger brother of the appellant. Under S. 82 C. P. Code it was the duty of the Court before proceeding with the appeal to declare that the notice had been duly served. This the Court, as the record shows, did not do, and without such declaration there is no sufficient service. If, in fact, the appellant had notice of the appeal, Art. 169 of Sch. II of the Limitation Act can have no application. We, therefore, set aside the order of the District Judge and remand the case for disposal on merits."

The reasoning of the above decision will apply with equal force to an application, as we have in the present case, to avoid the sale on the ground that the judgment-debtor did not have notice at all under Order XXI, Rule 66. Order XXI, R. 66, so far as material, enacts that, where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be drawn up in the language of such Court, and that the terms of such proclamation shall be settled in court after notice to the decree-holder and the judgment-debtor, except in cases where notices have already been issued under Order XXI, Rule 64, and such proclamation shall state the time and place of sale etc. In the corresponding Section 287 of the Code of 1882, the words "after notice to the decree-holder and the judgment-debtor" were not there. The addition of these words only emphasises the necessity of the notice to the judgment-debtor which should even otherwise be obvious, because before proceeding to sell a man's property the court must give notice to him that it is going to sell his property on such and such a date. If the man does not have such notice, how can he be expected to file the application under Art. 166 within thirty days of the sale?

20-A. The above decision settles two points: (1) that want of declaration of due service under S. 82 C.P.C. of 1882 meant that there was no sufficient service in the eye of law; and (2) that, if the respondent in the original appeal had no notice of the appeal and it was heard ex parte, Art. 169 of Sch. II of the Limitation Act of 1877 could have no application. This reasoning would apply by analogy to both the aspects of the application before us to have the sale declared void on the ground that the judgment-debtor had no notice under Order XXI, Rule 66. Firstly, since there was no declaration under Order V, Rule 19, that there was due service, there was not sufficient service in the eye of law, so far as Order V, Rule 19 is concerned. Secondly, if the judgment-debtor had factually no notice, Art. 166 of the Limitation Act of 1908 would not apply to him at all. It may be noted that

the wording of column 3 of Art. 169 of the Limitation Act of 1877 was exactly similar to the wording of Art. 166 of the Limitation Act of 1908, in that the starting point of limitation was mentioned in Art. 169 as the date of the decree in appeal. It was only in Act of 1908 that column 3 of Art. 169 was amended so as to read thus:—

"The date of the decree in appeal or, where notice of the appeal was not duly served, when the applicant has knowledge of the decree".

This wording of the Act of 1908 has been kept up in the new Act of 1963, where Arts. 164 and 169 of the Act of 1908, have been clubbed together as Art. 123. In other words, subsequent knowledge of the date of the decree was not a material factor in fixing the starting point of limitation in Art. 169 of the Limitation Act of 1877, and that was why it was held that, where the respondent in the original appeal had no notice of the appeal, Art. 169 of the Limitation Act of 1877 did not apply at all. On the same reasoning, we have to hold that Art. 166 of the Act of 1908, which is similarly worded, would not apply to a case where the judgment-debtor has factually no prior notice of the date of the sale.

21. The next case referred to is Vellayappa Chetti v. Veerappa Chetti, 1 Mad LW 1—1914 Mad WN 79=(AIR 1914 Mad 159 (1)). It was an application under Order IX, Rule 13 to set aside an ex parte decree. The entry of the court in the suit was, "defendants 1, 2, 5 and 6 absent; ex parte". The learned Judges were prepared to hold that there had been a declaration under Order V, Rule 19, that the summons had been duly served, but held that the learned Subordinate Judge was not justified in making the declaration, and should have ordered fresh notice; this is clear from the reference to the previous decisions and the arguments. We do not think that the decision is of any help on the question before us.

22. Peringadi Abdul Rahimhanaji v. Bramantavida Karuvenkatah Modin, 15 Mad LW 77=AIR 1922 Mad 417 (1) was a decision of Ramesam J., in which the learned Judge in an application under S. 25 of the Provincial Small Cause Courts Act, set aside in revision the ex parte decree on the ground that no order had been passed under Order V, Rule 19 declaring that the summons had been duly served. This consideration will apply equally to the application to have the execution sale declared void on the ground that no declaration of due service had been made under Order V, Rule 19.

23. In Sundararajulu v. Narayanaswami, AIR 1927 Mad 813=28 Mad LW 481=103 Ind Cas 825, decided by Srinivasa Aiyangar J., the facts were these:

In the previous execution petition of 1924, an order for the arrest of the second defendant was passed, but no batta was paid and the order was not carried out. In the later execution petition he sought to contend that the prior execution petition was barred by limitation. The decree-holder set up the plea of constructive res judicata. The judgment-debtor demurred by urging that there was no declaration of due service under Order V, Rule 19 in the previous execution petition. His contention prevailed with the executing Court. The revision petition filed by the decree-holder was dismissed by Srinivasa Aiyangar J. The relevant entry in the execution petition of 1924 may be stated in two parts:

"Defendants affixed 7th November 1924 as defendant 1 gone out, driving out, his wife said".

"Absent arrest defendant 2, 25th November 1924".

The first part was in the handwriting of the clerk. The second part was in the handwriting of the presiding officer. Srinivasa Aiyangar J. held that there was no declaration by the Court of the sufficiency of the service of the notice within the meaning of Order V, Rule 19 and that consequently the plea of constructive res judicata would not apply. It was urged on behalf of the decree-holder that the very fact that the Court, after referring to the absence of the judgment-debtors had proceeded to order execution must be regarded as impliedly including a declaration that the service was sufficient and proper. Srinivasa Aiyangar J. repelled that submission and observed—

"I am not sorry for my being unable to accede to the contention especially having regard to the unfortunate practice that has grown up at any rate in this Presidency of not paying sufficient attention to the service of processes. When the law requires that the court should declare the proper service of a notice or process, the mere omission to make such a declaration is not in my opinion a mere irregularity. Whatever it may be in the ordinary cases, I am satisfied that when the rule that is sought to be invoked is the rule of constructive res judicata the rules relating to proper service of notice cannot be too strictly adhered to."

Lower down:—

"For my part it seems to me that when the law requires the court to make a formal declaration about the propriety of the service, it requires the court to pronounce upon such propriety in a judicial manner and it is obvious that the sufficiency or otherwise of the service required to be decided on by the court should not be left merely to the office. I hold therefore that such a formal declaration of the propriety of service is really necessary, at any rate, in all cases in which on

the basis of such proper service the rule of constructive res judicata is sought to be availed of."

The above decision has been approved and followed by Walsh and Bardswell JJ. in 64 Mad LJ 629= AIR 1933 Mad 466. The judgment-debtors pleaded that the decree was not executable. It was urged that they were precluded from raising such a contention on the principle of constructive res judicata by an order in a prior execution petition. But in the prior execution petition there was no declaration by the Court that the summons had been duly served as required by Order V, Rule 19. It was held that consequently the omission was fatal and that the principle of constructive res judicata could not be invoked against the defendants. The decision of Srinivasa Aiyangar J. and that of the Bench were followed by Walsh J., on the same point of constructive res judicata in 64 Mad LJ 637= AIR 1933 Mad 406. The judgment-debtor was permitted to raise the plea of limitation despite the order in the previous execution petition directing his arrest, the reason being that in the previous execution petition there was no declaration of due service under Order V, Rule 19.

24. Before noticing the other decisions, I may pause here and mention straightway that the principle of these decisions on the question of constructive res judicata will apply equally to an application to have the execution sale declared void. The analogy consists in this: the doctrine of constructive res judicata, if applied, would preclude the judgment-debtor from raising the pleas otherwise open to him and, therefore, it was necessary to prove that he had notice of the prior proceedings in which he failed to take the plea and it was in that connection it was held that strict compliance with the provisions of Order V, Rule 19 was necessary. Similarly here the judgment-debtor is told that he must apply within thirty days of the date of the sale under Art. 166, and, in order that he may be pinned down to the shorter period, it is necessary that he should have had notice; in other words, there should be due compliance with the provisions of Order V, Rule 19.

25. The next decision chronologically in point of time cited by Sri Parasaran is that of Pandrang Row J. in AIR 1935 Mad 438=42 Mad LW 39. It was an application to set aside a sale on the ground that there was no due service of the notice under Order XXI, Rule 66, because there was no declaration under Order V, Rule 19 that the service by affixture was sufficient. The learned Judge allowed the appeal and set aside the sale on the ground that there was no due service of the notice under O. XXI R. 66, because there was no declaration

under Order V, Rule 19 that the service by affixture was sufficient or due service. The learned Judge observed:—

"The provisions of Order V, Rule 19 C.P.C. are imperative and when there is no declaration that the service is due service, the service cannot be held to have been effected at all, and the case is one in which there has been no service at all of the sale proclamation and the judgment-debtors had no opportunity to represent what they had to say to the Court, before the Court drew up the sale proclamation."

It must be added, however, that no question of the non-applicability of Art. 166 was discussed probably the application was filed within thirty days from the date of the sale.

26. The Bench decision in 64 Mad LJ 629= AIR 1933 Mad 466 was followed by Pandrang Row and Menon JJ. in AIR 1937 Mad 84. The facts are rather complicated, but it is enough to state the question was whether a particular order dated 8th October, 1928, in E.P. 104 of 1918 in execution of a decree in O.S. 330 of 1911 directing attachment would constitute res judicata so as to preclude the contention of the judgment-debtor later on that another earlier execution petition was not maintainable and was time-barred. There was no declaration by the Court under Order V, Rule 19 that there was sufficient service in E.P. 104 of 1928. On that ground it was held that the principle of constructive res judicata could not be applied in execution proceedings. The Court observed:—

"No doubt that order was passed on an application to execute the decree and if notice had been served in person on the judgment-debtor and he had failed to appear to object to the execution being allowed on the ground that the execution is barred by limitation, his failure to do so coupled with the order for attachment would constitute a bar in any later proceeding. In this particular case, however, there was no personal service nor was there any declaration by the Court that there was sufficient service. This question was considered by a Bench of this Court in 64 Mad LJ 629= AIR 1933 Mad 466, and it was held therein that unless there is declaration by the Court that the service made under Order V, Rule 17 is sufficient as required by O. V, Rule 19 C.P.C. any order passed by the Court in the absence of the judgment-debtor will not constitute res judicata." In that particular case notice was affixed on the ground that it had been refused, but it was held that, whether the affixture was by reason of the absence or by reason of refusal, the declaration under Order V, Rule 19 was necessary.

27. Next there is a decision of Pandrang Row J. in 71 Mad LJ 317 = AIR

1936 Mad 812. A decree of the Sub-Court, Silvaganga was ordered to be transmitted to the Sub-Court, Devakottal. Before the Sub-Court, Devakottal, the judgment-debtor raised pleas of limitation and discharge. The decree-holder pleaded that the order of transmission would operate as *res judicata*. The contention was repelled thus—

"The order of transmission would no doubt operate as *res judicata* if really it was passed after due service of notice of the petition on the judgment-debtor. There was no personal service; the service was by affixture, the reason for affixture being refusal by the judgment-debtor to acknowledge receipt of the notice. In such a case, as required by Order V, Rule 19 C.P.C., the Court shall either declare that the summons has been duly served or order such service as it thinks fit. In this particular case there was no such declaration. It was held in 64 Mad LJ 629—AIR 1933 Mad 466 by a Bench of this Court that the omission of the Court to make a declaration of the kind mentioned in Order V, Rule 19 C.P.C. is fatal when it is sought to apply the constructive principle of *res judicata* against the judgment-debtor The pleas of limitation and discharge have never been actually decided and the judgment-debtor is entitled to have a decision upon them. Express decision there has been none, and no decision can be implied in the absence of a proper declaration as required by law of the service of notice."

28. I shall stop here for the present and turn to the line of authorities on the opposite side, where it was held that a declaration under Order V, Rule 19, though mandatory, could be implied. In *re Shree Krishna Das*, 19 Mad LJ 31 = 3 Ind Cas 474 (Miller and Pinhey, JJ.) was a case where the learned Judges dismissed an appeal against the order of the City Civil Judge imposing a heavy fine. The fine was imposed under S. 174 C.P.C., 1882 (corresponding to Order XVI, Rr. 10 to 13 and 17 of the Code of 1908). The judgment was as follows:—

"The appellant refused service of the summons and a copy was duly affixed to his door. We do not think that the omission of the Judge to record under S. 82 C.P.C. an express declaration that the process was duly served, can invalidate his order under S. 174 C.P.C. The order on the summons, in our opinion, is sufficient declaration in the circumstances. The City Civil Judge has given sufficient reasons for imposing a heavy fine."

28-A. The provisions of S. 174 C.P.C. of 1882 were as follows:—

"If any person on whom a summons to give evidence or produce a document has been served fails to comply with the summons, or if any person so summoned

and attending departs in contravention of S. 173, the Court may order him to be arrested and brought before the Court.

"Provided that no such order shall be made when the Court has reason to believe that the person so failing had a lawful excuse for such failure.

When any person so brought before the Court fails to satisfy it that he had a lawful excuse for not complying with the summons, the Court may sentence him to fine not exceeding five hundred rupees".

29. It may be doubted whether in punishing a man for disobedience of a summons it is not essential that the summons should be declared to have been duly served in strict compliance with the rule. However, without going too far, it is enough to distinguish the case by noting the following features. Firstly, there were no words, "has been duly served" in S. 174. Further there was a proviso which enabled the party to satisfy the Court that he did not really have notice. Presumably for these reasons it was held that express declaration was not necessary and that it was enough if the Court was satisfied that the defendant had refused service. Further, for the reasons already discussed in full, the decision is not directly applicable to the question before us.

30. The next decision in point of time is that of Sadasiva Iyer and Spencer JJ. in *Mahomed Mera Rowther v. Kadir Mera Rowther*, 1914 Mad WN 63 = (AIR 1914 Mad 153). It arose out of an application by the judgment-debtor to set aside the Court auction sale on the ground that notice had not been duly served under S. 248 C.P.C. 1882 (corresponding to Order XXI, Rule 22 of the Code of 1908). The peon had returned the notice with the note that it was affixed to the outer door of the judgment-debtor owing to his evading service. The executing Court (District Munsiff) passed orders for attachment. The learned Judges observed:—

"This act of the Court indicates in our opinion a sufficient declaration that the service has been duly effected."

For the reasons already stated, this view requires reconsideration and it has to be held that an express declaration is necessary, though the exact form is immaterial.

31. The next decision is that of Burn and Stodart JJ. in 1939-2 Mad LJ 926 = (AIR 1940 Mad 213) which arose out of an application under Order IX, Rule 13 to set aside an *ex parte* decree. The judgment ran thus:—

"It is of course desirable that all courts should observe the mandatory provision in Order V, Rule 19 C.P.C. and 'either declare that the summons has been duly served or order such further service as it thinks fit'. But we do not think that

the absence of such an express declaration will involve as a necessary consequence a finding that a summons has not been duly served. In the present case, no less than four summonses were taken out to the appellant and they were all returned with reports that the copies had been affixed because the appellant was absent in some place or other. After the fourth return of the kind, the Court said on 24th March 1933, 'defendant 7 affixed on 15th March 1933, said to have gone to Tirupattur by the inmates of the house. Called absent. Defendant 7 ex parte.' In the circumstances of this case we see no difficulty in saying that there is here an implied, though not an express, declaration of sufficiency of service on the seventh defendant. The decisions in 64 Mad LJ 629 = AIR 1933 Mad 466 and 64 MLJ 637 are not in point. Moreover we must agree with the learned Sub-Judge that the appellant really knew all about the suit as it was going on. The mortgagor-defendants were his son-in-law and his grandsons and it is not possible to believe his statements that he knew nothing about the suit until after it had been decreed."

32. In Madras the following proviso was introduced to Order IX. Rule 13:

"Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim." The decision could be supported under the above proviso, but the proviso will not in terms apply to an application to have an execution sale declared void.

33. The next decision is that of Krishnaswami Aiyangar and Kunhi Raman, JJ. in 1942-2 Mad LJ 558 = AIR 1943 Mad 55. The learned Subordinate Judge set aside an execution sale on two grounds, the first of which was that the guardian ad litem of defendants 4 and 5 had not been duly served with notice of the execution petition. The return on the notice was not available, but what was stated to the High Court was that the return on the notice was affixed because the guardian was not to be found and was evading service. Without a specific declaration under Order V, Rule 19 the Court declared these defendants ex parte. In appeal against the order setting aside the sale, the learned Judges, following 1939-2 Mad LJ 926 = (AIR 1940 Mad 213), were prepared to imply a declaration. With great respect, this declaration cannot be considered as a safe precedent. Apart from the reasons already given for the necessity of an express declaration, it may be noted that in that particular case even the terms of the return of the process server were not

before the Court, and it does not appear whether that was the only service attempted and how the executing Court was satisfied that the guardian had been evading service, particularly when in the case of a minor the Court should normally be more considerate than in the case of an adult.

34. The next decision is that of Horwill, J. in *Adhilakshmi Amma v. Srinivasa Gounden*, 1944-1 Mad LJ 36 = AIR 1944 Mad 193, where the judgment-debtor sought to raise the plea of limitation in a later execution petition, but it was urged that, because he had failed to raise the plea in the earlier execution petition of 1937, the principle of constructive res judicata would bar him from raising the plea of limitation later. The judgment-debtor sought to urge in reply that there had been no declaration of due service under O. 5, R. 19 in the earlier execution petition and, therefore, on the principle of the prior Bench decision, the doctrine of constructive res judicata would not apply. Horwill, J. reviewed the case law up till then, and concluded—

"An examination of the various decisions indicates that one has to consider the facts of each case and decide on those facts whether the failure to declare a judgment-debtor ex parte was a mere omission and the subsequent procedure made it clear that the Judge did consider the service sufficient, or whether the facts of the case left in some doubt the question whether there was proper service or not. In the present case, the second defendant refused service on the frivolous ground that his father's name was not correct, despite the fact that his father was served at the same time and was a party to the same proceedings. Under such circumstances, the executing Court would undoubtedly have considered the service sufficient. When one considers the nature of the excuse offered and the fact that the executing Court immediately ordered "proclamation and sell", it becomes clear that the executing Court did consider the service sufficient. If the service was sufficient, then the second defendant was bound by all orders passed which impliedly decided any question that he might have raised with regard to the executability of the decree."

35. In my opinion, however, for the reasons already stated in full, there must be an express declaration by the executing Court of due service, though, the declaration need not be in any set form.

36. Sri V. V. Raghavan referred to the decision of Yahya Ali, J. in *Ammaniammal v. Sabanathi Pillai*, 1948-1 Mad LJ 422 = (AIR 1948 Mad 301) but there is no discussion and the decision is not of any help.

37. The next decision is that of Krishnaswami Nayudu, J. in *Adikesha*

Aiyar v. Papammal, 1949-2 Mad LJ 748 = AIR 1950 Mad 341, holding that the doctrine of constructive *res judicata* could not be applied to shut out the pleas of the judgment-debtor, where in the earlier execution petition there had not been an express declaration of due service. The learned Judge followed the Bench decision in 64 Mad LJ 529 = AIR 1933 Mad 466 and the other decisions to that effect and distinguished the decision of Horwill, J., and the decisions followed by him.

38. In Venkataramayya v. Venkatamutharao, AIR 1962 Andh Pra 156 Krishna Rao, J., followed the decision of Horwill, J., and refused to set aside the sale on the ground that there had been a declaration of due service of the notice under O. 21, R. 22. The two defendants-judgment-debtors were brothers and they were served by affixture. The second judgment-debtor put in his appearance, but his brother stayed away. The learned Judge observed—

"In these circumstances, there is *prima facie* no reason to think that the service by affixture was reduced to a formal ritual and was not sufficient for the first judgment-debtor's obtaining knowledge of the execution proceedings." The decision must be confined to the facts of that case and cannot be taken as a general authority.

39. Other High Courts have also taken the same view as ours. In Champat Singh v. Mahabir Prasad, AIR 1918 Ali 331, an application under O. 9 R. 13 to set aside an *ex parte* decree was allowed, because in the suit there had been no express declaration of due service under Order 5, Rule 19 and the necessity thereof was emphasised.

40. In Farangu v. Harikishan, AIR 1929 Lah 334, the judgment-debtor sought to raise the plea of limitation in execution, but was met by the plea of constructive *res judicata*. Bhide, J. pointed out that in the earlier execution petition of 1924, there was no due service and consequently the principle of constructive *res judicata* would not apply. The report of the process server showed that a copy of the notice was offered to the appellant and that he refused to receive it and the Court considered the service sufficient. Bhide, J. re-examined the facts and held that there was no due service. He observed—

"No copy of the notice was affixed on the outer door of the house of the appellant. Nor was any affidavit of the process server taken with respect to the service. The mere fact that the Court considered the service to be sufficient cannot conclude the matter."

As against these, there are the following cases. In Harcharan v. Md. Azizullah, AIR 1932 Oudh 326, there was an application under Section 25 of the Provincial

Small Cause Courts Act against the order of the trial Court refusing to set aside the *ex parte* decree. One of the grounds of the application was that there was no declaration of due service under O. 5, R. 19. The Bench held:

"We are of opinion that there is no substance in this argument. We think that the declaration required by Rule 19 is implicit in the circumstances attending the service of the summons on its return to the Court which had issued it. Further, the Court seized of the case clearly recorded in its first day's proceedings of the trial of the case, 'defendant sufficiently served.'"

The last mentioned circumstance would distinguish the case.

41. In Tahal Singh v. Chalnchal Singh, AIR 1934 Lah 985 (2), the return of the process server showed that Tahal Singh, the guardian of the minors judgment-debtors, refused to accept the notice sent to him under Order 21, Rule 66 and a copy thereof was affixed to the outer door of his house. The report was supported by an affidavit, but there was no formal order under Order 5, Rule 19, that Tahal Singh had been duly served. It was observed—

"The failure to pass a formal order under Order 5, Rule 19 is not a material irregularity in this case and does not vitiate the sale."

The decision does not purport to be an authority for all cases.

42. Ved and Co. v. Hayeen, AIR 1943 Bom 340 was an extraordinary case where the defendant, having received the copy of the summons, ran away with it and therefore, the process server had no other copy to affix to the bouse of the defendant. It was in these circumstances it was held that he had been duly served.

43. Sampatlal v. Baliprasad, 54 Cal WN 92 = AIR 1950 Assam 6 was a curious case where the suit which had been dismissed for default was restored and one of the defendants filed a revision petition against it on the ground that in respect of some other defendants there had been no express declaration of due service under Order 5, Rule 19, and, therefore, the order of the Court below was wholly without jurisdiction. The learned Judges repelled this contention pointing out that the other defendants had no grievance and that that point could not be urged by the revision petitioner. There were only incidental observations about the scope of Order 5, Rule 19 that it is not mandatory.

44. Some other decisions were referred to, like Manicka Goundan v. Krishna Gounder, (1948) 2 Mad LJ 574 = AIR 1948 Mad 326, Anathalayan v. Marudamuthu, 1953-1 Mad LJ 302 = (AIR 1953 Mad 528); Ellappa Naicker v. Arumugha Serval, 1966-1 Mad LJ 81 = (AIR 1967 Mad 5); Goculdas v. Dilaukhram, AIR 1943 Sind 186; Tripura Modern Bank v. Bansen

and Co., AIR 1952 Cal 781; Chathurbhai v. Clive Mills Co., AIR 1964 Cal 241, overruling Ganeshmul v. Kesoram Cotton Mills, AIR 1952 Cal 10. But we need not discuss them in detail.

45. In the result, I would answer the reference thus: Where the judgment-debtor files an application to have the execution sale declared void and the application is filed beyond thirty days from the date of the sale, if the decree-holder or the auction purchaser wants to defeat the application by urging that the application should have been filed within thirty days of the date of the sale under Article 166 of the Limitation Act of 1908 (or the corresponding Article 127 of the Act of 1963), for the reason that the summons had been duly served by affixture on the judgment-debtor as required by Order 5, Rule 19 it is necessary that there should have been strict compliance with the provisions of Order 5, Rule 19 by the executing Court when it proceeded to hold the sale in the absence of the judgment-debtor. In particular, where the return of the process server under Rule 17 has not already been verified by the affidavit of the serving officer the Court shall examine the serving officer on oath or cause him to be so examined by another Court touching his proceedings. It should also declare expressly that the summons has been duly served, though the exact form of that declaration may be in any convenient form, such as, "it is declared that the defendant has been duly served" or "it is declared that the service is sufficient" or simply "defendant duly served" or "service sufficient." What is important is that the endorsement of the Court itself should indicate that the presiding officer has applied his mind and considers that the summons has been duly served.

46. RAMAKRISHNAN, J.:— I had the advantage of perusing the judgment of my learned brother, Venkataraman, J., who has set out the facts as well as the several decisions cited at the Bar at length. It is not necessary for me to recapitulate them.

47. As mentioned by my learned brother, we did not allow arguments to reopen the finding of Kailasam, J., that in the present case the process server has not supplied an affidavit to verify the return. As a result there is non-compliance with the provisions of the first part of Order 5, Rule 19, Civil P. C. That itself would render the service invalid. No authority has been cited before us to show that the failure of the serving officer to verify the return by an affidavit can be condoned.

48. The learned Judge (Kailasam, J.) could have himself set aside the execution sale on the finding of fact about the non-

compliance with the first part of Order 5, Rule 19, Civil P. C., but the learned Judge apparently was of the opinion that, for the sake of giving a complete decision, it would be appropriate if he gave a finding also in regard to the compliance with the second part of Order 5, Rule 19, Civil P. C., namely, the making of a declaration by the Court that the summons had been duly served. Since in the view of the learned Judge there is a conflict of authority on this point, he has sought to obtain the opinion of a Full Bench. That is how the matter has come up before this Full Bench.

49. The notice by registered post sent to the judgment-debtor was returned as refused. When the Court notice was thereafter taken for service by the process server the judgment-debtor was reported to be absent in his house, and the process server then served the notice by affixture under Order 5, Rule 17, Civil P. C. He made a return as required under Order 5, Rule 18, Civil P. C. on the docket of the summons, mentioning the above facts. On 19-1-1959, when the execution petition came for hearing, the Court noted as follows:

"Respondent absent. Court notice affixed. Respondent called, absent. Set ex parte."

The sale was thereafter fixed for 18-3-1959 and adjourned to a further date. The properties were sold and the sale was confirmed on 28-8-1959. The point to note is that only one attempt appears to have been made to serve the judgment debtor through Court. On that date the judgment debtor was reported to have been absent from the village. The prior attempt was by service by registered post. As is well known the postal peon cannot serve the notice by affixture. He can only return the registered notice as 'unserved.' Therefore, the registered postal notice will be valid notice, only if it is actually served by delivery. In these circumstances, the Court has to ensure personal service by Court. If it is not possible to effect personal service either due to the refusal by the judgment debtor, or his absence from his house for an unreasonably long time, which would entail long and vexatious proceedings prolonging the execution, steps should be taken to effect service by affixture under Order 5, Rule 17, Civil P. C. It is to ensure that this method of service is not abused and that proceedings seriously affecting a party are not concluded behind his back, that Order 5, Rule 19, Civil P. C. lays down the formality of a declaration being made by the Court about due service of the notice by the affixture procedure. In the present case, there is the fact that the Court service had been taken only once. There is next the doubt which the learned Judge,

Kailasam, J., felt about the existence of an affidavit by the serving officer. These circumstances clearly gave an occasion for the executing Court to apply its mind and make a declaration of due service. In the above context, one is entitled to look for an explicit declaration by the Court, which would show in unmistakable terms that the Court had applied its mind to the propriety of the service by affixture and was satisfied about the propriety. But the endorsement of the Court on the execution petition made on 19-1-1959 extracted above, might be equally consistent with a mechanical recording of the factum of service by affixture and then setting the defendant *ex parte*, without a conscious effort being made by the Court to consider and approve the circumstances under which the service by affixture was effected. The consequence has been very grave to the judgment-debtor in this case. Valuable property, more than three acres in extent subject only to a Government loan of about Rs. 500 had been sold for Rs. 11. Further the thirty days bar of limitation under Art. 164 of the Limitation Act automatically runs from the date of the sale. Therefore, when the affected judgment debtor comes to Court after the lapse of thirty days for setting aside the sale, the auction purchaser can non-suit him by urging the bar of limitation. These circumstances clearly call for a strict application of the rule requiring the Court to make a declaration. In explicit terms about the adequacy of service as required under Order 5, Rule 19, Civil P. C. Such explicit declaration is absent in this case. It is at this stage that the question arises for consideration whether the direction about making a declaration of due service found in the second part of O. 5, R. 19, Civil P. C. requires an express declaration or it can be implied from the surrounding circumstances. Since my learned brother has dealt with this question at length, I will content myself by giving the matter a briefer treatment.

50. I will take up first, for consideration, the ratio which can be spelt out from the decisions which appear to support the view that a declaration could be implied from the circumstances of the case and that an express declaration need not be looked for. (1909) 19 Mad LJ 31, is a Bench decision where the learned Judges have not referred to any earlier authority. The judgment is a brief one dealing with a prosecution under Section 174 of the old Civil P. C. of a party who had not appeared in Court in response to summons. Section 174 of the old Civil P. C., under which the summonee was prosecuted, gave an opportunity to the summonee to show in his defence that he had no knowledge of the summons, and he could escape conviction in that manner. (1909) 19 Mad LJ

31 is clearly distinguishable on this ground.

51. Mohamed Mera Rowther v. Kadir Mera Rowther, 1914 Mad WN 53 = (AIR 1914 Mad 153) was a case where notice had not been served on the defendant in compliance with Order 21, Rule 22, Civil P. C. Following in (1909) 19 Mad LJ 31, the learned Judges held that a declaration after due service could be implied, or on and after a return of the process by the serving officer the Court passes orders on the basis that service has been duly made. The learned Judges of the Bench also observed that in the circumstances of the case, the judgment debtor had full notice. In our opinion this decision requires reconsideration in the light of the subsequent Bench decisions in 64 Mad LJ 629 = (AIR 1933 Mad 466) and AIR 1937 Mad 84, expressing a different view.

52. 1939-2 Mad LJ 926 = (AIR 1940 Mad 213) a judgment of Burn, J. and Stodart, J., was a case where the learned Judges held that in the circumstances of that case, the declaration of the sufficiency of service could be implied though it was not expressly made. A reading of the judgment shows that it was a case of setting aside of an *ex parte* decree presumably under Order 9, Rule 13, Civil P. C. though the judgment does not specifically refer to Order 9, Rule 13, Civil P. C. The learned Judges took into account the circumstances that the appellant really "knew all about the suit as it was going on." They went on so far as to say that the circumstances against him were so strong that they had "no compunction" to deal with the matter in the way they did. They felt not called upon to differ from 64 Mad LJ 629 = (AIR 1933 Mad 466) as they said that that decision was not in point. Therefore, the above decision was a special case where the learned Judges had no doubt at all in their minds that if an explicit declaration was necessary about the adequacy of the service, there could be only one answer, and that would be against the appellant. 1942-2 Mad LJ 558 = (AIR 1943 Mad 55) a Bench decision of Krishnaswami Aiyangar and Kunhiraman, JJ., dealt with an execution sale as in the present case. The affected parties were minors and their guardians were served by affixture on the report that they were not to be found and were evading service. When the return was brought to the notice of the Court, the Court declared the minor defendants *ex parte*. The specific terms of the order of the Court were not before the Court. The Court itself has noted that circumstance. The Court was only supplied with information about the terms of the order. Nevertheless, the learned Judges followed the decision in 1939-2 Mad LJ 926 = (AIR 1940 Mad 213) and refused to follow the judgment of Pandrang Row, J. in (1936) 71

Mad LJ 317 = (AIR 1936 Mad 812) which followed the Bench decision in 64 Mad LJ 629 = (AIR 1933 Mad 466). The learned Judges unfortunately did not refer to the special circumstances which were relied upon for the view taken in 1939-2 Mad LJ 926 = (AIR 1940 Mad 213). They did not also refer to any special circumstances in the case before them. On the other hand, with respect to the circumstances as stated in the judgment in 1942-2 Mad LJ 558 = (AIR 1943 Mad 55) would have equally justified the taking of a strict view of the matter, namely, the necessity for an express declaration, taking into account firstly the fact that minors were involved, and, secondly, the actual terms of the executing Court's order were not before the Bench. The learned Judges, while refusing to follow 71 Mad LJ 217 = (AIR 1936 Mad 812) did not discuss the effect of the earlier Bench decisions of this Court for a contrary view, viz., the decision in 64 Mad LJ 629 = (AIR 1933 Mad 466) which was relied on in 71 Mad LJ 317 = (AIR 1936 Mad 812). We are of the opinion that 1939-2 Mad LJ 926 and 1942-2 Mad LJ 558 = (AIR 1943 Mad 55) cannot form safe authority for dealing with the question now before us.

53. Next there is the decision of Horwill, J. in 1944-1 Mad LJ 36 = (AIR 1944 Mad 193). The learned Judge has carefully considered the effect of the aforesaid decisions and expressed his view that one has to consider the facts of each case and decide on those facts whether the failure to declare a judgment-debtor *ex parte* was a mere omission and the subsequent procedure made it clear that the Judge did not consider the service of notice sufficient, or whether the facts of the case left in some doubt the question whether there was a proper service or not. After making the above observations, the learned Judge found that in that particular case the affected party had notice of the proceedings and that there were ample reasons to hold that the failure to make a declaration was a mere omission and that the executing Court would undoubtedly have considered the service sufficient in the circumstances of the case.

54. My learned brother, Venkataraman, J., has set out in detail several decisions in favour of making an express declaration including the Bench decisions in 64 Mad LJ 629 = (AIR 1933 Mad 466); AIR 1937 Mad 84 and of Pandrang Row, J. in 64 Mad LJ 637 = (AIR 1933 Mad 406). In the first of the above cases, the learned Judges referred to and distinguished 1914 Mad WN 63. They observed that in the case before them there was nothing to show that the Court even looked at one of the returns before ordering the petition. They also observed that in the circumstances of the case, if the Court had proceeded to pass an order under O. 5,

R. 19, Civil P. C., it was very doubtful whether it would have accepted these returns even on their face value as correct. They, therefore, held that the service was not valid as the Court had not declared the service to be sufficient, as it is imperatively required to do under O. 5, R. 19, Civil P. C. and in a case where it is sought to apply the constructive principle of *res judicata* against the defendant, AIR 1937 Mad 84 (Bench) was a similar case of the application of the principle of constructive *res judicata*. 64 Mad LJ 637 = (AIR 1933 Mad 406) was the decision of a single Judge, Pakenham Walsh, J. That was also a case involving the principle of constructive *res judicata*, and the Court held, following several earlier decisions, including 64 Mad LJ 629 = (AIR 1933 Mad 466) that a declaration was imperative.

55. There are some more decisions of this Court which have been adequately referred to in the judgment of my learned brother and where it is held that if the principle of constructive *res judicata* under Section 11, Civil P. C. is sought to be applied against a party, it is necessary that the provisions contained in Order 5, Rule-19, Civil P. C. about making a declaration should be expressly complied with. Horwill, J. in the decision which I have referred to in the preceding paragraph, has dispensed with the requirement of an express declaration in the circumstances of the particular case before him. In that case the facts showed that in every probability the executing Court, if it had considered the circumstances, would have unhesitatingly made a declaration of due service. Horwill, J. was careful to distinguish cases where the facts left in some doubt the question whether there was a proper service or not. But the principle of inferring an implied declaration of due service obviously cannot be extended to a case where it is not possible to predicate an inadvertent omission on the part of the concerned Court and where the circumstances clearly lead to a doubt as to whether the affected party had notice of the proceedings. In such circumstances, a decision about the adequacy of the service should and ought to have been arrived at by the executing Court and a declaration should have been explicitly made. In such cases, the mere fact that the Court had set the defendant *ex parte* and proceeded to the next stage in the proceedings, like ordering a sale in execution proceedings, (or passing an *ex parte* decree in a suit) would not *ipso facto* lead to the inference that the Court had made the necessary declaration by implication. The failure to make the declaration could be equally consistent with the Court having adopted a mechanical approach to the matter—an approach which is not infrequently noticed, on the

part of the subordinate Courts. Srinivasa Aiyangar, J. has referred to its prevalence and strongly deprecated it in AIR 1927 Mad 313. There is also no scope in such cases to draw a presumption about the due performance of official acts under Illustration (e) to S. 114 of the Evidence Act, because the very performance of the act itself is left in a state of doubt.

56. To conclude, the point raised by Kailasam, J. for the answer of the Bench is whether the non-compliance of the requirements of O. 5, R. 19, Civil P. C. would make the service of the summons ineffective. Our answer to this question is this: Where there is no affidavit of the serving Officer, and where the serving officer is not subsequently examined by the Court, as found by the learned Judge in this case, there is non-compliance with the first part of Order 5, Rule 19, Civil P. C. and the service is ineffective. Next, the safe rule is to look for an explicit declaration of due service as enjoined by the second part of O. 5, R. 19, Civil P. C. In its absence, particularly in cases where valuable rights of parties are sought to be placed in jeopardy for example by the application of the principle of the law of limitation or of the rule of constructive res judicata, and where it is doubtful if the affected party had notice of the proceedings proposed to be taken against him, grave prejudice can be caused. The case dealt with by Horwill, J. covered an exceptional situation where the circumstances left no doubt whatever that the executing Court would have made the necessary declaration about the sufficiency of service, and therefore, the failure to make an explicit declaration was treated as a mere omission which can be overlooked. In our view, this decision must be confined to the facts of that particular case, and cannot be taken as laying down any general rule. On the other hand, it may very well happen that the circumstances are by no means conclusive, and there can be serious doubt about the sufficiency of the service for giving notice to the affected party. Therefore, I am inclined to the view that an explicit declaration should be insisted on. As stated by Venkataraman J., no precise form for such declaration need be laid down; any declaration or statement by the concerned Court, in the record, which would clearly show that it had applied its mind to the sufficiency of service will very well do for the purpose.

57. KAILASAM, J.: I agree with the reasons and the answer given to the reference in the concluding paragraph of the judgment of Venkataraman J. In the view that the endorsement of the Court itself should indicate that the presiding officer has applied his mind and considered that the summons had been duly served,

the decision in 1944-1 Mad LJ 36= AIR 1944 Mad 193, has to be found as not good law.

(After the expression of the opinion of the Full Bench aforesaid, this appeal coming on for hearing before Kailasam J. on 29-8-1969 the Court delivered the following Judgment:—)

In view of my finding sitting singly that the process server had not verified the return by an affidavit, there is non-compliance of the requirements of the first part of Order V, Rule 19 C.P.C. and on this ground alone the sale has to be set aside. In view of the decision of the Full Bench there is no compliance of the second part also. In the result the appeal against appellate order is allowed with costs. Leave refused.

Appeal allowed.

AIR 1970 MADRAS 288 (V 57 C 78)

FULL BENCH

K. VEERASWAMI, C. J., NATESAN AND SOMASUNDARAM, JJ.

The Chief Controlling Revenue Authority, Madras, Referring Authority v. S. M. Abdul Jammal and another, Respondents.

Refd. Case No. 19 of 1963, D/- 3-11-1969.

T. P. Act (1882), S. 108 — Stamp Act (1899), S. 16 and Sch. I, Art. 35 (as amended in Madras) — Lease — Premium and rent, difference between — Held, on facts, that Art. 35(c) was not applicable.

The distinction between a premium and a rent is that premium is one paid in consideration of the conveyance implied in the lease and is quantified in lump, whether it is paid outright or by instalments over a period or promised to be paid at a certain time. But, a rent, while it is also in consideration of a lease, is in lieu of the enjoyment which the lessee has and particularly as consideration therefor. The further feature of rent is, it is payable as and when it accrues unlike a premium the liability for which arises at the time the contract is entered into. AIR 1967 Andh Pra 90, Ref. (Para 3)

An agreement of lease contained the following two clauses: "The lessee shall effect the repairs and make additions and improvements at their own cost, at a cost not less than Rs. two lakhs, such improvements and additions shall also include construction of a building in the vacant plot of land in front of the main building including electric installations and the lessor shall sign all applications which are necessary to be made to the

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Corporation for effecting the said repairs, improvements and construction" and "The improvements and additions so made and effected shall belong to the lessor and form an accretion to the demised premises." The question posed was if on the terms, the document was liable to stamp duty under Art. 35(c).

Held, that definition of "lease" in Stamp Act (1899), S. 16 was not applicable to the case. The effect of these two clauses was not to stipulate for a premium, in the sense of a price paid or promised in consideration of the execution of a contract of lease. The provisions in the two clauses were provisions contracting out of the normal rights and obligations provided in S. 108, T. P. Act. Far from these two clauses providing for payment of a premium, they were a contract contrary to the statutory rights and obligations when they arise, and, the two clauses made an adjustment of such rights and obligations, but subject to certain limits. Therefore clause (c) of Art. 35 of the Stamp Act was not applicable.

(Paras 3, 4, 5)

Cases Referred: Chronological Paras
(1967) AIR 1967 Andh Pra 90 (V 54)
=1966-2 Andh WR 179, Vinay
Construction and Co. v. Inspector
General of Registration 3

G. Ramaswami, Addl. Govt. Pleader,
for referring Authority; C. Chinnaswami,
for Respondents.

VEERASWAMI, C. J.:— This is a reference under S. 57 of the Indian Stamp Act, 1899, the question being:

"Whether the cost of the repairs, additions and improvements to be effected on the premises by the lessees would fall 'within premium or for money advanced' in addition to rent received."

One Abdul Jameel, the first respondent, who is the owner of premises No. 22 Errabalu Chetty St., G. T. Madras, entered into an agreement of lease with the second respondent in respect of a major portion of the premises on a monthly rent of Rs. 5000. The lease is dated 22-6-1964 and was, in the first instance, for a period of 20 years with an option to renew it for a further period of 7 years. Clauses 7 and 8, which in effect give rise to this reference read:

"Cl. 7: The lessee shall effect the repairs and make additions and improvements at their own cost, at a cost not less than Rs. two lakhs, such improvements and additions shall also include construction of a building in the vacant plot of land in front of the main building including electric installations and the lessor shall sign all applications which are necessary to be made to the Corporation of Madras for effecting the said repairs, improvements and construction.

Clause 8. The improvements and additions so made and effected shall belong

to the lessor and form an accretion to the demised premises."

The Revenue at the lower stages was of opinion that these two clauses reserved a premium and it should be subjected to additional duty. Art. 35 of the Stamp Act, as amended in Madras, by clause (a) sub-clause (iv) provides that where the lease purports to be for a period of ten years but not exceeding 20 years, the same duty as a conveyance for a consideration equal to twice the amount or value of the average annual rent reserved should be paid. By clause (c) it is provided that where the lease is granted for a fine or premium, or for money advanced in addition to rent reserved, the document will be chargeable with duty as a conveyance for a consideration equal to the amount or value of such fine or premium. This will be in addition to the duty which would be payable under Art. 35(a)(iv). In view of the Revenue below the stage of the Board of Revenue the document attracted charge under both the clauses. That is how the reference has been made before us.

2. The contention for the Revenue is that the two clauses we have extracted provided for an obligation on the part of the lessees and correspondingly a right in the lessor to have repairs, additions and improvements made at a cost not less than Rs. two lakhs and that this stipulation amounted to a premium. It seems to us that the answer to the reference really turns on the true effect of the two clauses as to whether they stipulated a premium in consideration of the granting of the lease, or constituted but contractual stipulations contrary to the normal rights and obligations as between a lessor and lessee provided for by S. 108 of the Transfer of Property Act, especially in relation to effecting of repairs and improvements or additions being put up.

3. There is a definition of a lease in the Stamp Act, which, however, does not assist us in the present instance. S. 105 of the Transfer of Property Act defines a lease as one of immovable property in which there is a transfer of a right to enjoy such property, that it is made for a certain term, express or implied, and in consideration—

"of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee"

who accepts the transfer on such terms. The price paid or promised, or money, a share of crops, service or any other thing of value to be rendered periodically or on specified occasions would both form part of the consideration for the lease, but the distinction between a premium

and a rent, in the context, lies in the fact that premium is one paid in consideration of the conveyance implied in the lease and is quantified in lump, whether it is paid outright or by instalments over a period or promised to be paid at a certain time. But, a rent, while it is also in consideration of a lease, is in lieu of the enjoyment which the lessee has and particularly as consideration therefor. The further feature of rent is, it is payable as and when it accrues unlike a premium the liability for which arises at the time the contract is entered into. This Court in a few cases, which V. C. and Co. v. I. G. of Registration, AIR 1967 Andh Pra 90 followed, has held that the price paid or promised should be in terms of money is contradistinction with a share of crops, service or any other thing of value to be rendered. But, for purposes of answering the question under reference, we do not think it necessary to decide that question.

4. As we mentioned earlier, the duty chargeable in this case will entirely depend on the construction we place on the two clauses above extracted. As we read these clauses along with the rest of the terms of the document, we are inclined to think that their effect is not to stipulate for a premium, that is to say, in the sense of a price paid or promised in consideration of the execution of the contract of lease. In our view they appear to be provisions contracting out of the normal rights and obligations provided in S. 108. Under clause (f) of that section, the obligation to effect repairs is on the lessor. If the repairs which he is bound to make to the property have not been made within a reasonable time after notice by the lessee, the latter has been given the liberty to effect the repairs and deduct the expenses from the rent. Under clause (h) the lessee has, even after the termination of the lease, a right to remove at any time whilst he is in possession of the property leased, but not afterwards, all things which he had attached to the earth, subject of course, to the condition that he left the property in the same state in which he received it. The obligation of the lessee to restore the premises in as good a condition as it was at the time when he was put in possession has also been reiterated in clause (m) of S. 108. The two clauses we have referred to in the lease deed undoubtedly provide to the contrary, but, subject to limits.

In the nature of things, therefore, the imperative 'shall' is called for in the terms, that is to say, notwithstanding the law as indicated in the Transfer of Property Act that the lessor should effect the repairs, in the instant case the lessee should effect them, but subject to the limit in value mentioned in the deed.

Likewise, whereas the lessee at the time of the determination of the lease is entitled to remove such additions or improvements he has effected to the building, under the two clauses in the deed, the lessor is entitled to appropriate, but the limit on that matter in favour of the lessee is Rs. two lakhs. That is the reason why the two clauses speak of the obligation of the lessee that he "shall" effect the repairs and additions and improvements but at a cost not less than Rs. two lakhs. In our view, far from these two clauses providing for payment of a premium, they, in the sense we have mentioned, enter into a contract contrary to the statutory rights and obligations we have mentioned if and when they arise, and, the two clauses make an adjustment of such rights and obligations, but subject to certain limits.

5. On that view it will follow that clause (c) of Art. 35 of the Stamp Act is not applicable. We answer the question against the Revenue with costs, Counsel's fee Rs. 250.

Reference answered.

AIR 1970 MADRAS 290 (V 57 C 79)

FULL BENCH

K. VEERASWAMI, C. J., NATESAN AND SOMASUNDARAM, JJ.

The Chief Controlling Revenue Authority, Board of Revenue, Madras, Petitioner v. H. B. Devaraj, Coonoor, Respondent.

Refd. Case No. 3 of 1966, D/-3-11-1969.

Stamp Duty — Stamp Act (1899), Sch. I, Art. 45, Proviso (Madras) — Partition deed of "assessed lands" — Assessment of stamp duty — Standing crops on such land should not be separately valued — Exoression "land" carries with it all the fixtures thereto like trees, plants, crops and the like. (Para 3)

Addl. Govt. Pleader and K. Kumaraswami Pillai, Asst. Govt. Pleader, for Petitioner; N. Suryanarayana for A. K. Sreeraman and A. S. Kailasam, for Respondent.

VEERASWAMI, C. J.:— The question referred to us under Section 57 of the Indian Stamp Act, 1899, is:—

"Whether Art. 45 of Sch. 1 to the Indian Stamp Act, 1899 requires that standing crops should be separately valued in assessing the instrument of partition of assessed lands for stamp duty."

The facts are extremely simple. The respondent and his father effected a partition of their landed properties on 14th August 1963. The document was stamped with Rs. 13-50. At the time of its registration objection was taken to the proper stamp duty. The executants of the

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document were required to assess also the value of the standing tea crops on the land and additional duty to be paid thereon.

2. There is no dispute that duty chargeable in case of a partition instrument under Art. 45 is the same duty as a bond and the amount of duty is quantified with reference to the amount of the value of the separated share or shares of the property. There is a proviso to this Article which provides the mode of quantifying the duty if the property divided is land held on Revenue settlement for a period not exceeding thirty days and paying the full assessment. In that case the charge will be calculated on the value calculated at not more than twenty five times the annual Revenue charged on the land.

3. The question referred to us itself regards the property, the subject-matter of partition, as "assessed lands." The simple question, therefore, is whether the land in the context of partition and of Art. 45, includes standing crops. We have not the slightest doubt that it does. The expression 'land' carries with it all the fixtures thereto like trees, plants, crops and the like. We are not on the question whether the property is to be regarded as tea estate to be valued as such. We answer the question against the Revenue with costs. Counsel's fee Rs. 250.

Reference answered.

'AIR 1970 MADRAS 291 (V 57 C 80)

GANESAN, J.

Doraipandi Konar, Petitioner v. P. Sundara Pathar, Respondent.

Civil Revn. Petn. No. 2416 of 1967, D/-8-4-1969, from decree of Sub-J., Madurai, in A. S. No. 221 of 1967.

(A) T. P. Act (1882), S. 108 (f) and (m) — Repairs — Duty of landlord and tenant.

S. 108 imposes an obligation only on the tenant to carry out certain repairs and casts an obligation on the landlord to carry out only such repairs "which he is bound to make to the property". The words "any repairs which he is bound to make to the property" found in S. 108(f) mean only those repairs which the landlord is bound by an express contract to make. (Para 11)

S. 108 (m) contemplates two implied covenants on the part of the tenant: (1) to keep the property in repair i.e., to maintain the property in the same condition at all times during the whole term of the lease and (2) to restore in repair i.e., to restore the premises in as good a condition as he found the property. This obligation does not cover cases of damage

caused by friction of the air, exposure and ordinary use and also cases of damage due to an extraordinary cause, such as storm, flood or accidental fire. Reading S. 108 (f) and (m) together the position is clear that the lessor is under no liability to repair in the absence of an express covenant making him liable. (Para 12)

Thus in cases governed by S. 108 neither the tenant nor the landlord is bound to carry out repairs caused by reasonable wear and tear or even by irresistible force and that the tenant is liable to rectify only those defects which have been caused by any act or default on his part or on the part of his servants or agents. (Para 13)

(B) Houses and Rents— Madras Buildings (Lease and Rent Control) Act (18 of 1960), S. 22 and S. 2(7) — Repairs — Rights and liabilities of tenant and landlord — Act is complete Code on subject of repairs — Not open to parties to fall back upon terms of tenancy agreement or upon provisions of T. P. Act. 1955-1 Mad LJ 62 (SN) Criticised.

The Madras Buildings (Lease and Rent Control) Act, 1960, is a complete Code on the rights and liabilities of the landlord and tenant in respect of repairs to the building and it is not permissible for a landlord or a tenant in cases governed by the Act to fall back upon the provisions of S. 108 of the T. P. Act or the contract of tenancy for determining their rights and liabilities in respect of repairs to the building. The provisions of the Act are carefully designed and worded so as to cover all the important aspects of the problems relating to repairs to the building; and it is difficult to say that the Act had left out any aspect relating to repairs untouched, leaving the parties to have their rights settled under the T. P. Act or the contract of tenancy in respect of "repairs". It names the landlord as the person who has to carry out the repairs and comprehensively sets out the nature of the repairs he is bound to carry out to the building, the circumstances under which the tenant can get the repairs done and the extent of compensation which he will be entitled to if he carries them out with his own funds. It also sets out the limit of the landlord's obligation to effect repairs and excludes additions, improvements, and alterations from that category. (Para 15)

The Act clearly sets out the rights and liabilities of the tenant and the landlord in respect of repairs; and therefore the rights and duties of the parties relating to repairs must be ascertained only by reference to S. 22 read with S. 2(7) of the Act and that it is not open to the parties to fall back upon the terms of the

tenancy agreement or upon the provisions of the T. P. Act for that purpose. 1951-2 Mad LJ 53 (SN) & (1924) 93 LJKB 1080=131 LT 757, Rel. on, 1955-1 Mad LJ 62 (SN) Criticised. (Para 23)

(C) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (18 of 1960), S. 2 (7) — Repairs — Meaning of — Repair involves element of renewal but renewal of whole and substantially whole cannot be termed repair. (Words and Phrases — Repair — Meaning of).

The basic idea underlying the concept of repairs is restoration of a building to its original condition. This implies that the old structure is retained and is renovated from the damaged condition to its original sound state. Repair always involves an element of renewal, but renewal of the whole and substantially the whole cannot be termed repair proper. Where the building is completely demolished and a new structure put instead, it would normally be reconstruction, not repairs, proper. In exceptional cases however, repair may imply a complete renewal and substitution. An addition material alteration or anything which substantially improves a thing in value from the original condition except in so far as it is necessary to carry out such restoration cannot be said to be merely repair of that thing; it will be bringing into existence an altered thing, an improved thing, a new thing for all intents and purposes. 1911-1 KB 905, Rel.

(Para 30)

On facts held what the tenant had done to the building amounted to a reconstruction and not mere repair as contemplated by the Act. The original building in question consisted of only the roof, walls and the floor and as a result of the tenant's action the entire roof had been replaced, all the walls had been put up afresh and the flooring had been completely done up anew. The whole building had been substantially renovated and it would be idle to contend that only a repair of the building had been done. Even if the work done is taken piece by piece, the renewal of the thatch alone may amount to repair; and it would be impossible to say that the conversion of the mud walls into brick-walls and the mud floor into cement floor would be mere repair. It constituted a material alteration and an improvement in that the nature and composition of the flooring and the walls had undergone a complete change and the value had considerably enhanced.

(Para 31)

(D) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (18 of 1960), S. 22 — Repairs by tenant — Previous permission of Controller not obtained — Tenant is not entitled to any compensation. (Para 32)

(E) T. P. Act (1882), S. 108 — Rights of tenant — Tenant has no right to effect reconstruction of or improvements to building and claim compensation. (Para 33)

(F) Contract Act (1872), S. 70 — Lawfully and non-gratuitously — Tenant effecting repairs amounting to renovation of building against wish of landlord — Previous permission of Rent Controller also not obtained — S. 70 cannot be invoked — (Houses and Rents — Madras Buildings (Lease and Rent Control) Act (18 of 1960), S. 22).

By the use of the word "lawfully" in S. 70, the legislature had in contemplation cases in which a person held such a relation to another as either directly to create or by implication reasonably to justify the inference that, by some act done for another person, the person doing the act was entitled to look for compensation to the person for whom it was done. (1889) 11 All 234 & AIR 1916 Cal 497, Rel. on.

In the second place, the section is not attracted in cases of services rendered by the claimant at the request of or against the will of the other party sought to be charged with. In order to merit compensation, the services rendered must have been acquiesced in by the other party. The provisions of this section cannot justify the officious obligations in respect of services which the person sought to be charged with did not wish to have rendered.

Held since the tenant had effected repairs amounting to renovation of building without previous permission of Rent Controller as required under S. 22 of Madras Buildings (Lease and Rent Control) Act and also disregarding objection of landlord, tenant could not invoke provisions of S. 70 of Contract Act.

(Para 34)

Cases Referred: Chronological Paras

(1963) AIR 1963 J & K 18 (V 50), Hansraj Tirathram v. Administrator Municipality, Jammu	29
(1960) AIR 1960 Mad 24 (V 47), Mahomed Mohideen Rowther v. Mohammad Mohideen Rowther	25, 23
(1955) 1955-1 Mad LJ 62 (SN), Ramakrishna Mudaliar v. Munafisahib	16
(1951) 1951-2 Mad LJ 53 (SN), Ramasubbayya v. Dist. Munsif of Koonool	22
(1949) AIR 1949 All 681 (V 36), Ram Ashray v. Hiralal	27
(1949) AIR 1949 Mad 765 (V 36)= ILR (1950) Mad 152, Muhammad Unay v. Unniri	16, 17
(1924) 93 LJKB 1080=131 LT 757, Hewitt v. Rowlands	20

- (1916) AIR 1916 Cal 497 (V 3)=
 21 Cal WN 394, Panchkori v.
 Haridas 34
 (1911) 1911-1 KB 905=80 LJKB
 713, Lurcott v. Wakeley 30
 (1889) ILR 11 All 234=1889 All WN
 67, Chedilal v. Bhagwan Das 34

S. Kothandarama Nayanaar, for Petitioner; V. Balasubramaniam, K. Kunchithapadham and N. Balasubramaniam, for Respondent.

JUDGMENT:— The landlord is the revision petitioner herein and he is aggrieved that the Subordinate Judge of Madurai had by his judgment in A. S. 221 of 1967 reversed the judgment of the District Munsif of Melur in O. S. 222 of 1966 and decreed the suit for a sum of Rs. 835-30 proved to have been spent by the respondent tenant.

2. The respondent is running a tea shop in the eastern and northern portion of a building at a monthly rent of Rs. 40. The flooring of the respondent's portion was made of mud and the walls also similarly were made of mud, and the premises have a common thatched roof with the other two portions of the building. As the petitioner landlord refused to renovate the roof which was leaking in the rains and to repair the mud floor and to put walls in the place of the mud walls which had fallen in spite of his requests and a notice, the respondent renewed the entire thatched roof which was common to his premises as well as the other portions of the building, demolished the old mud walls and put up brick walls instead on three sides and laid a new cement floor instead of the old mud floor. The petitioner unsuccessfully obstructed the respondent from carrying out the said operations while they were going on and later refused to meet the charges amounting to Rs. 835-30 proved to have been spent by the respondent.

3. The learned District Munsif is of opinion that the respondent was entitled if at all, only to replace the old mud walls with new mud walls and to repair the mud floor and had no right to replace the mud walls with a brick wall and the mud floor with a cement floor but upheld the respondent's act in renovating the entire thatched roof and he held that the respondent would be entitled to recover, if at all only a sum of Rs. 532-87. But he found, that, as the respondent had not applied to the Rent Controller for permission to replace the roof, walls and mud floor under S. 22 of the Madras Buildings (Lease and Rent Control) Act, 1960, he is not entitled to recover any amount and accordingly dismissed the entire suit. He is of opinion that the provisions of Section 108 (f) of the Transfer of Property Act which relate to the rights of a lessee in case of repairs not done by the lessor within a reasonable

time of notice cannot be invoked, after Section 22 had been enacted in the Madras Buildings (Lease and Rent Control) Act 18 of 1960.

4. The learned Subordinate Judge, Madurai, however, is of opinion that Section 22 of the Act is not a complete code by itself, defining the rights and liabilities of the lessors and lessees, that Section 108 of the Transfer of Property Act continues to apply to cases like the present one, that what the respondent had effected were only repairs and not a reconstruction of the building and that, as the petitioner landlord has refused to carry out the repairs, the respondent was entitled to recover the entire amount claimed by him. Hence the revision. It may be observed that he, however, repelled the contention that Section 70 of the Indian Contract Act was applicable to this case.

5. The first question which arises for consideration is whether the respondent is entitled to base his claim upon the provisions of Section 108 (f) of the Transfer of Property Act, ignoring the provisions of Section 22 of the Madras Buildings (Lease and Rent Control) Act. In order to appreciate the contention of the learned counsel, it is desirable to set out the relevant provisions of these two Acts.

6. Section 2 (7) of the Rent Control Act defines repairs as

"the restoration of a building to a sound or good state after decay or injury, but does not include additions, improvements, or alterations except in so far as they are necessary to carry out such restoration."

7. The provisions of Section 14 (1) in so far as they deal with repairs read thus:

"Notwithstanding anything contained in this Act, but subject to the provisions of Sections 12 and 13, on an application made by a landlord, the controller shall, if he is satisfied—

(a) that the building is bona fide required by the landlord for carrying out repairs which cannot be carried out without the building being vacated, pass an order directing the tenant to deliver possession of the building to the landlord before a specified date."

8. Section 22 in so far as it relates to ordinary buildings reads thus:—

"If a landlord fails to make necessary repairs to the building within a reasonable time after notice is given by the tenant in the case of any other building, the controller may direct on an application by the tenant that such repairs may be made by the tenant and that the cost thereof may be deducted by the tenant from the rent payable for the building;

Provided that the cost of repairs and the deduction thereof which the Controller may authorise shall not exceed in any one year one-twelfth of the rent payable

in respect of the building for that year."

9. Section 108 of the Transfer of Property Act states thus:—

"In the absence of a contract or local usage to the contrary, the lessor and lessee of immoveable property, as against the one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:—

(B) Rights and liabilities of the lessee; (f) if the lessor neglects to make within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expenses of such repairs with interest from the rent, or otherwise recover it from the lessor; (m) the lessee is bound to keep and on the termination of the lease, to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes, caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left."

10. The provisions of Section 22 of Act 18 of 1960 clearly imply that there is a duty on the part of the landlord to make necessary repairs to the building within a reasonable time after notice by the tenant, and Section 2 (7) of Act 18 of 1960 while setting out the meaning of the term 'repairs' clearly excludes from the definition additions, improvements or alterations except in so far as they are necessary to carry out such restoration. I may add that the provisions of Section 108 (f) of the Transfer of Property Act refer to only cases of repairs to be done by a landlord and, by implication, exclude additions, improvements or alterations from his obligation in the same manner as had been done by Act 18 of 1960.

11. There is however, one significant difference between these two facts and it is this. While the landlord under Act 18 of 1960 has an obligation to make necessary repairs to the property, Section 108 of the Transfer of Property Act imposes an obligation only on the tenant to carry out certain repairs and casts an obligation on the landlord to carry out only such repairs "which he is bound to make to the property." The words "any repairs which he is bound to make to the property" found in Section 108 (f) of the Transfer of Property Act have been interpreted by the Courts to mean only those

repairs which the landlord is bound by an express contract to make.

12. Section 108 (m) of the Transfer of Property Act contemplates two implied covenants on the part of the tenant: (1) to keep the property in repair i.e., to maintain the property in the same condition at all times during the whole term of the lease and (2) to restore in repair i.e., to restore the premises in as good a condition as he found the property. This obligation does not cover cases of damage caused by friction of the air, exposure and ordinary use and also cases of damage due to an extraordinary cause, such as storm, flood or accidental fire. Reading S. 108 (f) and (m) together the position is clear that the lessor is under no liability to repair in the absence of an express covenant making him liable.

13. It thus appears that, in cases governed by Section 108 of the Transfer of Property Act, neither the tenant nor the landlord is bound to carry out repairs caused by reasonable wear and tear or even by irresistible force and that the tenant is liable to rectify only those defects which have been caused by any act or default on his part or on the part of his servants or agents. Under the Act 18 of 1960 it appears however, that repairs which are necessitated by reasonable wear and tear or irresistible force have to be carried out by the landlord.

14. The second difference lies in this. While under the Transfer of Property Act, in the case of repairs which the landlord was bound to make under express covenant, the lessee may make the same himself after notice to the landlord and deduct all the expenses he had incurred in respect of such repairs with interest from the rent or otherwise recover it from the lessor under Act 18 of 1960, the tenant cannot make the repairs by himself and cannot deduct all the expenses of such repairs with interest from the rent, or otherwise recover it from the lessor. In such cases, he is bound to apply to the Rent Controller for directions and when the landlord refuses to make such repairs after request and can make the repairs only on permission by the Rent Controller and the cost of the repairs which can be deducted by the tenant from the rent cannot exceed one month's rent.

15. On a comparison of the provisions of the Transfer of Property Act and Act 18 of 1960, I have no doubt in my mind that the Madras Legislature had intended the Madras Buildings (Lease and Rent Control) Act, 18 of 1960 to be a complete Code on the rights and liabilities of the landlord and tenant in respect of repairs to the building and that it is not permissible for a landlord or a tenant in cases governed by Act 18 of 1960 to fall back upon the provisions of Section 108 of the Transfer of Property Act or the contract

of tenancy for determining their rights and liabilities in respect of repairs to the building. The provisions of Act 18 of 1960 appear to be carefully designed and worded so as to cover all the important aspects of the problems relating to repairs to the building; and it is difficult to say that the Act 18 of 1960 had left out any aspect relating to repairs untouched, leaving the parties to have their rights settled under the Transfer of Property Act or the contract of tenancy in respect of "repairs." It names the landlord as the person who has to carry out the repairs and comprehensively sets out the nature of the repairs he is bound to carry out to the building, the circumstances under which the tenant can get the repairs done and the extent of compensation which he will be entitled to if he carries them out with his own funds. It also sets out the limit of the landlord's obligation to effect repairs and excludes additions, improvements, and alterations from that category.

16. The learned Subordinate Judge has relied on the decision of Mack, J. in Ramakrishna Mudaliar v. Munafi Sahib 1955-1 Mad LJ 62 short notes; and I have seen the original order itself. That was a case under the Madras Buildings (Lease and Rent Control) Act 25 of 1949 and the decision is to the effect that Section 11 (2) of that Act appears to have been enacted in order to give some protection to tenants in occupation of houses without the safeguard of a lease agreement with a specific covenant to repair, to obtain relief from the landlords who negligently refuse to do any repairs and sometimes use this as a weapon for the purpose of vacating tenants by making them so uncomfortable that they vacate the premises and that a tenant who has a lease agreement with a specific covenant to repair is not fettered or restricted by Section 11 (2) of Act 25 of 1949 and can enforce his covenant to repair under the ordinary law through ordinary Courts. Mack, J. has pointed out that in Muhammad Unny v. Unniri, ILR (1950) Mad 152 = (AIR 1949 Mad 765) a Bench of this Court had held that the jurisdiction of a Civil Court to entertain a suit by a landlord for eviction of a tenant and to pass a decree therein is not expressly or impliedly taken away by the provisions of Act 23 of 1949.

17. If Mack, J. had intended to lay down as an absolute rule that the terms of a tenancy agreement will override the specific provisions of this Act in all cases even on matters specifically dealt with by them, I must say that I respectfully disagree; in any case, I am clear that the decision cannot apply to Act 18 of 1960. I am willing to concede that, where the Rent Control Act has not made any provisions in respect of certain rights and liabilities of the tenant and the landlord in certain matters, and had left them open

and untouched, it would be open to them to fall back upon their express covenants for enforcement of such rights and liabilities, or on the provisions of the Transfer of Property Act for that purpose, in case there are no such agreements of tenancy; but I am clear that the express covenants contained in the agreements of tenancy cannot prevail in respect of rights and liabilities for which specific provision has been made in the Act and which have been clearly defined there. In such cases it is plain that the Legislature had clearly intended that the provisions of the Act in respect of the said rights and liabilities shall bind the tenant and the landlord and shall prevail. Admittedly there is no general saving clause in the Rent Control Act of 1960 to the effect that the provisions of the Act are subject to the contracts of tenancy, on the other hand, the legislature has, wherever it thought fit that the rights and obligations found in the tenancy agreement should be preserved, said so in plain terms and preserved such rights and obligations by enacting a special section or sub-clause to that effect. For instance, while dealing with eviction, Section 10 (3) (d) specifically provides that where a tenancy is for a specified period agreed upon between the landlord and the tenant, the landlord under Section 10 (3) shall not be entitled to apply under this sub-section before the expiry of such period. It is however found that a landlord is given the right to seek for eviction on grounds like wilful default in the payment of rent etc. as contemplated by Section 10 (2) in such cases. The intention of the legislature is thus clear and it cannot therefore, be now seriously urged that the Act 18 of 1960 applies only to cases where there are no contracts of tenancy and that the rights and obligations secured by the contracts will override the provisions of the Act and can be enforced in spite of them.

18. In the second place, it appears to me clear that it would be inequitable to permit a tenant or a landlord to take advantage of some of the provisions of the Act which are more favourable to them than the express terms of the contract of tenancy and to look to the terms of the tenancy regarding other aspects in respect of which the provisions of the Act are less favourable to them. I do not think that Courts of justice should permit such injustice and inequity.

19. Mack, J. has referred to the fact that this Court has in ILR (1950) Mad 152 = (AIR 1949 Mad 765) held that the jurisdiction of a Civil Court to entertain a suit by a landlord for eviction and to pass a decree has not been taken away by the provisions of the Rent Control Act. But then, it is obvious that such a right to have recourse for obtaining a decree was not inconsistent with the provisions of that

Act. As pointed out in that judgment itself, the jurisdiction to pass a decree of a Civil Court was not expressly or impliedly taken away by the provisions of that Act. This decision ILR (1950) Mad 152 = (AIR 1949 Mad 765) cannot therefore, lend any serious support to the proposition advanced by Mack, J.

20. I also find that in *Hewitt v. Rowlands*, (1924) 93 LJKB 1080 = 131 LT 757 an English Court has held as follows—

"An obligation on the part of the landlord to do any repairs, which was a term of the contractual tenancy, will be imported into the terms of the statutory tenancy. The fact that it was inconvenient or unprofitable on the landlord to fulfil his obligation is immaterial. Again if there is covenant in the lease that the lessee shall keep the premises in good repair this covenant would be imported into the statutory tenancy, since it is not inconsistent with the Act, which by implication preserves the liability of the tenant, if the lease in fact imposes this liability on the lessee."

21. On a reference to provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (1920 statistics) I am satisfied that this decision does not lend any support to the view taken by Mack, J. Sec. 2 (5) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 reads thus:

"For the purposes of this section, the expression 'repairs' means any repairs required for the purpose of keeping premises in good and tenantable repair, and any premises in such a state shall be deemed to be in a reasonable state of repair, and the landlord shall be deemed to be responsible for any repairs for which the tenant is under no express liability." This means that the tenant will be liable to effect only the repairs which he had undertaken to do under the express terms of the tenancy agreement and that the landlord shall be responsible for other repairs not provided for in the agreement. The observation of the Court that the obligations undertaken by the tenant or the landlord to effect repairs by virtue of the contract will be imported into the terms of the statutory tenancy is consistent with, and, indeed, is in pursuance of the provisions of the Act themselves, and the Act specifically provides that the landlord shall be responsible for the repairs, when the tenant has not undertaken to do. There is no warrant in this judgment for the proposition that the terms of the tenancy will override the provisions of any rent-control legislation, even though the latter has specifically provided for matters covered by the terms of the tenancy.

22. I am inclined to follow the decision of Subba Rao, J. (as he then was) in *Ramasubbayya v. Dt. Munsif of Kurnool*,

1951-2 Mad LJ (short notes) 53, wherein he has laid down that the two statutory conditions to enable a tenant to make repairs to a building under Section 11 (2) of the Act 25 of 1949 are (1) failure by the landlord to make the necessary repairs to the building after notice by the tenant and (2) permission by the House Rent Controller to the tenant to make repairs after the landlord had committed default. I do not think that this decision was intended to cover a case where the lease itself contained a covenant to repair.

23. It is not disputed that the tenancy in question between the parties in the present instance falls within the ambit of the Madras Buildings (Lease and Rent Control) Act 1960. As I have already observed this Act clearly sets out the rights and liabilities of the tenant and the landlord in respect of repairs; and I am therefore, of opinion that the rights and duties of the parties relating to repairs must be ascertained only by reference to Sec. 22 read with Section 2 (7) of this Act and that it is not open to the parties to fall back upon the terms of the tenancy agreement or upon the provisions of the Transfer of Property Act for that purpose.

24. It is urged by the respondent tenant that he had carried out only repairs and not improvements and that he had not reconstructed the entire house; and his contention had been accepted by the learned Subordinate Judge, but I find it difficult to uphold the same. I have already set out the definition of repairs as found under Section 2 (7) of the Act 18 of 1960 and the emphasis in the definition is on the word "restoration", and the section clearly points out that repairs do not include additions, improvements or alterations except in so far as they are necessary to carry out such restoration. The term "improvements" has not been defined in the Act; and the meaning and import of the term must be gathered from the dictionaries and decisions.

25. The decision of this Court in *Md. Mohideen Rowther v. Md. Mohideen Rowther*, AIR 1960 Mad 24 contains a wealth of information on the distinction between 'repairs' and 'improvements' as culled out from various dictionaries and judgments. Webster's New International Dictionary of the English Language defines repairs as 'an act of repairing; restoration, or state of being restored, to a sound or good state after decay, waste, injury etc.' In Stroud's Judicial Dictionary the words 'to repair' are shown as meaning 'to make good defects, including renewal where necessary i.e., patching, where patching is reasonably practicable and, where it is not, you must put in a new piece. But "repair" does not connote a total "reconstruction."

26. The term 'improvement' is defined in Webster's New International Dictionary

as "a valuable addition, or betterment, as a building, clearing, drain, fence etc; on land." In Ballantine Law Dictionary, 'improvements' is described 'a word that includes everything that enhances the value of premises permanently for general uses, erection of a building, making substantial changes or additions in existing buildings, the laying of necessary side-walks and the digging of wells, are common illustrations; and it is further observed that it would be in violation of the proper construction of the term 'repair' to hold that it included original improvements, or work of a different character from that previously done.

27. In *Ram Ashray v. Hiralal*, AIR 1949 All 681 it is stated that where a kutchha building is demolished and a new pucca building is constructed, the new construction shall be regarded as an improvement.

28. After a survey of a large number of authorities Ramaswami, J. has laid down in AIR 1960 Mad 24, cited above that all repairs are improvements though all improvements are not repairs.

29. In *Hansraj Tirtharam v. Administrator Municipality Jammu*, AIR 1963 J and K 18, the distinction is brought out thus—

"The expression 'repair' signifies restoration to the original condition. Anything which substantially improves or materially alters a thing from its original condition cannot be said to be merely a repair of that thing; it will be bringing into existence an improved thing; an altered thing; a new thing for all intents and purposes. But it cannot be forgotten that 'repair' involves an element of renewal yet renewal of the whole or substantially the whole or not a lesser part of the whole cannot be said to be 'repair.'"

30. In *Lurcott v. Wakely and Wheeler*, 1911-1 KB 905, at p. 912, Cozens-Hardy M. R. had observed that

"in many cases repair necessarily involves, not repair strictly so called, but renewal. If an earthenware pipe breaks, you can only repair it by renewing it. Or again, if window frames become rotten and decayed, you cannot repair them except by renewing."

It is thus seen that, in defining the word 'repairs' in Section 2 (7) of Act 18 of 1960, the Madras Legislature has substantially adopted the meaning attributed to it by the dictionaries and decisions referred to above. The basic idea underlying the concept of repairs is restoration of a building to its original condition. This implies that the old structure is retained and is renovated from the damaged condition to its original sound state. Repair always involves an element of renewal, but renewal

of the whole and substantially the whole cannot be termed repair proper. Where the building is completely demolished and a new structure put instead, it would normally be reconstruction, not repairs proper. In exceptional cases however, as those enumerated by Cozens Hardy M. R. in 1911-1 KB 905, repair may imply a complete renewal and substitution. An addition material alteration or anything which substantially improves a thing in value from the original condition except in so far as it is necessary to carry out such restoration cannot be said to be merely repair of that thing, it will be bringing into existence an altered thing, an improved thing, a new thing for all intents and purposes.

31. Applying these principles to the present instance, I am satisfied that what the respondent had done to the building would amount to a reconstruction and not mere repair as contemplated by Act 18 of 1960. The original building in question consisted of only the roof, walls and the floor and as a result of the respondents' action the entire roof had been replaced, all the walls had been put up afresh and the flooring had been completely done up anew. The whole building had therefore, been substantially renovated and it would therefore, be idle to contend that only a repair of the building had been done. Even if the work done is taken piece by piece, the renewal of the thatch alone may amount to repair; and it would be impossible to say that the conversion of the mud walls into brickwalls and the mud floor into cement floor would be mere repair. It would clearly constitute a material alteration and an improvement in that the nature and composition of the flooring and the walls had undergone a complete change and the value had considerably enhanced.

32. It is also clear, that even if the respondent's acts can be assumed for the sake of argument only to be repairs, as the respondent had resorted to them without obtaining the previous consent of the Rent Controller on an application, he would not be entitled to any compensation, even to the extent of a month's rent, for the trouble he had undergone in renovating the building.

33. I would also like to add that, even if the respondent is entitled to invoke Section 103 of the Transfer of Property Act, there is no basis whatsoever for his present claim. In the first place, as I have already observed, a landlord is under no obligation in law to effect any repairs to the building except those which he had successfully undertaken under the tenancy agreement; and admittedly it is not the respondent's case that there is any term in the tenancy agreement casting an obligation on the petitioner to effect any

repairs to the building. The respondent cannot therefore, call upon the petitioner to pay compensation for the repairs he claims to have effected. In the second place, Section 108 of the Transfer of Property Act does not confer any right on a tenant to effect a reconstruction or improvements to the building and claim compensation. I am clear in that he had effected a reconstruction of the house.

34. I am also clear that the provisions of Section 70 of the Indian Contract Act cannot be legitimately invoked in this case. In the first place, it is difficult to say that the act of renovation done by the respondent was lawfully done for the petitioner. As observed in *Chedial v. Bhagwandas*, (1889) 11 LR 11 All 234 at p. 243, by the use of the word "lawfully" in Section 70 of the Indian Contract Act, the legislature had in contemplation cases in which a person held such a relation to another as either directly to create or by implication reasonably to justify the inference that, by some act done for another person, the person doing the act was entitled to look for compensation to the person for whom it was done. In *Panchkori v. Haridas*, 21 Cal WN 394 at p. 399 = (AIR 1916 Cal 497 at p. 499) it was held that it must be considered in each individual case whether the person who made the payment had any lawful interest in making it, if not, the payment cannot be said to have been made lawfully. In the second place, the section is not attracted in cases of services rendered by the claimant at the request of or against the will of the other party sought to be charged with. In order to merit compensation, the services rendered must have been acquiesced in by the other party. The provisions of this section cannot justify the officious obligations in respect of services which the person sought to be charged with did not wish to have rendered. Indeed evidence in this case is that the petitioner objected to the renovation and went to the extent of physically obstructing when the respondent started the construction and that the respondent carried out the work with the help of the police.

35. In the result, the revision petition is allowed; but, under the circumstances, without costs. The judgment and decree of the District Munsif of Melur in O. S. No. 222 of 1966 are confirmed, the decree and judgment of the Subordinate Judge are set aside and the suit is dismissed with costs.

Revision allowed.

AIR 1970 MADRAS 298 (V 57 C 81)

KAILASAM & VENKATARAMAN, JJ.

In re Veeral alias Kanai, Appellant.

Criminal Appeal No. 156 of 1969, D/- 18-9-1969 against judgment of S. J. Coimbatore, D/- 11-1-1969.

(A) Evidence Act (1872), S. 24 — Extra-judicial confession — Confession if oral must be assessed carefully — Voluntary nature of confession must also be considered before it can be acted upon.

(Para 12)

(B) Evidence Act (1872), S. 133 — Accomplice — Who is — Witness stating that she accompanied accused to isolated place knowing that accused was to deliver child — Witness further stating that accused killed her newly born child by twisting umbilical cord round its neck and strangulating it — Witness not disclosing this fact to anybody even after taking accused back to latter's house — Held, witness was no better than an accomplice — Her testimony because of her subsequent conduct was not above suspicion — Conviction on such evidence could not be sustained.

(Para 19)

P. M. Sundaram, Amicus Curiae, for Appellant; Public Prosecutor on behalf of State.

KAILASAM, J.:— The accused Veeral alias Kanai was tried by the learned Sessions Judge of Coimbatore for an offence under Section 302 of the Indian Penal Code in that on 9th September 1968 at about 3 A. M. at Vellaikinar, she committed the murder of her new-born female child by strangulation with the umbilical cord. The learned Judge found the accused guilty of the charge and sentenced her to undergo rigorous imprisonment for life. In the circumstances of the case, the learned Judge has also made a recommendation to the Government for reduction of the sentence of imprisonment for life to one of rigorous imprisonment for a period not exceeding two years.

2. The accused was married to one Chinnan of Vellaikinar village. They had a son, Palaniswamy. Chinnan died about ten years ago. After her husband's death, the accused left Vellaikinar, and went away somewhere, but she came back to Vellaikinar about four months prior to the occurrence. On the request of the accused, P. W. 1 Deival who has a house in the Harijan colony permitted her to live with P. W. 2 K. Chinnal and her daughter in a vacant shed belonging to P. W. 1 which is immediately north of the house of P. W. 1. Sometime before the occurrence, P. W. 1 came to know that the accused was pregnant. On the day prior to the occurrence, P. W. 1 met the accused and told her that she (P. W. 1) had heard that the accused was likely to cause mis-

carriage of her conception. The accused protested and stated that she was not of immoral character and that she would not cause any miscarriage, but would go to a hospital and have her delivery attended to.

3. According to P. W. 2, on the date of the occurrence, P. W. 2, and her daughter took their bed on the pial while the accused slept inside the shed. About first cock-crowing time, the accused woke up P. W. 2, saying that she wanted to answer calls of nature and asked P. W. 2 to accompany her. P. W. 2 and the accused proceeded towards the kuttai which is on the south west. On the way, they saw P. W. 4, Muthan, coming in the opposite direction. When questioned by P. W. 4 as to where they were going, the accused stated that she was going to the tank for easing. Then the accused went near the slope of the tank. A few minutes thereafter, she stated that she was going to deliver a child. P. W. 2, was standing a few feet away. A minute or two later, the accused delivered a child and the child gave out a cry. The accused then snapped the umbilical cord, put it round the child's neck and tightened it. Then there was no noise of the child. P. W. 2 protested at the behaviour of the accused. The accused knotted the umbilical cord round the child's neck. She then said that the child had died, and requested that P. W. 2 may keep silent over the whole matter. The accused then dug a small pit on the tank slope and placed the child in that pit. She covered the child with the blouse M. O. 1, belonging to the daughter of P. W. 2. A little while thereafter, the accused passed placenta and that was also put into the pit. The accused then covered the pit with mud; at the request of the accused P. W. 2 led her back to her house, and afterwards P. W. 2 went for her work.

4. At about 7 A. M. on 9-9-1968, P. W. 5 Palanal, a girl aged about 13 years, was returning home from Karuppan Thottam belonging to one Krishnaswamy Goundar after picking flowers. When she passed the Kuttai near the burial ground, she saw the dead body of a female child on the sloping bund of the tank. She ran to the village and informed several people, including P. W. 1, Deival, about what she saw. P. W. 1 on hearing from P. W. 5 about the dead body of the child lying near the slope of the tank, went to the spot and saw the child. She found the umbilical cord round the child's neck. According to her, there were contusions on the child's neck, and there was bleeding from the right ear and the tongue was protruding. Suspecting that the child must be that of the accused, she searched for the accused, but the accused was not found. Then P. W. 1 went to the house of the village munsif, P. W. 11, V. S.

Venugopal and gave a statement, Exhibit P-1, at about 10 A. M. In the report, P. W. 1 mentioned that she went and saw the child lying dead with the umbilical cord round the neck of the child. She further stated that on hearing the information, the accused skulked away and was chased and caught hold of by P. W. 10, Chinnan, and was produced before the village munsif. In the complaint, it was reported that the accused committed murder of the female child by strangulation and had thrown it away on the burial ground. P. W. 11 recorded the complaint of P. W. 1 and obtained her left thumb impression. He would add that while recording Exhibit P-1, P. W. 10 produced the accused before him and he questioned her. According to P. W. 11, the accused wept and told him that she had strangled the child with the umbilical cord and buried it in the slope of the tank, as otherwise the villagers would scold her and drive her out of the village for giving birth to a child in her state of widowhood. The village munsif sent reports to the police and the Magistrate. At about 4-30 P. M. police came, and P. W. 15, K. Kannappan, Inspector of Police saw the dead body of the child in the slope of the tank. The accused was produced before him. He arrested her and questioned her. He also held inquest over the body of the child. During the inquest, he examined P. Ws. 1, 2, 4, 5 and others. P. W. 15 then sent a requisition to the Sub-Magistrate, Coimbatore, for sending the accused to the hospital for treatment and certificate.

5. P. W. 7, Dr. Krishnamurthi, Civil Assistant Surgeon, Government Hospital, Coimbatore, admitted the accused in the hospital at 9-50 A. M. on 10-9-1968 and referred her to the duty lady Doctor, P. W. 9. P. W. 9, Dr. Saroja, examined the accused and found that she must have delivered a child between 35 to 48 hours prior to her examination.

6. The dead body of the child was sent by the Sub-Inspector of Police to the hospital and P. W. 8, Dr. Sagundhi, the Woman Assistant Surgeon, attached to the Government Hospital, Sular, conducted the autopsy. According to P. W. 8, in this case, the umbilical cord must have been put round the neck of the child and knotted after the child's birth.

7. When examined in the Committal Court, the accused stated that it was true that she took P. W. 2 with her; but she would state that even at the time of delivery of the child, the umbilical cord was wound round the neck of the child. She got giddiness and fell on the child, and she did not wind round the umbilical cord around the neck of the child and she also did not kill the child. In the Sessions Court, she stated that she took P. W. 2 with her, that she went to the tank and

felt like answering calls of nature, that she sat down and realised that she had delivered and that she became unconscious thereafter. She added that she vaguely remembered having fallen over the child after it was delivered. She stated that she would never have had the heart to kill the child even if it was illegitimate. She denied having told the village munsif that she killed the child.

8. The learned Sessions Judge on a consideration of the evidence placed before him found that the prosecution had proved its case beyond all reasonable doubt, convicted the accused under Section 302 of the Indian Penal Code and sentenced her to imprisonment for life.

9. The case for the prosecution is that the child was born alive and that the accused strangled it by putting a knot with the umbilical cord round the neck of the child and killed it. To substantiate this version, the prosecution relies on the testimony of P. W. 2. The prosecution further relies on the evidence of P. W. 11, the village munsif, who states that while he was recording the first information report from P. W. 1, P. W. 10 produced the accused before him and the accused confessed that she strangled the child with the umbilical cord, and buried it in the slope of the tank. In addition to the evidence of these two witnesses, the prosecution relies on the medical evidence for proving that the death was due to strangulation by the use of the umbilical cord after the child was born alive.

10. Before considering the medical evidence, it is necessary to consider the evidence of P. Ws. 2 and 11, which if accepted, would prove that the accused is guilty of the charge framed against her. As already stated, so far as P. W. 2 is concerned, it is common ground that P. W. 2 accompanied the accused to the tank slope where the child was delivered by the accused. The accused herself admits the presence of P. W. 2 along with her at that time. The evidence of P. W. 4 that the said accused and P. W. 2 were going together can be accepted. The question is whether the evidence of P. W. 2 that the accused delivered the child, that the child gave out a cry and immediately the accused snapped the umbilical cord, put it round the child's neck, knotted it and the child died, can be safely accepted. It is admitted by P. W. 2 that the pregnancy of the accused was known to many women in the village. The accused came to the village four months before the date of the occurrence and her advanced stage of pregnancy was known to the villagers. P. W. 2 also would admit that the accused did not take any step to cause miscarriage on the conception, nor did she attempt to leave the village and go away. She appeared

to resign herself to the consequences of her act of folly. On this aspect, the evidence of P. W. 1 is that when she questioned the accused about her pregnancy, the accused stated that she was not of immoral character and that she would not cause any miscarriage of her conception, but would go to a hospital and have the delivery attended to. P. W. 3 would say that the accused admitted to her that she was pregnant and implored her not to tell this to anyone in the village. This evidence is not in accordance with that of P. Ws. 1 and 2 who would state that the accused admitted that she was pregnant and that she was not going to cause any miscarriage and she would have the delivery attended to in a hospital. It is therefore, clear from the evidence of P. Ws. 1 and 2 that the villagers knew about the pregnancy of the accused and that the accused told the persons when questioned that she would not cause any miscarriage and she would join a hospital and have the delivery attended to. In this background, it is not possible to come to the conclusion that the accused was determined to kill her child when it was born. If P. W. 2 had known that the accused was calling her to help her in killing the child, she would be in the position of an accomplice and her evidence would require corroboration in material particulars. According to P. W. 2 she never expected that the accused would kill the child after the delivery. There is no reason for not accepting the evidence of P. W. 2 that she did not know that the accused wanted to put an end to the life of the child after the delivery.

11. The point that has to be considered is whether the statement of P. W. 2 that she saw the accused putting the umbilical cord round the neck of the child and strangulating it can be accepted. In cross-examination, it was specifically put by the accused to P. W. 2 that the child was born with the umbilical cord twisted round its neck and that it was a still born child. The witness denied the suggestion. But her subsequent conduct makes her testimony suspicious. According to her, at the request of the accused, she led back the accused to her house and after leaving the accused in her house, she went away for work. She would state that at about 10 A. M. she learnt that the villagers had known about the killing of the child by the accused and went to the village munsif's house and saw the accused there. She then told the people about the accused taking her to the tank slope and what followed thereafter. Strangely enough, the village munsif is completely silent about P. W. 2 coming to his house and telling about what she knew. If only P. W. 2, an eye-witness, had stated what she saw to the village munsif, the village munsif would have certainly spoken to it

in the Court. If P. W. 2 had given the information to the village munsif while he was preparing the reports that would have found a place in the village munsif's reports. P. W. 2 admitted that she was taken to the police station four or five days after the occurrence and was kept there for two days and sent away. She denied that even from Monday evening (that is the day of the occurrence) she was kept at the Station for a week and thereafter sent home. There is no explanation for her being detained at the police station for two days even according to the witness. The conduct of P. W. 2 in not informing the villagers and giving a complaint is not explained. Further, her detention in the police station creates a suspicion that her evidence is not voluntary. The learned Sessions Judge found that the very fact that P. W. 2 did not go and inform anyone in the village about the accused delivering a child and killing it would attract a certain amount of criticism to the evidence of P. W. 2. In spite of this defect in the testimony of P. W. 2 the learned Judge was prepared to accept it as the medical evidence "clinching corroborated" the testimony of P. W. 2. I am of the view that criticism of the evidence of P. W. 2 is justified, and her evidence would not stand by itself.

12. The evidence of the village munsif that the accused confessed the crime was strongly relied upon by the learned Public Prosecutor. P. W. 11, the village munsif would state that the accused was produced before him by P. W. 10 and that when he questioned her, she wept and told him that she strangled the child with the umbilical cord and buried it in the slope of the tank. P. W. 10 would state that he searched for the accused in the shed given to her and as she was not there, he searched for her in the village and found her about three furlongs east of the village on the road leading to Saravanampatti. He told the accused that she should not leave the village without the matter of the child's death being cleared and brought her to the village and handed her over to the village munsif at about 10 A. M. In cross examination, it was put to the witness that the accused was not going away from the village, but was brought from a tea shop. There can be no doubt from the testimony of P. W. 10 that the villagers suspected foul-play by the accused in the death of the child and forcibly took her to the village munsif's house. Taking the surrounding circumstances into account, it is very likely the accused would have been subjected to a near inquisition by the villagers when she was produced before the village munsif. It is also probable that the village munsif suspecting her would have

put some questions. In the circumstances, even if she had made a statement the voluntary nature of that would have to be carefully considered. It is well settled that oral confessions which are not reduced to writing will have to be very carefully assessed before they can be acted upon. Added to that, in this case, the voluntary nature of the statement, if ever she made one, is also open to doubt. More than all these facts, the question whether the accused did make a confession or not, has to be considered. According to the village munsif, the accused made the confession while he was making the report. If the accused had made such a confession before the village munsif when he was recording Exhibit P-6, certainly P. W. 11 would have included it in Exhibit P-6, or would have at least stated about the confession as an addenda to the report. When questioned about the non-inclusion of this fact in Exhibits P-7 and P-8, the village munsif, while admitting that he had not made any reference about questioning the accused and about her admitting the guilt, did not offer any explanation. The learned Sessions Judge accepted the testimony of P. W. 11 as he thought that there was no reason for an independent and respectable witness like him to perjure against the accused. I am unable to accept the assessment of the evidence of P. W. 11 by the learned District Judge, for, prudence dictates, that one should be very cautious before an oral confession by an accused is accepted. For the reasons which I had set out above, I feel that it is extremely unsafe to place any reliance on the testimony of P. W. 11 that the accused confessed the crime to him.

13. The question that remains to be considered is whether the medical evidence conclusively establishes that (1) the child was born alive and (2) that its death was caused by strangulation of the neck with the umbilical cord. The evidence of the doctor who conducted the post-mortem, P. W. 8, Dr. Sugandhi, is that she found the umbilical cord tied around the neck of the child and contusions and abrasions were seen all around the neck with a knot in the umbilical cord on the right side of the neck. In her opinion, the child appeared to have died of asphyxia due to strangulation with the umbilical cord. She also was of the view that the child would not have been a still born child, and the child must have been alive at the time of the birth and it must have died thereafter due to asphyxia, as otherwise, the internal organs would not have been in a congested state. She admitted that the umbilical cord could have been found round the neck of the child along with the knot at the time of birth. But in this case, because

of the presence of contusions and abrasions on the neck of the child, the cord must have been put round the neck and knotted after the child's birth. She further stated that the contusions and abrasions on the child's neck could have been caused due to some pressure being applied at the place with human fingers. In cross-examination, the doctor admitted that there were no nail marks on the child's neck. The doctor arrived at her opinion that the child ought to have been born alive from the fact that the internal organs were found to be in a congested state. She also concluded that the umbilical cord must have been put round the neck and knotted after the child's birth from the fact that there were certain contusions and abrasions in the neck.

14. The question arises whether these symptoms conclusively establish that the child was born alive and whether the death was caused by strangulation by knotting the umbilical cord round the neck of the child. A child is considered to be born alive when, after complete extrusion from the mother, it exhibits, some sign of vitality, such as for example, activity of the heart, breathing, movement of the limbs, crying etc. Where respiration is not established it is essential for a person who was present at the delivery to give evidence of the complete birth as well as of the subsequent sign of life. (Taylor's Principles and Practice of Medical Jurisprudence Volume II page 115). In this case, as already stated, I am not prepared to place much reliance on the evidence of P. W. 2 who speaks to the child being born alive. In this case, there is no attempt to establish respiration. At page 116 the learned author states that it is important to consider most carefully the accepted signs of live birth and to discuss the nature and value of the deductions which may legitimately be drawn from them. Evidence of life may be drawn from various circumstances, such as breathing (expansion of the lung, air in the stomach or bowel), crying, muscular movements, circulation and heart-beat, etc. In this case, apart from the oral testimony of P. W. 2 that the child cried, which I am not prepared to accept, no evidence as to breathing or circulation and heart-beat was deposed to. Evidence as to breathing is considered essential, for several changes are produced in the lungs after the child starts breathing when it is born alive. A tabulation is given by Taylor as to the changes caused to the lungs of the child after a live birth. For instance, the volume of the lungs becomes four to six times larger, their margins get rounded, the colour changes, air sacs become visible, they contain full of blood, which is frothy on squeezing, the weight of the lungs increases, and the expanded areas float in water. Neither the evi-

dence of the doctor nor the post mortem discloses that any attention was paid to these aspects, and there is no mention of the lungs except stating that all internal organs were found congested. At page 122, the learned author points out as follows:

"Another common cause for foetal distress at and after birth is cerebral damage due to moulding or to encirclement of the neck by the cord causing engorgement of veins These changes, too, may stimulate those of asphyxiation, but suspicion must not be maintained in the face of a reasonable natural possibility, such as difficult labour."

Referring to hydrostatic test, it is pointed out that microscopic examination of the lung will be necessary before an opinion can be expressed. The various other tests which are prescribed by the medical science to determine whether the child was born alive or still-born were not performed. The conclusion of Taylor after a discussion on the medico-legal aspects on this question at page 150 is significant and may be extracted:

"The conclusions to be drawn from these observations are that if the Courts were to insist upon conclusive medical evidence of a separate existence in every trial for child murder or infanticide, there would be very few convictions, except where a confession was made by the accused, where the infant was found alive, but dying, or the crime was committed in the presence of eye-witnesses."

But, in this case, the alleged confession by the accused cannot be accepted and the evidence of the eye-witness, P. W. 2 is suspect. The medical evidence is not helpful since the necessary tests have not been performed, and the data that is furnished by the medical evidence is grossly inadequate. In this state of evidence it is extremely hazardous to come to the conclusion that the child was born alive.

15. I will now proceed to consider whether the medical evidence has established that the death was homicidal or caused by strangulation of the neck by knotting the umbilical cord. To recapitulate, the evidence of the doctor is that she found the umbilical cord tied around the neck of the child and contusions and abrasions were seen around the neck and that the knot in the umbilical cord was on the right side of the neck. The cord was not found attached to the navel and the doctor was of the view that the cord was snapped from the child's navel after the birth. The doctor also did not find any nail marks on the child's neck. The aspects relied on by the prosecution are the presence of a knot in the umbilical cord on the right side of the neck, the contusions and abrasions around the neck and the snapping of the cord from the

child's navel. The encircling of the cord round the neck is not uncommon and Taylor reports at page 144, on the authority of Walker, that the cord encircles the neck in some twelve per cent of cases occasionally twice, and it has caused death in many instances, in spite of skilled assistance. Though not very common, cases have been reported from time to time, in which an actual knot has been found in the cord. For such a knot to occur, the body of the child in its movements in utero must have passed through a loop of the cord, forming a knot which may be tightened by its further movements. Taylor again quotes Gardinar who found that in ten per cent of cases the cord may encircle the neck more than once, or be knotted, though these abnormalities are rare. Again at page 172, the author states the position thus:

"Where the cord is knotted, the possibility of it being a natural obstetric event, though not entirely eliminated (for the cord is occasionally found knotted in obstetric practice) becomes more remote, and the likelihood of wilful strangulation looms larger. Unless the cord is knotted several times, a wilful act cannot, however, be regarded as proved." Thus, no inference as to homicide can be inferred from the fact that the strangulation was by the umbilical cord. But, the knot that is found is rather uncommon and leads to a suspicion that it may be homicide. But the possibility of such a knotting due to natural causes cannot be ruled out.

16. The snapping of the cord is also not uncommon for Taylor points out at page 145 that in precipitate labour, the cord, especially when very short, may be torn. The cord may be severed in other ways, either by accident or deliberately. When the cord is used as a strangulating ligature, it may show evidence of having been handled roughly. In this case, the doctor has not noted any evidence of the ligature having been handled roughly. The contusions and the abrasions on the neck of the child, on which the doctor relied on, do not also conclusively establish that death was due to homicide. Marks of fingure nails on the neck are not uncommon. The learned author at page 171 finds that in self-assisted deliveries, the mother may claw with the fingers in desperation to get the infant out and have done with her troubles. In this case, there were no nail marks. The doctor, P.W. 8, herself admitted that the contusions and abrasions on the child's neck could have been caused due to some pressure being applied at that place. This may be at the time when the delivery took place or even due to the encirclement of the cord. The author finds that when a child is born with the umbilical

cord round the neck, it is not uncommon to find injuries on the neck. At page 156, the author quotes an instance where the cord was coiled three times around the neck, passing under right armpit; and upon removing it, three parallel discoloured depressions were distinctly marked. These extended completely around the neck and corresponded to the course taken by the coils. Much reliance cannot therefore be placed on the presence of contusions and abrasions on the child's neck.

17. The snapping of the cord is relied on by the prosecution as a very strong circumstance indicating violence. The doctor has found that the skin in the abdomen was found to have been peeled off and hence according to her, it is quite likely that the cord was snapped from child's navel after the birth. Whether the snapping of the cord was accidental or deliberate, the doctor has not offered any opinion. As already pointed out, the snapping of the cord by accident cannot be ruled out. In the circumstances, I am unable to place any reliance on the fact that contusions and abrasions were found on the neck of the child or that the cord was found snapped. Considering the medical evidence as a whole, I am of the view that it is far too inconclusive to find that death was due to strangulation by intentionally tying the umbilical cord on the neck of the child. Having rejected the alleged confession of the accused as spoken to by P.W. 11 and the oral evidence of P.W. 2 and having found the medical evidence inconclusive, I am satisfied that the conviction of the accused cannot be accepted. The accused is entitled to the benefit of doubt, and should be acquitted. I would allow the Criminal Appeal, set aside the conviction and the sentence imposed on her and set her at liberty.

18. VENKATARAMAN, J.:— I agree that the appellant will have to be acquitted, but I would put my reasoning on some aspects in a different form. At the outset, I agree with my learned brother that it is unsafe to act on the testimony of P.W. 11 that the accused made an extra-judicial confession of the murder. If the accused had made such a confession, P.W. 11. would have referred to it in his forwarding report.

19. So far as the evidence of P. W. 2 is concerned, it seems to me that even when she left the house along with the accused, she knew that the accused expected to deliver a child and wanted to dispose it of. In this view of the matter, P.W. 2 would be in the position of an accomplice and that is also the view of the learned Sessions Judge. The reasons for my view are these. P.W. 2 admits

that previous to that night she had not accompanied the accused for her answering calls of nature, and that during nights they would answer calls of nature even at places near their house. Actually, the evidence of the Circle Inspector of Police (P.W. 15) shows that the place where the dead body was buried was about a furlong from the shed of the appellant. If it was merely for answering calls of nature, P.W. 2 would have asked the accused why it was necessary to go so far. P.W. 2 no doubt states in chief examination that the tank was the usual place where they would go for answering calls of nature, since water was available there. Obviously, P.W. 2 would be interested in suppressing the fact that she was an accomplice, and therefore gave such evidence in chief examination. Further, it is difficult to believe that the appellant had taken M. O. 1, the blouse belonging to P. W. 2's daughter, without the knowledge of P. W. 2. It may be noted that the cross-examination on behalf of the accused was that P.W. 2 has taken M.O. 1 on coming to know that the accused had developed labour pains. Really, the whole cross-examination proceeds on the basis that it was P.W. 2 who killed the child and wanted to foist the blame on the accused and therefore did not inform anybody. Her conduct in not informing the villagers of what the accused did, according to her, till 10 A.M. fits in with the view that P.W. 2 is really in the nature of an accomplice. She was kept at the police station for two days. If she was a mere innocent witness, why should she have been kept at the police station for two days?

20. My learned brother thinks that the medical evidence has not conclusively established that the child was murdered and that we cannot rule out the possibility of the child having been born dead with the umbilical cord round the neck. With great respect, I am, however, inclined to differ from my learned brother on this aspect. It seems to me that the evidence of P.W. 8, that the child died of asphyxia due to homicidal strangulation with the umbilical cord, must be accepted. The doctor gave three reasons in support of the conclusion: (i) contusions and abrasions were seen all around the neck with a knot in the umbilical cord on the right side of the neck, (ii) on dissection she found the subcutaneous tissues in the neck to be echymosed, (iii) the internal organs were congested. It seems to me that the two facts, viz., the presence of contusions and abrasions around the neck, and echymosis of the subcutaneous tissues in the neck prove violence and pressure at that place. Those circumstances, taken along with the congestion of the internal organs and the remoteness of the possibility of the child being born dead with the um-

bilical cord around the neck with a knot at the time of the birth are sufficient to show that death was due to homicidal violence and strangulation with the umbilical cord and pressure with hands. Though the doctor is not positive, she also says that because the skin of the abdomen was found to be peeled off, it was likely that the cord was snapped from the child's navel after the birth. Modi at page 374 of the Fifteenth Edition (1965) states:

"Strangulation:— This is also a common form of child murder. During the act of strangulation, far greater violence is used than necessary, and severe marks of abrasions and contusions with extravasation of blood in the soft tissues are usually found on the neck."

Lower down he says:

"Rarely, the natural folds of the skin in the neck of a fat child may resemble the cord marks caused by strangulation, but in that case, no marks of abrasions or any extravasation of blood will be visible on the neck."

21. These passages support the evidence of the doctor that death was due to homicidal strangulation.

22. Similarly Taylor, at page 172, of the Twelfth Edition states:

"Marks of encirclement by the umbilical cord are seldom clear-cut, for the cord is soft and its 'weave' or 'twist' of vessels too easily flattened by the pressure of tightening to cause a visible pattern on the skin."

This again suggests, that, where contusions and abrasions are present, as in this case, it is not a case of natural death by encirclement of the umbilical cord prior to birth.

23. Apart from the medical evidence itself, we cannot ignore the other pieces of circumstantial evidence in the case which go to show that it was not a case of the child being born dead with the umbilical cord around its neck with a knot. In the first place, the circumstances of the case taken as a whole clearly suggest that the accused and P.W. 2 went to the tank knowing that there would be delivery soon and intending that the child, when born, should be disposed of. Under the circumstances, it seems to me to be too good a coincidence to be true that the child was born dead with the umbilical cord around the neck, relieving the accused and P.W. 2 of the necessity of killing the child. Again, if the child was born dead with the umbilical cord around its neck, there was no need at all to bury the child. Indeed, one would expect the conduct of the accused and P.W. 2 to be different from what it was if the child was born dead with the umbilical cord around the neck. If that was what happened, we could expect P.W. 2

5. Having regard to the serious consequences emanating from the displacement of a large number of persons affected by the validating Act, Government promulgated a notification on April 1, 1965 directing the continuance in service of all the local candidates. Subsequently, on August 17, 1966, rules were made by the Governor under the proviso to Article 309 of the Constitution and Rule 3 of those rules directed regularisation of all local candidates who had been appointed before December 31, 1964 and who were still in service when the Governor's rules commenced to operate.

6. But it was thought that neither the Government Order nor the Rules made by the Governor could be useful to the petitioner for the reason that although he had been appointed before December 31, 1964 which is the date to which the Governor's Rules refer, he had not continued in service after his services were terminated on May 23, 1964 and he was no longer in service when the Governor's Rules commenced to operate. So, the petitioner's representations that the benefit of the Governor's Rules may also be made available to him produced no useful results.

7. In this writ petition the petitioner asks for a direction for the regularisation of his service. There is also another prayer for a declaration that some of the Governor's Rules to which we have referred are void but that prayer was not pressed before us.

8. It seems to us that regularisation of the petitioner's appointment under the Governor's Rules could not have been refused.

9. It is an uncontroverted fact that all the local candidates who were able to get the State Level Recruitment Committee's selection quashed did have the benefit of regularisation by reason of the fact that there was no interruption in their services notwithstanding the selection made by the Recruitment Committee. They were able to continue in service because of the order of stay made by this court in the respective writ petitions filed by those persons. So, it is indisputable that if petitioner also had been able to get an order of stay from this court, he would have also continued in service in the same way in which the other persons were able to continue and the only reason for which he was not able to continue in service in that way was that the State Level Recruitment Committee made a selection and some one so selected displaced the petitioner from his post.

10. But the selection which discontinued the petitioner's service, was, accord-

ing to the pronouncement of this Court an incompetent selection and so the interruption in service was in the eye of law no interruption. The clear effect of that pronouncement was that no one selected by the Recruitment Committee acquired the right to hold the post which was already held by another. And if nonetheless the petitioner's service was terminated to make his post available to the person chosen by an incompetent group of persons, such termination has no validity and the petitioner should be deemed to have continued in service.

11. If continuance in service at a specified point of time is what earns regularisation, the authority which has to make the regularisation cannot refuse it on the basis of an interruption caused by its own illegal act. Any appeal to such discontinuance cannot claim the support of reason and is plainly unjust.

12. If the others who got an order of stay continued in their posts and the petitioner would also have so continued if he had got an order of stay, it would be incongruous for any one to suggest that the others who got an order of stay should get regularised in their posts and he who was not able to get an order of stay could not claim a similar benefit. In every way they were equals and the accidental fact that there was no stay in the case of someone does not make them unequal.

13. Moreover, there is an uncontroverted allegation in the affidavit that a certain Nararajappa and several others who were appointed as local candidates after the petitioner was appointed are continuing in their posts after they got the benefit of regularisation. So, it would be extremely unreasonable to refuse the benefit of regularisation in the case of the petitioner who, for no fault of his and for the reason that he was prevented from continuing in service by an illegal selection by the State Level Recruitment Committee could not be in service at the relevant point of time.

14. We must understand the Governor's Rules and the Government Order which preceded it in a rational way and the interpretation which we place on it must be one which promotes their purpose and that purpose was to confer a benefit on persons like the petitioner who were affected by the validating Act subsequently made, and, so, the petitioner could not be excluded from their operation.

15. The subsequent validation of the Recruitment Committee's selection on which Mr. Shamsunder depended could not impair a right which the Governor's Rules created when they commenced to operate.

16. We do not also accede to the submission made by Mr. Government Pleader that the prayer for mandamus was not preceded by a demand. There is an incontroverted allegation in the affidavit of the petitioner that he did make one.

17. So, we make a declaration for regularisation of petitioner's services under Rule 3 of the Governor's Rules with effect from the date on which such regularisation was directed by those Rules. No costs.

Petition allowed.

AIR 1970 MYSORE 162 (V 57 C 40)

A. R. SOMNATH IYER AND
AHMED ALI KHAN, JJ.

B. Siddoji Rao, Petitioner v. The State of Mysore and others, Respondents.

Writ Petition No. 2843/1967, D/- 20-6-1969.

Industrial Disputes Act (1947), Sec. 12 (5), 10 — Refusal of reference — Communication of reasons is imperative — Dismissal of workman for alleged assault on officer — Workman exonerated by criminal Court — Government refusing reference on ground of its own opinion as to truth of accusation — Held refusal was on extraneous ground even if Government had reached conclusion that allegation was proved beyond doubt. AIR 1960 SC 1223, Rel on. (Paras 4, 5, 6)

Cases Referred: Chronological Paras (1960) AIR 1960 SC 1223 (V 47) = 1960-2 Lab LJ 592, State of Bombay v. K. P. Krishnan 5

P. K. Subba Rao, for Petitioner; P. K. Shyamasunder High Court Govt. Pleader, for Respondents.

SOMNATH IYER, J.:— The petitioner was a garden supervisor in the Government Spun Silk Mills at Channapatna in the district of Bangalore and he was also the convener of the canteen committee of a canteen organised by Government. At one stage there was a criminal prosecution instituted against the petitioner on the allegation that he assaulted the Administrative Officer of the mills who is respondent 3 before us, but that prosecution ended in the petitioner's acquittal. Meanwhile the petitioner had been dismissed from the post of a garden supervisor.

2. It was in that situation that the petitioner sought a reference under Section 10 of the Industrial Disputes Act, after there was an unsuccessful endeavour at conciliation. That reference was refused by Government on December 31, 1966 through an order which reads:

"GOVERNMENT OF MYSORE
No. LMA 573 LLD 66.

Mysore Government
Secretariat,
Vidhana Soudha,
Bangalore,
Dated 31-12-1966.

From

The Secretary to the Government of Mysore, Labour the Municipal Admn., Dept.,

To

1. Sri B. Siddoji Rao, Garden Supervisor, Government Spun Silk Mills, Channapatna, Bangalore District.
2. The Management, Government Spun Silk Mills, Channapatna, Bangalore District.

Sir,

Endorsement.

Sub:— Industrial dispute between the workmen and Management of Government Spun Silk Mills, Channapatna, re: termination of services.

With reference to the above subject, I am directed to state that Government consider that the dispute in question does not merit reference for adjudication as it was proved that the officer was assaulted by the workmen and the dismissal of the workmen justified.

Yours faithfully,

Sd/- G. G. Purohit,
Under Secretary to Government,
L. M. A. Department."

3. In this writ petition which at one stage incorporated another prayer for reinstatement which has since been deleted the only question which we should investigate is the sustainability of the refusal of the reference sought by the petitioner.

4. We are of the opinion that there has been no proper disposal of the application for a reference since the only ground on which it was refused was that in the opinion of Government it was proved that the Administrative Officer was assaulted by the petitioner. Section 12 (5) of the Industrial Disputes Act makes the communication of the reasons for refusal of the reference imperative, and it is obvious that there has been no obedience to that sub-section since the only reason for which the reference was refused is an extraneous one which had no relevance to Section 12 (5).

5. That that is so is the effect of the pronouncement of the Supreme Court in State of Bombay v. Krishnan (K. P.), 1960-2 Lab LJ 592 = (AIR 1960 SC 1223) in which it was explained that while it may be open to Government to refuse a reference under Section 12 (5) on the ground that the dispute raises a claim which is

stale or opposed to the Act or inconsistent with any agreement between the parties or that it suffers from infirmities of that character, such refusal would be impermissible on the ground that the workman was guilty of some misconduct. Such refusal could not be founded on the alleged misconduct of a workman even if Government reached the conclusion that that misconduct is proved beyond doubt.

6. In the case before, us, the dispute in respect of which a reference was sought, was a dispute concerning the dismissal of the petitioner on the accusation that he assaulted the Administrative Officer, and it was not possible for Government to refuse that reference on the basis of its own opinion as to the truth of that accusation, and especially after the Criminal Court in which the petitioner was prosecuted had ended in his exoneration.

7. So we quash the impugned order of Government by which the reference was refused, and we make a direction to Government that it shall now dispose of the application for a reference afresh and in accordance with law.

8. No costs.

Writ allowed.

AIR 1970 MYSORE 163 (V 57 C 41)

A. NARAYANA PAI, J.

S. H. Kelkar and others, Petitioners v. Mandakini Bai and another, Respondents.

Civil Revn. Petn. No. 1218 of 1968, D/- 31-7-1969, against order of II Addl. Civil J., Bangalore City, D/- 16-7-1968.

Civil P. C. (1908). O. 23, R. 1 and O. 33, R. 1 — Suit instituted in forma pauperis — Court refusing leave — Plaintiff striking off certain reliefs for want of funds — Plaintiff subsequently getting funds — Amendment of plaint to include the reliefs ordered — Striking off reliefs in the case, was not giving up reliefs within the meaning of O. 23, R. 1.

The plaintiff instituted the suit in forma pauperis. When the Court refused leave, the plaintiff, for want of sufficient funds, struck off some of the reliefs she prayed for in the suit. But the averments in the plaint concerning those reliefs remained intact. Subsequently when the plaintiff was in possession of funds, she applied for amendment of the plaint to include those reliefs.

Held, permitting the amendment, that the striking off of the reliefs under the circumstances of the case was not withdrawal of reliefs within the meaning of O. 23, R. 1. Further, the Rule contemplated withdrawal of reliefs subsequent to the institution of the suit. The striking off of the reliefs in the case was prior to

payment of court-fee and thus prior to the institution of the suit. AIR 1949 Pat 358, Foll.

Cases Referred: Chronological Paras (1949) AIR 1949 Pat 358 (V 36) =

ILR 27 Pat 751, Ram Laxman

Janki v. Mukund Lal

S. G. Sundaraswamy, for Petitioners;
G. Dayananda, for Respondent No. 1.

ORDER:— The suit was originally sought to be instituted in forma pauperis with five prayers. On refusal of leave to do so, the plaintiff struck off four reliefs from the plaint, paid court-fee on the fifth relief and the suit was registered accordingly. Subsequently when she was in possession of sufficient funds to pay the court-fee in respect of the omitted reliefs also, she applied for amendment by way of reinstatement of the originally given up reliefs. The Civil Judge has granted the permission. Hence this Revision Petition by the contesting defendants 1 to 3.

2. Although the reliefs were struck off, the original averments in the plaint were left intact. Hence the opinion of the Civil Judge that the reliefs now sought to be reinstated flowed from or depended upon the averments already in the plaint and that therefore, no surprise or serious prejudice can be postulated, is not open to any serious criticism.

3. The only substantial question for consideration is whether the striking out of the reliefs in the circumstances mentioned above can be equated to withdrawal of reliefs within the meaning of Rule 1 of Order 23 without the permission of the Court so as to preclude the plaintiff from suing in respect of them.

4. It is difficult to accept the contention that such should be regarded as the legal effect of striking out reliefs. It will be seen that the withdrawal referred to in Rule 1 of Order 23 is a withdrawal subsequent to the institution of a suit. Here, striking out of the reliefs was before payment of the court-fee. Even without striking out the reliefs if a plaint is presented with sufficient court-fee only for one of the reliefs, the highest penalty which would be visited upon the plaintiff is the rejection of the plaint so far as the prayers not supported by the court-fee are concerned. Such rejection does not preclude the plaintiff from instituting a fresh suit on the same cause of action. Such was the view taken by a Bench of the Patna High Court in Ram Lakshman Janki v. Mukund Lal, AIR 1949 Pat 358, see para 15 at p. 361 of the Report.

5. There is therefore, no reason to disagree with the Civil Judge.

6. The Revision Petition is dismissed.
Petition dismissed.

AIR 1970 MYSORE 164 (V 57 C 42)

A. R. SOMNATH IYER, A. C. J.

P. Ramachandra Rao, Appellant v. N. Subramanya and others, Respondents.

Regular Second Appeal No. 194 of 1965, D/- 21-8-1969 against Judgment of Civil J. Shimoga, D/- 25-9-1964.

(A) Limitation Act (1963), Art. 65 — Limitation Act (1908), Art. 144 — Sale of undivided share of coparcener — Suit for possession of share by deceased purchaser's son within 12 years of sale against some coparceners but coparcener in possession impleaded after 12 years — Suit held not barred by limitation as possession of coparcener was on behalf of plaintiff and not adverse to him — (Civil P. C. (1908), O. 7, R. 7).

Where a coparcener was adjudged insolvent and his undivided share was purchased through Official Receiver by the plaintiff's father who died later on and subsequently the plaintiff brought the suit for possession of his share within 12 years but impleaded the remaining coparcener who was actually in possession of the property, as opposite party, after the expiry of 12 years; Held that said coparcener's plea of adverse possession could not be entertained as his possession must be deemed to be on behalf of and not adverse to the plaintiff's father. The right of purchaser of undivided share to its possession accrues only when the specific property is allotted to him. Till then the question of adverse possession does not arise. AIR 1966 SC 470, Foll.; AIR 1916 Mad 990 (2) (FB), *Ref.* (Para 5)

Suit for possession and not for partition was brought in this case because the properties sold by the Official Receiver were allotted to the defendant coparcener at a settlement between members of the family. Hence there was no substantial defect in the frame of suit brought by the plaintiff. (Para 6)

(B) Civil P. C. (1908), O. 20, R. 12 — Limitation Act (1908), Article 109 — Claim for past mesne profits — Defendant's possession till date of institution of suit for possession on behalf of plaintiff — Plaintiff's claim for past mesne profits has to be disallowed. (Para 7)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 470 (V 53) —
(1966) 1 SCR 628, Manikayala Rao
v. Narasimhaswami 1
(1916) AIR 1916 Mad 990 (2) (V.3) —
ILR 39 Mad 811 (FB), Vyapuri v.
Sonamma Bol Ammani 2
T. S. Ramachandra, for Appellant; H. N.
Narayan, for Respondents Nos. 1 to 8.

JUDGMENT:— This is an appeal preferred by defendant 3 from a decree for partition which was made by the Civil

Judge in appeal. The material facts are these: Defendants 1 and 3 were brothers and belonged to a Hindu joint family. When defendant 1 was adjudged an insolvent under the provisions of the Insolvency Act, his right title and interest in his share of the family properties was sold by the Official Receiver on April 1, 1950 and that sale was confirmed. The purchaser at that sale was the plaintiff's father in whose favour a sale deed was executed by the Official Receiver on July 12, 1950.

2. The suit out of which this appeal arises was next brought on July 12, 1962 for delivery of possession to the plaintiff of the fifth share which had been purchased by his father. The plaintiff became entitled to a fifth share since the defendants' other brothers are not parties to this litigation.

3. The Civil Judge negated the contention that the suit was barred by limitation and the plea of limitation was founded almost exclusively upon the fact that although the suit was brought within 12 years from the date of the execution of the sale deed in favour of the plaintiff's father, defendant 3 was impleaded as a party to the suit subsequently and after the expiry of 12 years from the date of the sale deed. But the Civil Judge was of the opinion that possession of defendant 3 was possession on behalf of the plaintiff's father who had purchased defendant 1's share in the family property and that there could be no bar of limitation.

4. The view taken by the Civil Judge receives full support from the enunciation made by the Supreme Court in Manikayala Rao v. Narasimhaswami, AIR 1966 SC 470 in which Sarkar, J. as he then was delivering the majority judgment of the Court said this in the context of the right of a purchaser of an undivided share of a coparcener in Hindu joint family property:

"His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased. His right to possession 'would date from the period when a specific allotment was made in his favour.' It would, therefore, appear that Sivayya was not entitled to possession till a partition had been made. That being so, it is arguable that the defendants in the suit could never have been in adverse possession of the properties as against him as possession could be adverse against a person only when he was entitled to possession. Support for this view may be found in some of the observations in the Madras Full Bench case of Vyapuri v. Sonamma Bol. Ammani, ILR 39 Mad 811—(AIR 1916 Mad 990(2)) (FB)" (Page 473).

5. This elucidation makes it clear that adverse possession of defendant 3 could never have commenced against the plaintiff's father or after his death against the plaintiff until the plaintiff or his father became entitled to possession, and that right to possession could accrue to them only when specific property is allotted to them which is attributable to the share of defendant 1 which the plaintiff's father had purchased from the Official Receiver. If the right to possession could accrue to him only then, defendant 3 who was in possession until then would be in possession on behalf of defendant 1 if there had been no sale of his interest, and on behalf of the plaintiff's father and the plaintiff after that sale.

6. It is no doubt true that the suit brought by the plaintiff was not a suit for partition but was only a suit for possession. The reason why the suit was brought in that form was that the properties the right title and interest of the defendant in which were brought to sale by the Official Receiver, were the properties allotted to defendant 3 at a settlement between the members of the family, and so there was no substantial defect in the suit brought by the plaintiff.

7. I therefore, dismiss this appeal. But the direction by the Civil Judge in his decree that there should be an ascertainment of the past mesne profits claimable by the plaintiff cannot be sustained since until the date of the institution of the suit the possession of defendant 3 on the enunciation already made, is, the possession of the plaintiff, and so there can be no claim which could properly be made for past mesne profits. So, I delete the direction.

8. No costs.

Decree modified.

section. Thus, if the father is alive and a partition of joint family property is made between him and his son or sons, the demand for partition by unmarried daughter cannot be sustained. (Para 4)

T. S. Ramachandra, for Appellant; K. S. Puttaswamy, for Respondents Nos. 1 & 2.

JUDGMENT: This appeal is by defendant 6 which arises out of a suit brought by two plaintiffs for a partition of the property which belonged to a Hindu joint family which was composed of defendant 1 and defendants 3 to 6. Defendant 1 is the father and defendants 3 to 6 are his sons. The two plaintiffs and defendant 2 are his daughters. There was a partition on April 19, 1960 between the members of the family in which defendant 6 took his fifth share and the other members of the family remained joint. It is because of that partition that the two plaintiffs claimed that they were also entitled to demand a partition in the family properties under Section 8 of the Hindu Law Women's Rights Act (Mysore Act 10 of 1933) which will be referred to as the Act.

2. The Munsiff dismissed the suit on the ground that the plaintiffs could not demand a partition because their father was alive. But the Civil Judge allowed the appeal and gave the plaintiffs the decree which they wanted for partition and delivery of possession of their 2/23rd share in the family properties including the property which had fallen to the share of defendant 6. So defendant 6 appeals.

3. Mr. Ramchandra appearing for defendant 6 contends that the decree for partition offends against proviso (ii) to Section 8 of the Act. He is right in making that submission.

4. Although under Section 8 (1) (a) the unmarried daughters in a Hindu Joint family have the right to demand a share in the family properties when a partition of joint family property is made between a person and his son or sons, that right is clearly controlled by the proviso to that section, CL (ii) of which reads:

"Provided always as follows:—

xx xx xx
(ii) No female whose husband or father is alive shall be entitled to demand a partition as against such husband or father, as the case may be;"

Defendant 1 who is the father of the plaintiffs was alive when the suit was brought and continues to be alive. So the Civil Judge was not right in taking the view that the demand for the partition by the plaintiffs could be sustained.

5. So I allow this appeal. But since defendant 6 is the only person who appealed from the decree made by the Civil Judge, the decree that I make is that there should be a partition and delivery of possession to the plaintiffs of 8/115 share

'AIR 1970 MYSORE 165 (V. 57 C 43)

A. R. SOMNATH IYER, A. C. J.

Lakshminarayana, Appellant v. Saraswati and others, Respondents.

Second Appeal No. 494 of 1965, D/- 25-8-1969, from judgment and decree of Civil J., Shimoga, in R. A. No. 143 of 1964.

Hindu Law Women's Rights Act (10 of 1933 Mysore), S. 8 (1) (a), Proviso, CL (ii) — Right of unmarried daughter to demand share in family properties is controlled by proviso to the Section.

Although under Section 8 (1) (a) the unmarried daughters in a Hindu Joint family have the right to demand a share in the family properties when a partition of joint family property is made between a person and his son or sons, that right is clearly controlled by the proviso to that

which is the share to which they are entitled after eliminating from the joint family property the share of defendant 6 who alone has appealed from the decree of the Civil Judge. So for the 2/23 share as directed by the Civil Judge, I substitute a 8/115 share. I also make an elucidation that the partition made on April 19, 1960 in Exhibit D-5 between defendant 6 and other members of the family remains unaffected by this decree and that defendant 6 shall continue to be the absolute owner of the share allotted to him at that partition.

6. Each party will bear his or her own costs.

Appeal allowed.

AIR 1970 MYSORE 166 (V 57 C 40)

T. K. TUKOL AND C. HONNIAH, JJ.

Nagreddy, Petitioner v. Khandappa and others, Respondents.

Writ Petn. No. 3772 of 1968, D/- 24-9-1969.

Limitation Act (1963), S. 5 — Section does not apply to election petition filed before a persona designata — (Panchayats — Mysore Village Panchayats (Election of the Chairman and the Vice Chairman) Rules (1959), R. 17 — Election petition filed before Munsiff beyond time — Delay cannot be condoned).

Section 5 of the Limitation Act, 1963 is not applicable to an application filed before the Munsiff under R. 17 of the Mysore Village Panchayat (Election of the Chairman and the Vice-Chairman) Rules, 1959. The scheme of the Limitation Act is that it deals only with proceedings taken before Court. Hence, the delay in filing the election petition before Munsiff who is only a persona designata cannot be condoned. AIR 1969 SC 1335 & AIR 1970 SC 209, Rel. on. (Para 9)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 209 (V 57) — (1969) 1 SCWR 1092, Nityananda M. Joshi v. Life Insurance Corp. of India

(1969) AIR 1969 SC 1335 (V 56) — Civil Appeals Nos. 170 to 173 of 1968, D/- 20-3-1969 = 1969 Lab IC 538, Town Municipal Council, Atrani v. Presiding Officer, Labour Court, Hubli

(1968) 70 Bom LR 104 = 1968 Mah LJ 1 (FB), P. K. Porwal v. Labour Court at Nagpur

K. Jagannath Shetty, for Petitioner; Doddakalegowda, High Court Government Pleader Amicus Curiae, for Respondents.

TUKOL, J.:— The sole question that arises in this writ petition for our decision is, whether Section 5 of the Limitation Act 1963 is applicable to an applica-

tion filed before the Munsiff under R. 17 of the Mysore Village Panchayat (Election of the Chairman and the Vice-Chairman) Rules, 1959, to be hereinafter referred to as the "Rules."

2. The election for the post of the Chairman of the Village Panchayat of Kollur in Chincholi Taluk, District Gulbarga, was held on 24-7-1968 and the results were published on 24-7-1968. Itself, declaring that the present petitioner was duly elected as Chairman. Respondent No. 1 filed an election petition No. 13/68 before the Munsiff at Chincholi on 2-8-1968. The present petitioner opposed that application on the ground that there was a delay of two days in filing the petition and that the petition was liable to be dismissed as barred by time. The Munsiff took the view that the petitioner before him was under a bona fide belief that a copy of the declaration of the results was necessary for the petition and that the two days' delay was caused by bona fide mistake, since the Rules did not require a copy of the declaration of the result to be annexed to the petition. He accordingly allowed the application and adjourned the proceeding and called upon the respondents to file their counter to the election petition. It is the legality of this order that is required to be decided in this writ petition.

3. Mr. Jagannath Shetty, the learned Advocate appearing for the petitioner, submitted that since the application for setting aside the election of the Chairman was required to be made to the Munsiff as a persona designata and not as a presiding officer of a Civil Court, the provisions of Section 5 of the Limitation Act were not applicable and that the Munsiff was in error in condoning the delay of two days and setting it down for further hearing.

4. Rule 17 of the 'Rules' lays down:

"Any member of the panchayat may challenge the validity of the election of the Chairman or the Vice-Chairman, as the case may be, within seven days from the date of publication of the result of election under Rule 12 by filing an election petition, together with a deposit of Rs. 100 as security for costs before the Munsiff within whose territorial jurisdiction the village Panchayat is situated.

Explanation: For the purpose of this rule, Munsiff means—

(i) in the Bombay area, Civil Judge, Junior Division;

(ii) in Madras Area, a District Munsiff."

The facts are clear from this Rule: (1) The application is required to be made before the Munsiff. (2) It is to be made within 7 days from the date of publication of the result of the election, under Rule 12. It must be mentioned that the application is not required to be filed in the Court of the Munsiff, but has to be filed before the

Munsiff indicating that it is to be filed before a persona designata.

5. Since the point did not appear to be free from difficulty, Mr. Doddakale Gowda was requested to appear as *Amicus Curiae* as none appeared on behalf of the respondents. He has drawn our attention to a number of decisions of the different High Courts, which have taken the view that the provisions of the Limitation Act would be applicable to applications filed before a persona designata. We are thankful to Mr. Doddakale Gowda for the assistance he rendered to us. However, it is not necessary to refer to these decisions since the point is concluded by the two decisions of the Supreme Court relied upon by Mr. Jagannatha Shetty, learned Advocate appearing for the petitioner.

6. In *Town Municipal Council Atrani v. Presiding Officer, Labour Court, Hubli*, Civil Appeals Nos. 170 to 173 of 1968, decided by the Supreme Court on March 20, 1969 (reported in AIR 1969 SC 1335), their Lordships had to consider whether Article 137 of the Limitation Act 1963 was applicable to an application filed before the Labour Court under Sec. 33-C(2) of the Industrial Disputes Act 1947. During the course of the judgment, their Lordships referred to the Full Bench decision of the Bombay High Court in *P. K. Porwal v. Labour Court at Nagpur*, (1968) 70 Bom LR 104 (FB), which took the view that Article 137 of the Limitation Act applies to applications filed under laws other than the Code of Civil Procedure. After referring to the previous history and the interpretation of old Article 181 and to the preamble of the New Limitation Act 1963, their Lordships concluded:

"It is clear, therefore, that proceedings other than suits and purposes connected therewith are now covered by the law of limitation. Another important change to be noticed is that in the preamble of the old Act, were the words 'limitation of suits, appeals and certain applications to courts'. Thus the preamble itself limited that Act to certain applications only and those applications also were applications to Courts only. That part of the preamble is now dropped by the new Act. This is the second indication of the intention of the Legislature to widen the application of the new law of limitation, making it applicable to all applications." Dealing with this point, their Lordships of the Supreme Court expressed their inability to agree with the view taken by the Bombay High Court. They stated:

"Under the old Limitation Act, no doubt, the long title was 'An act to consolidate and amend the law for the limitation of suits and for other purposes', while in the new Act of 1963, the long title is 'An Act to consolidate and amend

the law for the limitation of suits and other proceedings and for purposes connected therewith'. In the long title, thus, the words, 'other proceedings' have been added; but we do not think that this addition necessarily implies that the Limitation Act is intended to govern proceedings before any authority, whether executive or quasi-judicial, when, earlier, the old Act was intended to govern proceedings before civil Courts only. It is also true that the preamble which existed in the old Limitation Act of 1908 has been omitted in the new Act of 1963. The omission of the preamble does not, however, indicate that there was any intention of the legislature to change the purposes for which the Limitation Act has been enforced. The Bombay High Court also attached importance to the circumstances that the scope of the new Limitation Act has been enlarged by changing the definition of 'applicant' in S. 2(a) of the new Act so as to include even a petitioner and the word 'application' so as to include a petition. The question still remains whether this alteration can be held to be intended to authorities other than Courts. We are unable to find any provision in the new Limitation Act, which would justify holding that these changes in definition were intended to make the Limitation Act applicable to proceedings before bodies other than Courts."

7. Another decision relied upon by the learned counsel for the petitioner is *Nityananda M. Joshi v. Life Insurance Corporation of India*, (1969) 1 SCWR 1092 = (AIR 1970 SC 209). In that case also their Lordships had to consider the applicability of Article 137 of the Limitation Act 1963 to an application by employees under Section 33-C of the Industrial Disputes Act. After referring to the decisions quoted above, their Lordships reiterated the same view and affirmed the earlier view as regards the applicability of the provisions of the Limitation Act only to proceedings taken before civil Court. This is what they have stated in para 3 (of SCWR) = (Para 3 of AIR):

"Further S. 4 of the Limitation Act 1963, provides for the contingency when the prescribed period for any application expires on a holiday and the only contingency contemplated is 'when the Court is closed'. Again under S. 5 it is only a Court which is enabled to admit an application after the prescribed period has expired if the Court is satisfied that the applicant had sufficient cause for not preferring the applications. It seems to us that the scheme of the Indian Limitation Act is that it only deals with applications to Courts, and that the Labour Court is not a Court within the Indian Limitation Act, 1963".

In view of the law laid down by the Supreme Court, we hold that Section 3

of the Limitation Act 1963 is not applicable to a proceeding initiated on an application under Rule 17 of the 'Rules' and that the Munsiff ought to have dismissed the application as barred by time.

10. In the result, we allow this writ petition and the order passed by the Munsiff is set aside. Since the Munsiff has decided the application on a preliminary point and fixed it for further hearing, we think that it is appropriate that he should pass the final order in the case. Therefore, the Munsiff is directed to dismiss the petition and pass suitable orders as to costs before him. No costs in this Court.

Writ petition allowed.

AIR 1970 MYSORE 168 (V 57 C 45)

G. K. GOVINDA BHAT AND
B. VENKATASWAMI, JJ.

P. Cheradappa Pai, Petitioner v. Agricultural Income-Tax Officer, Puttur, Respondent.

Writ Petns. Nos. 1769 and 1770 of 1967.
D/- 15-1-1970.

(A) Hindu law — Partition — Partial or complete — Test — Partition deed — Construction — Intention to separate of the members clear — Portion of joint family property not divided — Presumption is that members hold it as tenants-in-common — Assessment of member as joint family, for agricultural income-tax, would not be valid — (Mysore Agricultural Income-tax Act (22 of 1957), S. 3(3)).

A partition is said to be partial as to the property where the members of a joint family make a division and severance of interest in respect of a part of the joint estate, while retaining their status as a joint family and holding the rest as the properties of a joint and undivided family. Where there is evidence to show that the parties intended to sever, then the joint family status is put an end to, and with regard to any portion of the property which remained undivided the presumption would be that the members of the family would hold it as tenants-in-common unless and until a special agreement to hold as joint tenants is proved. The true test of partition of property according to Hindu law is the intention of the members of the family to become separate owners and that intention being the real test, it follows that an agreement between the members of a joint family to hold and enjoy the property in defined shares as separate owners operates as a partition, although there may have been no actual division of the property by metes and bounds. *Mulla's Hindu Law*, 13th Edn., p. 381 and (1866) 11 Moo Ind App 75 (90), Foll. (Para 4)

BN/CN/A806/70/VBB/A

G, the kartha of a joint Hindu family, entered into a registered partnership deed in 1958 with his four sons — C (the petitioner) and C's three brothers. The joint family, at the time of the partition, owned lands and other properties. All the properties of the family (except the areca gardens and the outstanding properties) were partitioned by metes and bounds and were allotted to the shares of each member. Some properties were allotted jointly to the shares of C and his three brothers. The partition deed stated that in the areca gardens and the outstandings, only C and his three brothers had rights and that G had not interest. It further stated that C and his brothers should enjoy the said properties on the basis of equal rights:

Held, on construction of the partition deed, that there was a complete partition and not a partial partition. All the properties belonging to the joint family of which G was the kartha, before the date of partition, were divided. After the partition, the areca gardens or the outstanding properties did not remain as the joint and undivided properties of the parties to the deed. The areca gardens were not divided for the reason that they had been granted on long term leases under registered documents before the date of the partition deed and the family had only the right to receive the rents. The rights of C, the petitioner, and his three brothers were clearly defined as equal. Therefore it was clear that the areca gardens did not remain as the family properties but as the properties of the four brothers as tenants-in-common.

(Para 4)

When the properties were held as tenants-in-common, C, the petitioner, could not be assessed under Mysore Agricultural Income-tax Act, 1957, in the status of kartha of a Hindu undivided family consisting of himself and his three younger brothers. The petitioner and his brothers should have been assessed as tenants-in-common.

(Para 4)

(B) Mysore Agricultural Income-Tax Act (22 of 1957), Schedule, Part, I Proviso — Person having undivided one-fourth share in areca gardens measuring 13.27 acres held in common with three brothers — Case of such person does not fall within Proviso to Part I of Schedule.

By virtue of the proviso to Part I of the Schedule, a person who derives agricultural income from 5 acres or less of areca garden is not chargeable to tax.

(Para 5)

Where under a partition deed between the kartha of a joint Hindu family and his four sons (including petitioner) areca gardens measuring 13.27 acres were allotted jointly to the shares of the petitioner and his three brothers, in which each brother (including the petitioner) had a

1/4th share, but the gardens were not divided by metes and bounds between the brothers, the petitioner cannot say that he derives agricultural income from 3.31 acres (1/4th share of 13.27 acres) of areca gardens only; he derives agricultural income from 13.27 acres of areca garden, but his interest is a 1/4th share. In such cases, a person having an undivided interest in properties held in common cannot contend that his share, if partitioned out by metes and bounds, would fall below the taxable limit. Since the petitioner derives agricultural income from 13.27 acres of areca garden, although his interest therein is 1/4th share, he does not fall within the proviso to Part I of the Schedule to the Act. (Para 5)

Cases Referred: Chronological Paras
(1866) 11 Moo Ind App 75=8 WRPC 1,
Appovier v. Rama Subba Aiyan 4

U. L. Narayana Rao, for Petitioner (in both appeals); S. R. Rajasekhara Murthy, Govt. Pleader, for Respondent.

G. K. GOVINDA BHAT, J.:— These two writ petitions arise under the Mysore Agricultural Income-Tax Act, 1957, hereinafter called the Act, pursuant to a notice issued on 26th September 1966, the petitioner filed two returns for the assessment years 1965-66 and 1966-67 furnishing only the extent of the areca gardens from which he derived agricultural income with their survey and subdivision numbers; but he did not furnish the particulars of the income, expenses etc. In response to the Form No. 5 notice, the petitioner appeared before the respondent and produced before him copies of a registered partition deed dated 10th January 1958 and three term lease deeds in respect of the areca gardens from which income is derived. On perusal of the documents produced by the petitioner and hearing his contentions, the respondent came to the conclusion that there was only a partial partition in the family under the partition deed dated 10th January 1958 and that in respect of the properties described in Schedule F of the partition deed there was no partition and the family held the properties as joint family properties. On the basis that the status of the Assessee is that of the Hindu undivided family, the respondent computed the income derived from the areca gardens in question for the assessment years 1965-66 and 1966-67 and levied agricultural income-tax. Aggrieved by the said order, the petitioner has approached this Court for relief under Article 226 of the Constitution of India.

2. The first ground urged in support of the writ petitions by Sri U. L. Narayana Rao, the learned counsel for the petitioner is that the petitioner derives agricultural income from land which is not more than 50 acres of eighth class of

land specified in Part II of the Schedule to the Act, and therefore no agricultural income-tax is payable under the Act. The second ground is that the respondent, on an erroneous construction of the partition deed, has held that there was only a partial partition and that the areca gardens comprised in Schedule F of the partition deed are owned by the petitioner as kartha of his Hindu undivided family consisting of the petitioner and his brothers, and that on a true construction of the partition deed it should be held that the petitioner and his three brothers own the areca gardens as tenants-in-common.

3. The total extent of the areca gardens comprised in Schedule F of the partition deed is 13.27 acres. Under the partition deed, the said areca gardens, which at the time of partition had been granted on long term leases, were not divided by metes and bounds, but were allotted to the shares of the petitioner and his three younger brothers and each of the brothers held a 1/4th share.

4. In order to appreciate the contentions urged in these writ petitions, it is necessary to refer to the terms of the registered partition deed dated 10th January 1958. That was a partition deed entered into between Gopala Pai and his four sons, viz., Cherdappa Pai, Vittal Pai, Venkatesha Pai and Narasimha Pai. The joint family of the said Gopala Pai, at the time of the partition, owned lands and other properties. All the properties of the family except the areca gardens described in Schedule F and the outstandings described in Schedule G were partitioned by metes and bounds and the properties described in Schedules A, B, C, D and E were respectively allotted to the shares of Gopala Pai, Cherdappa Pai, Vittal Pai, Venkatesha Pai and Narasimha Pai. The B and C schedule properties were allotted jointly to the shares of the petitioner Cherdappa Pai and his three brothers. The partition deed states that in the F and G schedule properties only parties Nos. 2 to 5 to the document have rights and that party No. 1 Gopala Pai has no interest. It further states that parties Nos. 2 to 5 shall enjoy the said properties on the basis of equal rights. It is clear, on a perusal of the partition deed, that there was a complete partition and not a partial partition as held by the respondent. A partition is said to be partial as to the property where the members of a joint family make a division and severance of interest in respect of a part of the joint estate, while retaining their status as a joint family and holding the rest as the properties of a joint and undivided family. Vide Mulla's Hindu Law, 13th Edition, p. 351. The same learned author further states that where there is evidence to show that

the parties intended to sever, then the joint family status is put an end to, and with regard to any portion of the property which remained undivided the presumption would be that the members of the family would hold it as tenants-in-common unless and until a special agreement to hold as joint tenants is proved. It has been laid down by the Judicial Committee of the Privy Council in *Appovier v. Rama Subba Aiyar*, (1866) 11 Moo Ind App 75 at p. 90 that the true test of partition of property according to Hindu Law is the intention of the members of the family to become separate owners and that intention being the real test, it follows that an agreement between the members of a joint family to hold and enjoy the property in defined shares as separate owners operates as a partition, although there may have been no actual division of the property by metes and bounds. In the instant case, all the properties belonging to the joint family of which Gopala Pal was the Kartha, before the date of partition, were divided. After the partition, the F schedule properties or the G schedule properties did not remain as the joint and undivided properties of the parties to the deed. The F schedule properties were not divided for the reason that they had been granted on long term leases under three registered documents before the date of the partition deed and the family had only the right to receive the rents. The rights of the petitioner and his three brothers were clearly defined as equal. Therefore it is clear that the F schedule properties did not remain as the family properties but as the properties of the four brothers as tenants-in-common.

When the properties are held as tenants-in-common, the petitioner cannot be assessed in the status of a Hindu undivided family. The appropriate provision for assessment of persons holding property as tenants-in-common and deriving agricultural income as defined under the Act is sub-section (3) of Section 3 of the Act. Section 3 is the charging section under the Act and sub-section (3) states that in the case of persons holding property as tenants-in-common and deriving agricultural income, the tax shall be assessed at the rate applicable to the agricultural income of each tenant-in-common. Therefore, the respondent was clearly in error in treating the petitioner as Kartha of a Hindu undivided family consisting of himself and his three younger brothers. The petitioner and his brothers should have been assessed as tenants-in-common and not in the status of a Hindu undivided family.

areca garden is 13.27 acres in which the petitioner has a $\frac{1}{4}$ th share and therefore the share of the petitioner is 3.31 acres of areca garden which is less than 5 acres of the second class specified in Part II of the Schedule. Areca gardens come under the second class in Part II. One acre of areca garden is equal to 10 acres of the eighth class of land. Therefore, it is contended that under the proviso to Part I of the Schedule, the petitioner is not chargeable to tax. The relevant proviso to Part I of the Schedule to the Act states that no agricultural income-tax shall be payable by a person who derives agricultural income from land not more than fifty acres of the eighth class of land or an extent equivalent thereto consisting of any one or more of the classes of land specified in Part II. By virtue of the said proviso a person who derives agricultural income from 5 acres or less of areca garden is not chargeable to tax. We have already referred to the partition deed under which the F schedule areca gardens were allotted jointly to the shares of the petitioner and his brothers. The total extent of the said areca gardens is 13.27 acres in which the petitioner has a $\frac{1}{4}$ th share. The said areca gardens have not been divided by metes and bounds, between the petitioner and his three brothers. Therefore, the petitioner cannot say that he derives agricultural income from 3.31 acres of areca garden only; he derives agricultural income from 13.27 acres of areca garden, but his interest is a $\frac{1}{4}$ th share. In such cases, a person having an undivided interest in properties held in common cannot contend that his share if partitioned out by metes and bounds, would fall below the taxable limit. Since the petitioner derives agricultural income from 13.27 acres of areca garden although his interest therein is $\frac{1}{4}$ th share, he does not fall within the proviso to Part I of the Schedule to the Act. Therefore, we reject the first contention urged by the learned counsel for the petitioner.

6. The petition succeeds on the second ground urged by the petitioner, viz., that the respondent is in error in assessing the petitioner in the status of a Hindu undivided family. That being a clear error apparent on the face of the record, we quash the impugned orders of assessment made by the respondent. The respondent is at liberty to assess the petitioner and his brothers for the relevant assessment years in accordance with law and in the light of this judgment.

7. No costs.

Petition allowed.

5. In regard to the first ground, the argument of the learned counsel for the petitioner is that the total extent of the

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M. SADASIVAYYA AND

D. M. CHANDRASHEKHAR, JJ.

P. Janardhana Shetty and another, Petitioners v. The Union of India by Secretary to the Government of India, Ministry of Home Affairs, New Delhi and others, Respondents.

Writ Petns. Nos. 1737, 1872 and 2209 of 1966, D/- 24-12-1969.

(A) Industrial Disputes Act (1947), S. 2-A and Preamble — S. 2-A is not inconsistent with the object of the Act — Scope and object of Act, indicated — Purpose of Preamble — Conflict between Preamble and Section — Section prevails — (Constitution of India, Art. 245) — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Preamble).

A section of an Act cannot be said to be inconsistent with, and repugnant to the object of the Act. The scope and scheme of an Act can only be gathered from the provisions contained in the Act. It is not permissible to say what the scope and scheme of an Act are by reading certain provisions only of that Act and then to say certain other provisions of that Act are not in harmony with such scope or scheme. To ascertain the scope and scheme of an Act, one has to look into all the provisions therein.

(Para 15)

Just as a proviso to a Section may contain an exception to the rule set out in the main part of that Section, certain section or sections of an Act may also provide for an exception to the general scheme contained in the other provisions of that Act. Just as the main part of a section and the proviso thereto, must be read together to ascertain the scope of that section, the rule contained in some sections of an Act and exception contained in other section or sections of that Act, together constitute the scheme of that Act.

(Para 16)

It is true that the provisions of the Act, other than Section 2-A, provide for settlement of disputes between an employer and employees collectively and not disputes between an employer and an individual employee, unless such dispute is espoused or sponsored by the Union of employees or a considerable body of employees and that Section 2-A makes an exception to such rules. But on that score Section 2-A cannot be said to be inconsistent with or repugnant to the Act.

(Para 17)

That Section 2-A was not in the Act when it was originally enacted, but was introduced subsequently by means of the Amending Act, can make no difference for ascertaining whether there is any inconsistency or repugnancy. AIR 1952 SC 324. Applied.

(Para 18)

As the long title and Preamble of the Act indicate, the main object of the Act is to make provision for investigation and settlement of industrial disputes. It is not correct to start with any preconceived notion that the Act is intended to give effect to the concept of collective bargaining only and that anything which is not a part of collective bargaining, is outside the scope of the Act. The words, 'Industrial Dispute', occurring in the preamble of the Act, are wide enough to cover a dispute between an employer and a single employee. There is no reason to infer that Section 2-A which provides for settlement of individual disputes between an employer and an individual employee in certain circumstances, is outside the scope indicated in the Preamble, namely investigation and settlement of industrial disputes. AIR 1957 SC 104, Ref.

(Para 19)

Moreover, the Preamble of an Act is merely intended to indicate the main purpose of Act and does not cover the entire ambit or the Act; the Preamble cannot control the meaning or scope of any section in that Act; and when there is conflict between Preamble and the enacting portion, the latter shall prevail.

(Para 20)

(B) Civil P. C. (1908), Preamble — Interpretation of Statutes — Ultra vires — Meaning of — To say that section of Act is ultra vires the Act, is misnomer — (Words and Phrases — "Ultra Vires") — (Constitution of India, Preamble and Art. 254.)

The term, 'ultra vires', simply means beyond powers or lack of power. An act is said to be ultra vires when it is in excess of the power of the person or authority doing it. When it is said that a legislative enactment or any of its provisions, is ultra vires of the Constitution, it means that the Legislature which purported to enact it, exceeded the power conferred on it (the Legislature) under the Constitution. When it is said that a rule is ultra vires of the Act, it means that the authority which purported to make the rule, exceeded the power conferred on it (such authority) under the Act.

(Para 22)

A Section of an Act cannot be ultra vires of the Act. That section is enacted by the same Legislature which enacted the rest of the Act. That Legislature did not derive from that Act its power to enact that Section. On the other hand that Act is as much a creature of the Legislature as that section. It is misnomer to say that a section of an Act is ultra vires of that Act.

(Para 23)

(C) Civil P. C. (1908), Preamble — Validity of an Act or Section of an Act — Tests, indicated — (Constitution of India, Preamble).

When the validity of an Act is called in question, the first thing for the Court

to do is to examine whether the Act is a law with respect to a topic assigned to the particular Legislature which enacted it; if it is, then the Court is next to consider whether, in the case of an Act passed by the Legislature of a State, its operation extends beyond the boundaries of that State, and if the impugned law satisfied both these tests, then finally the court has to ascertain if there is anything in any other part of the Constitution which places any fetter on the Legislative powers of such Legislature; the impugned law has to pass all these three tests.

What applies to a legislative enactment, applies to every part of it including every section of it. AIR 1957 SC 699. Relied on. (Paras 24, 25)

(D) Industrial Disputes Act (1947). S. 2-A — Section is within Entry 22 of List III and is within legislative competence of Parliament — Section is not violative of Art. 14 — (Constitution of India, Arts. 245, 14 and Sch. VII, List III, Entry 22).

Section 2-A being inserted by the Industrial Disputes (Amendment) Act 1965, which is a Parliamentary enactment, the only two tests to be satisfied for that section being valid, are:

- (i) Whether that Section is with respect to a topic assigned to Parliament; and
- (ii) Whether it offends any of the provisions in Part III of the Constitution or restriction placed in any other part of the Constitution.

(Para 25)

The original Act namely, the Industrial Disputes Act, 1947 is an Act coming within Entry 22, List III. The scope of this Entry is wide enough to include industrial and labour disputes between an individual employee and his employer and Section 2-A must be held to be valid, unless it is shown to violate any of the provisions of Part III of the Constitution or any of the fetters in any other part of the Constitution. (Paras 26, 27)

Section 2-A of the Act is not invalid on the ground that it offends Article 14 of the Constitution. (Para 28)

It is true that Section 2-A treats differently a workman who is discharged, dismissed, retrenched or whose services are terminated and a workman who has some other grievance regarding his employment or conditions of employment. Consequently, an employer who discharges, dismisses, retrenches or terminates the services of his workman, is treated differently from an employer whose workman has a grievance in regard to his (the workman's) employment or conditions thereof. But such differential treatment of individual workmen or employers does not amount to impermissible discrimination offending Art. 14. (Para 30)

There is an intelligible differentia which distinguishes an individual workman who is discharged, dismissed, retrenched or whose services have been terminated, and an individual workman who has some other grievance in regard to his employment or conditions thereof. Likewise there is an intelligible differentia between an employer who discharges, dismisses, retrenches or terminates the services of an individual workman and an employer whose workman has some other grievance regarding his employment or conditions thereof. Such differentia has a rational relation to the object sought to be achieved by the statute, namely the Industrial Disputes Act. AIR 1954 SC 545 & AIR 1958 SC 538. Applied. (Para 33)

Looked at, whether from the point of view of an individual workman or from the point of view of an employer, the distinction made by Sec. 2-A between the grievance arising out of discharge, dismissal, retrenchment or termination of services and other grievances of an individual workman, is based on a classification which has reasonable relationship to the object of the Act. (Para 38)

The question whether the classification in a given case is reasonable, must depend upon the facts and circumstances of that particular case. The test of reasonableness of the classification has to be applied to each individual case and no abstract standard of reasonableness of classification can be laid down. Hence decisions holding that classification made in certain cases are valid or invalid, though useful, cannot provide an answer to the question whether the impugned classification in a given case, is valid or invalid. AIR 1955 SC 13 & AIR 1954 SC 545 & AIR 1964 SC 600 & AIR 1968 SC 658. Distinguished. (Paras 42, 43)

(E) Civil P. C. (1908), Preamble — Interpretation of Statutes — Retrospective operation — Principles indicated.

No statute is to be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.

A retrospective operation is not to be given to a statute so as to impair the existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. Every statute which takes away or impairs vested rights acquired under the existing laws or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed to be intended not to have retrospective operation.

If the language of the statute is plainly retrospective, it must be so interpreted.

When the intention is clear that the Act should have a retrospective operation, it must unquestionably be so construed even though the consequences may appear unjust and hard.

A statute is not to be construed to have a greater retrospective operation than its language renders necessary. The retrospective effect of a statute may be partial in its operation.

If a statute is in its nature a declaratory Act, it is retrospective even if it takes away previous rights. (Para 47)

A statute is not necessarily retrospective because a part of the requisites for its action, is drawn from a time antecedent to its passing. The use of the present tense alone is not sufficient to infer that the statute does not apply to past event also; it is one of the relevant factors in ascertaining whether the Legislature intended that the statute should apply to past events, conduct or facts also. (Para 64)

It is an invariable rule that a statute does not operate retrospectively when the power conferred on it, is based on facts, events or conduct anterior to its enactment. AIR 1965 SC 1206. Relied on. (Para 65)

A substantive right cannot be taken away retrospectively unless the law expressly states so or there is a clear intentment. AIR 1969 SC 1187. Relied on. (Para 71)

The question whether a statutory provision has or had no retrospective operation, does not depend upon what the Government is or is not likely to do in its discretion. (Para 73)

(F) Industrial Disputes Act (1947), S. 2-A — Section creates new rights — Adjudication by Industrial Court and ordinary Civil Court — Distinction.

An Industrial Tribunal or Labour Court not merely adjudicates existing rights and liabilities but can also create new rights and liabilities and enforce them. While under the ordinary law, a workman discharged, dismissed or retrenched, can only get compensation for wrongful dismissal, an Industrial Tribunal or Labour Court can order reinstatement of such workman together with back wages. It cannot be said that Section 2-A merely deals with a procedural matter. (Para 67)

(G) Industrial Disputes Act (1947), S. 2-A — Section has no retrospective operation — 1969 (2) LLJ 186 (Delhi). Dissented from.

Section 2-A has no application to discharge, dismissal, retrenchment or termination of services of an individual workman, which took place prior to Sec. 2-A coming into force. (1961) 3 All ER 203. Relied on. Case Law Ref. (1969) 2 Lab LJ 186 (Delhi). Dissented from. (Para 79)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 1187 (V 56)=
1969-2 SCJ 661, Ranjit Chandra Chaudhary v. Mohitosh Mukharjee 71
- (1969) 1969-2 Lab LJ 186=19 Fac LR 1 (Delhi), National Productivity Council v. S. N. Kaul 63
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- (1961) 1961-3 All ER 203=1961-3 WLR 727, Sunshine Porcelain Potteries v. Nash 74
- (1960) AIR 1960 SC 12 (V 47)=
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- (1958) AIR 1958 SC 538 (V 45)=
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- (1957) AIR 1957 SC 104 (V 44)=
1956 SCR 956, Central Provinces Transport Service Ltd. v. Raghunath Gopal Patwardhan 11, 20
- (1957) 1957-3 All ER 617=1957-1 WLR 1219, In re, Solicitor's Clerk 55
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- (1955) AIR 1955 SC 13 (V 42)=
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- (1954) AIR 1954 SC 545 (V 41)=
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- (1953) AIR 1953 SC 58 (V 40)=
1953 SCR 302, D. N. Banerjee v. P. R. Mukherjee 50
- (1952) AIR 1952 SC 324 (V 39)=
1952 Cri LJ 1503, Shamrao v. District Magistrate, Thana 16
- (1937) 1937-1 All ER 114=109 LJ KB 658, Barber v. Pagden 70
- (1875) 10 QB 195=44 LJM 60, Rex v. Vine 56
- (1848) 12 QB 120, Rex v. St. Mary White Chappel (Inhabitants) 63

V. Viswanath Rai, for Petitioners (in all Appeals); E. S. Venkataramiah, for Respondents Nos. 1 to 3; Sathya Murthy, for Respondent No. 4 (in No. 2209/66); M. N. Farooki, for Respondent No. 4 (in No. 1872/66).

CHANDRASHEKHAR, J.— These three petitions are similar and they raise common questions of law. They relate to the disputes arising out of termination of services of individual workmen by their respective employers who are the petitioners herein.

2. In these petitions, the petitioners have asked for striking down Section 2-A of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act). They have also impugned the conciliation proceedings pending before the Labour & Conciliation Officer, Bangalore, (hereinafter referred to as the Conciliation Officer) in respect of such disputes.

3. Respondent 4 in each of these petitions whose services were terminated, preferred an appeal under Section 39 of the Mysore Shops and Commercial Establishments Act, 1961, (hereinafter referred to as the Shops & Establishments Act), before the Commissioner of Labour in Mysore (hereinafter referred to as the Commissioner), who is the Appellant Authority under the said Act. After Section 2-A was inserted in the Act by the Industrial Disputes (Amendment) Act, 1965, (Central Act XXXV of 1965), the Commissioner issued a Circular (marked Exhibit III in such of these petitions) in which it was stated that a workman who is removed or dismissed from service by his employer can get better reliefs under the provisions of the Act than under the provisions of the Shops and Establishments Act. The Circular advised workmen who had preferred appeals under Section 39 of the Shops and Establishments Act, to consider the desirability of withdrawing such appeals and approaching the Conciliation Officer for taking up the matter under the provisions of the Act.

4. Respondent 4 in each of these petitions made an application for withdrawing his respective appeal preferred under Section 39 of the Shops and Establishments Act. Thereafter the Commissioner directed the Conciliation Officer to take up the conciliation proceedings in respect of disputes between the respective employers and the employees relating to their dismissal or removal from service. Accordingly the Conciliation Officer issued to the petitioner and the respondent 4 in each of these petitions, notices under Section 12(1) of the Act, read with R. 10 of the Industrial Disputes (Mysore) Rules, 1957, requiring them to attend the proceedings before him. Feeling aggrieved by such notices, the petitioners have presented these petitions.

5. Mr. Viswanath Rai, learned counsel for the petitioners in all these petitions, advanced the following contentions:

(i) Section 2-A of the Act is ultra vires of the Act.

(ii) Sec. 2-A is violative of Art. 14 of the Constitution;

(iii) Section 2-A has no application to a dispute arising from discharge, dismissal, retrenchment or termination of services, made prior to 1-12-1965;

(iv) The Commissioner should have disposed of the appeals under Section 39 of the Shops and Establishments Act;

(v) The Commissioner should not have issued the Circular, Exhibit III;

(vi) The Commissioner had no competence to direct the Conciliation Officer to take up conciliation proceedings under Sec. 12(1) of the Act; and

(vii) The Conciliation Officer has no jurisdiction to take up conciliation proceedings.

6. In order to appreciate these contentions of Mr. Viswanath Rai, it is necessary to set out certain provisions of the Act.

7. The long title of the Act reads: "An Act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes."

The preamble of the Act reads: Whereas it is expedient to make provision for the investigation and settlement of industrial disputes, and for certain other purposes hereinafter appearing, it is hereby enacted as follows:

8. Section 2 of the Act contains definitions of certain words and expressions occurring in the Act. Clause (k) of Section 2 defines 'industrial dispute' as any dispute or difference between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person.

Section 2-A was inserted in the Act by the Industrial Disputes (Amendment) Act, 1965, (Central Act XXXV of 1965) which came into force from 1-12-1965. Section 2-A reads:—

2-A. Dismissal, etc., of an individual workman to be deemed to be an Industrial Dispute.—

Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute.

Section 2(d) of the Act defines 'Conciliation Officer' as a Conciliation Officer appointed under the Act.

Section 12 sets out the duties of Conciliation Officers.

Sub-section (1) of Section 12 provides, *inter alia*, that where an industrial dispute exists or is apprehended, the Conciliation Officer may hold conciliation proceedings in the prescribed manner.

9. Before insertion of Section 2-A, the provisions of the Act were construed as having application to settlement of disputes involving the rights of workmen as a class and not disputes which merely touch individual rights of a single workman. In other words, such dispute must be between an employer on the one hand and the employees acting collectively on the other hand.

10. The meaning of the expressions 'industrial dispute' before the insertion of Section 2-A in the Act, has been elucidated thus by the Supreme Court in *D. N. Banerji v. P. R. Mukharjee*, AIR 1953 SC 58 at p. 61:

"The words 'industrial dispute' convey the meaning to the ordinary mind that the dispute must be such as would affect large groups of workmen and employers ranged on opposite sides on some general questions on which each group is bound together by a community of interests — such as wages, bonuses, allowances, pensions, provident fund, number of working hours per week, holidays and so on. Even with reference to a business that is carried on, we would hardly think of saying that there is an industrial dispute where the employee is dismissed by his employer and the dismissal is questioned as wrongful. But at the same time, having regard to the modern conditions of society where capital and labour have organised themselves into groups for the purpose of fighting their disputes and settling them on the basis of the theory that in union is strength, and collective bargaining has come to stay, a single employee's case might develop into an industrial dispute, when as often happens, it is taken up by the trade union, of which he is a member, and there is a concerted demand by the employees for redress."

11. Again in *Central Provinces Transport Service Ltd. v. Raghunath Gopal Patwardhan*, AIR 1957 SC 104, Venkatarama Iyer, J., who spoke for the Court, said at p. 109:

"Notwithstanding that the language of Sec. 2(k) is wide enough to cover a dispute between an employer and a single employee, the scheme of the Industrial Disputes Act does appear to contemplate that the machinery provided therein should be set in motion to settle only disputes which involves the rights of workmen as a class and that a dispute touching the individual rights of a workman was not intended to be the subject of an adjudication under the Act, when the

same had not been taken up by the Union or a number of workmen."

12. But Section 2-A has brought about a substantial change in the scope and scheme of the Act by enabling an individual workman, unaided by the Union of employees or considerable section of the employees, to raise an industrial dispute, if such dispute is in respect of his discharge, dismissal, retrenchment or termination of his services.

13. Mr. Viswanath Rai submitted that the provisions of the Act are intended to give effect to the concept of collective bargaining by employees and that before the introduction of Section 2-A, the Act provided for settlement of disputes between workmen as a class and their employer and not for settlement of a dispute between an employer and an individual workman.

Mr. Viswanath Rai argued that S. 2-A which enables an individual workman to raise an industrial dispute, in certain circumstances, is inconsistent with, and repugnant to the concept of collective bargaining embodied in the Act and hence Section 2-A must be held to be ultra vires of the Act.

14. We are unable to see how a Section of an Act can be said to be inconsistent with, and repugnant to the concept of collective bargaining embodied in the Act and hence Section 2-A must be held to be ultra vires of the Act.

15. We are unable to see how a section of an Act can be said to be inconsistent with, and repugnant to the object of, the Act. The scope and scheme of an Act can only be gathered from the provisions contained in the Act. It is not permissible to say what the scope and scheme of an Act are by reading certain provisions only of that Act and then to say certain other provisions of that Act are not in harmony with such scope or scheme. To ascertain the scope and scheme of an Act, we have to look into all the provisions therein.

16. Just as a proviso to a section may contain an exception to the rule set out in the main part of that Section, certain section or sections of an Act may also provide for an exception to the general scheme contained in the other provisions of that Act. Just as the main part of a section and the proviso thereto, must be read together to ascertain the scope of that section, the rule contained in some sections of an Act and an exception contained in other section or sections of that Act, together constitute the scheme of that Act.

17. As seen earlier, it is true that the provisions of the Act, other than Section 2-A, provide for settlement of disputes between an employer and employees collectively and not disputes between an employer and an individual employee.

unless such dispute is espoused or sponsored by the Union of employees or a considerable body of employees and that Section 2-A makes an exception to such rule. But on that score Section 2-A cannot be said to be inconsistent with, or repugnant to, the Act.

18. That Section 2-A was not in the Act when it was originally enacted, but was introduced subsequently by means of the Amending Act, can make no difference for ascertaining whether there is any inconsistency or repugnancy. As pointed out by the Supreme Court in *Shamarao v. District Magistrate, Thana*, AIR 1952 SC 324, when a subsequent Act amends the earlier one in such a way as to incorporate itself, or a part of itself, into the earlier Act, then the earlier Act must thereafter be read and construed (except where that would lead to repugnancy, inconsistency or absurdity) as if the altered words had been written into the earlier Act with pen and ink and old words scored out so that thereafter there is no need to refer to the Amending Act at all.

19. As the long title and preamble of the Act indicate, the main object of the Act is to make provision for investigation and settlement of industrial disputes. It is not correct to start with any preconceived notion that the Act is intended to give effect to the concept of collective bargaining only and that anything which is not a part of collective bargaining, is outside the scope of the Act. The words, 'Industrial Dispute', occurring in the preamble of the Act, are wide enough to cover, as stated by Venkatarama Iyer, J., in AIR 1957 SC 104, a dispute between an employer and a single employee. There is no reason to infer that Section 2-A which provides for settlement of individual disputes between an employer and an individual employee in certain circumstances, is outside the scope indicated in the preamble, namely, investigation and settlement of industrial disputes.

20. Moreover, it is well settled that the preamble of an Act is merely intended to indicate the main purpose of Act and does not cover the entire ambit of the Act; the preamble cannot control the meaning or scope of any section in that Act; and when there is conflict between preamble and the enacting portion, the latter shall prevail.

21. Mr. Vishwanath Rai referred to several passages in Ludwig Teller's treatise on Labour Disputes and Collective Bargaining. We do not consider it necessary to advert to these passages or the views of the learned author on labour disputes and collective bargaining because we are not concerned with any social doctrine or philosophy but with the limited question as to the validity of Sec-

tion 2-A which provides for settlement of a dispute between the employer and an individual employee in certain circumstances.

22. We shall now examine the contention of Mr. Vishwanath Rai that S. 2-A is ultra vires of the Act. The term, 'ultra vires', simply means beyond powers or lack of power. An Act is said to be ultra vires when it is in excess of the power of the person or authority doing it. When it is said that a legislative enactment or any of its provisions, is ultra vires of the Constitution, it means that the Legislature which purported to enact it, exceeded the power conferred on it (the Legislature) under the Constitution. When it is said, that a rule is ultra vires of the Act, it means that the authority which purported to make the rule, exceeded the power conferred on it (such authority) under the Act.

23. How can a section of an Act be ultra vires of the Act? That section is enacted by the same Legislature which enacted the rest of the Act. That Legislature did not derive from that Act its power to enact that Section. On the other hand that Act is as much a creature of the Legislature as that section. We think it is a misnomer to say that a section of an Act is ultra vires of that Act.

24. As pointed out by the Supreme Court in *State of Bombay v. R. M. D. Chamarbaugwala*, AIR 1957 SC 699, when the validity of an Act is called in question, the first thing for the Court to do is to examine whether the Act is a law with respect to a topic assigned to the particular Legislature which enacted it; if it is, then the Court is next to consider whether, in the case of an Act passed by the Legislature of a State, its operation extends beyond the boundaries of that State; and if the impugned law satisfied both these tests, then finally the Court has to ascertain if there is anything in any other part of the Constitution which places any fetter on the Legislative powers of such Legislature; the impugned law has to pass all these three tests.

25. What applies to a legislative enactment, applies to every part of it including every section of it; Section 2-A being inserted by the Industrial Disputes (Amendment) Act 1965, which is a Parliamentary enactment, the only two tests to be satisfied for that section being valid, are:

(i) Whether that section is with respect to a topic assigned to Parliament; and
(ii) Whether it offends any of the provisions in Part III of the Constitution or restriction placed in any other part of the Constitution.

26. Entry 22 in List III of the Seventh Schedule to the Constitution reads:

Trade Union, Industrial and Labour Disputes.

The original Act, namely, the Industrial Disputes Act, 1947, is an act coming within this Entry. We think the scope of this Entry is wide enough to include industrial and labour disputes between an individual employee and his employer.

27. As Parliament had legislative competence to enact Section 2-A which deals with industrial disputes between an individual workman and his employer in regard to certain matters, Section 2-A must be held to be valid, unless it is shown to be violative of any of the provisions of Part III of the Constitution or any of the fetters in any other part of the Constitution.

28. It was next contended by Mr. Vishwanath Rai that Section 2-A of the Act is invalid on the ground of its offending Art. 14 of the Constitution. Elucidating this contention, Mr. Vishwanath Rai argued that Section 2-A makes discrimination as between an individual workman who is discharged, dismissed, retrenched, or whose services have been terminated, and an individual workman who has any other grievance. While the former can raise an industrial dispute, even if his case is not espoused by the Union or a large number of workmen, the latter cannot do so unless his case is so espoused.

29. It was argued by Mr. Vishwanath Rai that there is also discrimination between an employer who discharges, dismisses, retrenches or terminates the services of an individual workman, and an employer whose workman has some other grievance. While the former employer has to face conciliation proceedings or adjudication by the Labour Court in respect of the dispute arising out of such discharge, dismissal, retrenchment or termination, even if the case of such workman, is not espoused by the Union or a large number of workmen, the latter employer will not be put to the necessity of facing conciliation proceedings or adjudication by the Labour Court in respect of the grievance of such workman unless the case of such workmen is so espoused.

30. It is true that Section 2-A treats differently a workman who is discharged, dismissed, retrenched or whose services are terminated and a workman who has some other grievance regarding his employment or conditions of employment. Consequently, an employer who discharges, dismisses, retrenches or terminates the services of his workman, is treated differently from an employer whose workman has a grievance in regard to his (the workman's) employment or conditions thereof. The real question is whether such differential treatment of individual workmen or employers, amounts to impermissible discrimination offending Art. 14.

31. As pointed out by Mahajan, C. J., in *Suraj Mall Mohita & Co., v. Viswanathasastri*, AIR 1954 SC 545, Art. 14 of the Constitution does not assure that every law must have universal application for all persons who are not by nature, attainment or circumstance, in the same position; the State can, by classification, determine who should be regarded as a class for purposes of legislation and in relation to a law enacted in respect of a particular subject; but such classification must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and should not be made arbitrarily and without any substantial basis.

32. In *Rama Krishna Dalmia v. Justice Tendolkar*, AIR 1958 SC 538, the Supreme Court reiterated that Art. 14 does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the tests of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that the differentia must have a rational relation to the objects sought to be achieved by the statute in question.

33. It does not admit of any doubt that in the present case the first of the above conditions is satisfied. There is an intelligible differentia which distinguishes an individual workman who is discharged, dismissed, retrenched or whose services have been terminated, and an individual workman who has some other grievance in regard to his employment or conditions thereof. Likewise there is an intelligible differentia between an employer who discharges, dismisses, retrenches or terminates the services of an individual workman and an employer whose workman has some other grievance regarding his employment or conditions thereof. The more important question is whether such differentia has a rational relation to the object sought to be achieved by the statute, namely, the Industrial Disputes Act.

34. Mr. Vishwanath Rai contended that such classification of individual workmen or employers, has no rational relation to the object sought to be achieved by the Act. It was argued by Mr. Vishwanath Rai that there is no reason why departure should be made from the concept of collective bargaining, in the case of an individual workman who is discharged, dismissed, retrenched or whose services are terminated, while such departure is not made in the case of a workman who has some other grievance regarding his employment or conditions thereof.

35. Discharge, dismissal, retrenchment or termination of services of a workman, is of much graver consequence to a work-

man than any other grievance in regard to wages, bonus, allowances, working hours, work load, holidays or other conditions of employment.

35-A. A workman who is discharged, dismissed, retrenched or whose services are terminated, is very often likely to be forgotten by his erstwhile fellow workmen and the chances of his case being sponsored by the Union of workmen, are substantially less than those in the case of a workman who has some other grievance and continues in employment. Thus a workman who is discharged, dismissed, retrenched or whose services are terminated, is at a greater disadvantage for enlisting the support of his fellow workmen to raise a collective dispute.

36. It is open to the Legislature to recognise different degrees of harm and to provide for different remedies in respect of them. The Legislature may provide for remedy for a harm or an evil of bigger magnitude and may not provide for a remedy for a harm, or an evil of a smaller magnitude. By so doing the Legislature does not violate Art. 14.

37. So long as discharge, dismissal, retrenchment, or termination of services, if of greater degree of consequence to an individual workman than any other grievance in regard to his employment or condition thereof, it is open to the Legislature to provide for a special remedy in regard to a workman who is discharged, dismissed, retrenched or whose services are terminated, while such remedy may not be provided for a workman whose grievance is of lesser gravity.

38. Looked at, whether from the point of view of an individual workman or from the point of view of an employer, we think the distinction made by Section 2-A between the grievance arising out of discharge, dismissal, retrenchment or termination of services and other grievances of an individual workman, is based on a classification which has reasonable relationship to the object of the Act.

39. In support of his contention that Section 2-A is not based on a reasonable classification, Mr. Vishwanath Raj relied on a number of decisions. In particular he referred to the decisions of the Supreme Court in AIR 1954 SC 545 and *Minakshi Mills Ltd. v. Vishwanatha Shastri*, AIR 1955 SC 13 wherein the Supreme Court held that there was no valid classification between tax evaders dealt with under the drastic provisions of the Taxation on Income (Investigation Commission) Act, 1947, and the same class of persons who fall within the ambit of Section 34 of the Indian Income-tax Act.

40. Mr. Vishwanath Raj next referred to *Motiram Dekha v. N. E. Frontier Railway*, AIR 1954 SC 600 wherein the Supreme Court held that there was no valid ground in which employees in Rail-

ways alone could be said to constitute a class for themselves, to justify a rule which empowered the Railway Authorities to retire, at their option, Railway employees who had completed 10 years of service, while in other branches of civil services the Central Government can retire, at its option, an official who has attained the age of 50 years or completed 25 years of service.

41. Reliance was also placed on the decision in *Income-tax Officer, Assam v. Lawrence Singh*, AIR 1968 SC 658 in which exclusion of Government servants belonging to a certain hill tribe from the benefit of exemption from Income-tax granted to people of that tribe, was assailed. The Supreme Court held that such classification of Government servants into a separate category, was not a reasonable classification.

42. The question whether the classification in a given case is reasonable, must depend upon the facts and circumstances of that particular case. The test of reasonableness of the classification, has to be applied to each individual case and no abstract standard of reasonableness of classification, can be laid down. Hence decisions holding that classification made in certain cases are valid or invalid, though useful, cannot provide an answer to the question whether the impugned classification in a given case, is valid or invalid.

43. We cannot accede to the contention of Mr. Viswanath Raj that Sect. 2-A is discriminatory and violative of Art. 14 of the Constitution.

44. It was contended by Mr. Viswanath Raj that Section 2-A is only prospective and not retrospective in operation, that as discharge, dismissal, retrenchment or termination of services of individual workmen in these three petitions, had taken place prior to Section 2-A coming into force (i.e. 1-12-1965), Section 2-A has no application to their cases and hence such discharge, dismissal, retrenchment or termination of their services, did not give rise to industrial disputes.

45. On the other hand, the learned Government Advocate contended that Section 2-A of the Act is applicable also to disputes arising out of discharge, dismissal, retrenchment or termination of services of individual workmen which took place prior to 1-12-1965.

46. As the question whether Sec. 2-A is applicable where discharge, dismissal, retrenchment or termination of services of an individual workman, took place prior to 1-12-1965, has arisen in a few other Writ Petitions which are pending before this Court, and as any decision rendered by us in the present petitions, will be binding in those other cases also, we permitted learned counsel appearing in those other cases who desired to intervene, to do so, and to address arguments on this

question. Accordingly, Mr. U. L. Narayana Rao addressed arguments supporting the contention of Mr. Vishwanatha Rai, while Mr. S. Krishnaiah and Mr. M. C. Narasimhan addressed arguments supporting the contention of the learned Government Advocate.

47. Before dealing with the rival contentions of learned counsel on this question we may state a few well accepted rules of interpretation of statutes bearing on the point of retrospective operation of statutory provisions.

(i) No statute is to be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication;

(ii) A retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. Every statute which takes away or impairs vested rights acquired under the existing laws or created a new obligation or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed to be intended not to have retrospective operation;

(iii) If the language of the statute is plainly retrospective, it must be so interpreted. When the intention is clear that the Act should have a retrospective operation, it must unquestionably be so construed even though the consequences may appear unjust and hard;

(iv) A statute is not to be construed to have a greater retrospective operation than its language renders necessary. The retrospective effect of a statute may be partial in its operation;

(v) If a statute is in its nature a declaratory Act, it is retrospective even if it takes away previous rights; and

(vi) A statute is not necessarily retrospective because a part of the requisites for its action, is drawn from a time antecedent to its passing.

48. Mr. Vishwanatha Rai advanced the following reasons for holding that Section 2-A does not apply to discharge, dismissal, retrenchment and termination of services, which had taken place prior to 1-12-1965;

(i) The adverbial clause, "where an employer discharges, dismisses, retrenches or otherwise terminates, uses present tense. The intention of the Legislature is that the provisions of the Section (Section 2-A) should apply to discharge, dismissal, retrenchment or termination of services, that takes place after the coming into force of this section and not to any of those which had taken place prior to the Section coming into force. If the Legislature intended that the section

should apply to discharge, dismissal, retrenchment, or termination of services that had taken place prior to the section coming into force, the legislature would have employed past perfect tense and not present tense, i.e., the Legislature would have said "where any employer has discharged, dismissed, retrenched or otherwise terminated the services of an individual workman". The use of the present tense in the section clearly indicates that the Legislature intended that the section should apply to discharge, dismissal etc., that takes place after the section coming into force.

(ii) If the section is construed as applying to discharge, dismissal, retrenchment or termination of services that had taken place prior to the section coming into force, then, all the previous discharge, dismissal, retrenchment and termination of services, would become industrial disputes and individual workmen who have been discharged or dismissed, retrenched or whose services were terminated in the past, can claim that disputes relating to their discharge, dismissal, retrenchment or termination should be referred for adjudication. The consequences of such disputes being reopened after the lapse of many years, and referred for adjudication, would be disastrous to employers. Hence, it could not have been the intention of the Legislature that such discharge, dismissal, retrenchment or termination of services, which had already taken place at a time when the employers were under no statutory liability to be subjected to adjudication under the Act, should now be subjected to a new liability in respect of such discharge, dismissal, retrenchment or termination of services which had already happened.

(iii) Section 2-A is not a mere procedural matter but creates new rights in favour of individual workman and imposes new liabilities and obligations on employers, because under the ordinary law of master and servant, an employee who is discharged, dismissed etc., can only claim damages for wrongful dismissal or discharge and cannot claim reinstatement; whereas under industrial adjudication, the Labour Court or the Tribunal can not only award damages but also order reinstatement of workmen together with back wages. A provision which imposes such serious liabilities and obligations on employers, cannot be construed as having retrospective effect when there are neither express words nor necessary intendment to that effect in the section.

49. In support of his contention, Mr. Viswanatha Rai relied on the decision of the Punjab and Haryana High Court in *Sri Gopal Paper Mills Ltd. v. The State of Haryana*, 1968 Lab IC 1250 (Punjab & Har). Tekchand, J., said at p. 1267, that

Sec. 2-A creates a substantive right and cannot be retrospective in operation and that if that were not so, then all the previous dismissal would become industrial disputes and that it could not be the intention of the Legislature that all dismissed personnel in the past, could now claim reference on the ground that such dismissal is an industrial dispute.

50. Mr. Vishwanatha Rai referred to the decision in *Carson v. Carson Stoyek*, (1964) 1 WLR 511. There, in November 1961 the husband took back into the matrimonial home his wife who had confessed to him her adultery in 1960. The wife left the matrimonial home in August 1962. The husband filed a petition praying for divorce on the ground of the wife's adultery in 1960. Sec. 3 of the Matrimonial Causes Act, 1963, provides that an adultery which had been condoned, shall not be capable of being revived. The question that arose in that case, was whether that section had retrospective effect.

Scarman, J., said that the husband had an accrued right to divorce the wife upon the ground of adultery which he had condoned but which was then revived and that there was nothing in the language of Section 3 of that Matrimonial Causes Act, 1963, (which came a year later) which compels holding that Parliament, by that section, intended to interfere with the accrued right.

51. Mr. U. L. Narayana Rao, learned counsel who intervened, referred to the following observations in *Crales Supreme Court in the Central Bank of India v. Their Workmen*, AIR 1960 SC 12 at p. 27.

"For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word 'declared' as well as the word 'enacted'."

The Supreme Court added:

"A remedial Act, on the contrary is not necessarily retrospective; it may be either enlarging or restraining and it takes effect prospectively, unless it has retrospective effect by express terms or necessary intendment."

52. Mr. Narayana Rao contended that the Industrial Disputes (Amendment) Act, 1965, by which Sec. 2-A was inserted, is a remedial Act and not a declaratory Act, that the former, unlike the latter, is not necessarily retrospective, and that there is nothing in the language of Section 2-A which makes it retrospective so

as to render discharge, dismissal, retrenchment or termination of services of an individual workman before 1-12-1965, an industrial dispute.

53. On the other hand, the learned Government Advocate contended that Sec. 2-A applies to dismissal, discharge or retrenchment or termination of services, which has taken place prior to 1-12-65 and that such a construction of S. 2-A does not amount to any retrospective operation of that section. The learned Government Advocate relied on the rule that a statute cannot be said to be retrospective because a part of the requisites for its action, is drawn from a time antecedent to its passing. The learned Government Advocate argued that Sec. 2-A confers prospective benefit only and that even if such benefit is on the basis of antecedent facts, namely, discharge, dismissal, retrenchment or termination of services of individual workman which took place prior to 1-12-1965, such application of Sec. 2-A cannot be regarded as retrospective.

54. The learned Government Advocate referred to several cases in which statutory provisions were held to be applicable on the basis of facts or events which had taken place prior to the coming into force of such statutory provisions.

55. In re: *Solicitor's Clerk* (1937) 3 All ER 617 a solicitor's clerk was convicted of larceny in 1953. Under Sec. 15 (1) of the Solicitor's Act, 1941, as amended by Section 11 of the Solicitors (Amendment) Act, 1956, the Disciplinary Committee made an order disqualifying him from acting as solicitor's clerk. It was contended that the offence for which he was convicted, was committed before Sec. 11 of the Solicitors (Amendment) Act, 1956, came into force and that the Disciplinary Committee had no jurisdiction to make an order which was retrospective in its effect. Repelling that contention, Lord Goddard, C. J., held that Section 11 was not retrospective but enabled an order to be disqualifying a person from acting as a solicitor's clerk in future and that what happened in the past was the cause or the reason for making that order.

56. In *Rex v. Vine*, (1875) 10 QB 195, the words,

"Every person convicted of felony shall for ever be disqualified from selling spirits by retail and if any persons shall, after having been so convicted, take out or have any licence to sell spirits by retail, the same shall be void to all intents and purposes," were applied to a person who had been convicted of felony before the Act was passed, though by doing so, vested rights were affected.

Mellor, J., observed (pp. 200-201):
"It appears to me to be the general object of this statute that there should be

restraints as to the persons who should be qualified to hold licences, not as a punishment, but for the public good, upon the ground of character A man convicted before the Act passed is quite as such tainted as a man convicted after; and it appears to me not only the possible but the natural interpretation of the section that any one convicted of felony shall be ipso facto disqualified, and the licences, if granted, void."

57. In *Sajjan Singh v. State of Punjab*, AIR 1964 SC 464, the appellant was convicted of an offence under Section 161/165 of the Indian Penal Code read with Sec. 5(2) of the Prevention of Corruption Act, 1947, sub-section (3) of Section 5 of the Prevention of Corruption Act, 1947, reads:—

"In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income, may be proved, and on such proof the Court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption."

58. It was contended that when the section speaks of an accused being in possession of pecuniary resources of property disproportionate to his known sources of income, it meant only pecuniary resources or property acquired after the date the said Act coming into force and that otherwise it would be to give the Act retrospective operation. Rejecting that contention, this is what *Das Gupta, J.*, who spoke for the Court, said at p. 468:

"We agree with the learned counsel that the Act has no retrospective operation. We are unable to agree however that to take into consideration the pecuniary resources or property in the possession of the accused or any other person on his behalf which are acquired before the date of the Act, is in any way giving the Act a retrospective operation."

59. The main justification for that conclusion has been explained by his Lordship thus:

"Looking at the words of the Section and giving them their plain and natural meaning, we find it impossible to say that pecuniary resources and property acquired before the date on which the Prevention of Corruption Act came into force, should not be taken into account even if in possession of the accused or any other person on his behalf. To accept the contention that such pecuniary resources or property should not be taken

into consideration, one has to read into the section the additional words 'if acquired after the date of this Act' after the word 'property'. For this there is no justification."

60. In *Bashiruddin v. B. S. S. Majlis Awaqf*, AIR 1965 SC 1206, Section 27 of the Bihar Waqfs Act, 1947, as amended by the Bihar Waqfs (Amendment) Act, 1951, empowered the Majlis to remove the Mutavalli from his office if such Mutavalli refused to act or wilfully disobeyed the orders and directions of the Majlis under the Act. There, it was contended that this amendment was not retrospective in operation and that the Majlis could exercise this power only in respect of orders and directions of the Majlis given after the date on which Amending Act came into force and not in respect of orders and directions issued previously. Repelling that contention, this is what *Hidayatullah, J.* (as he then was), who spoke for the Court, said at page 1209:

"The amendment, no doubt, conferred jurisdiction upon the Majlis to act prospectively from the date of the amendment but the power under the amendment could be exercised in respect of orders and directions issued by the Majlis and disobeyed by the Mutwalli before the amendment came into force A statute is not necessarily used retrospectively when the power conferred by it is based on conduct anterior to its enactment, if it is clearly intended that the said power must reach back to that conduct. It would be another matter if there was a vested right which was taken away, but there could be no vested right to continue as Mutwalli after mismanagement and misconduct of many sorts were established."

His Lordship explained that no vested right of Mutwalli was taken away because there could be no vested right to continue as Mutwalli after mismanagement and misconduct were proved. His Lordship added that it would be another matter if there was a vested right which was taken away.

61. The learned Government Advocate argued that the mere use of the present tense in Sec. 2-A when it says: "Where an employer discharges, dismisses, retrenches or otherwise terminates services of an individual workman", does not necessarily lead to an inference that the section refers only to discharge, dismissal, retrenchment or termination which takes place after the section comes into operation. In support of his contention, the learned Government Advocate relied on the decision in *Kapur Chand v. B. S. Grewal*, AIR 1965 SC 1491. There, the landlord made an application under Section 14-A(i) of the Punjab Security of Land Tenures Act, 1953, before the authority specified therein, for eviction of his

tenant on the ground that he (the tenant) had failed to pay rent regularly without sufficient cause. The appellant authority under that Act directed the tenant to be evicted.

Sec. 9(1) of that Act reads:

9(1). Notwithstanding anything contained in any other law for the time being in force, no land-owner shall be competent to eject a tenant except when such tenant—

(i) xx

xx

(ii) 'Fails to pay' rent regularly without sufficient cause; or

xx

xx

(underlining (here in ' ') is ours)

It was contended by the learned counsel for the tenant that Sec. 9(1) (ii) applies prospectively and that the conduct of the tenant prior to the enactment of Sec. 14-A could not be taken into account. Repelling that contention, Hidayatullah, J., (as he then was), who spoke for the Court, said at p. 1493:

"In our opinion, the conduct of the tenant prior to the coming into force of the new section can be taken into account. The clause in question makes a particular conduct the ground for an application for eviction. The necessary condition for the application of Sec. 9(1) (ii) may commence even before the Act came into force and past conduct, which is as relevant for the clause as conduct after the coming into force of the Act, cannot be over-looked."

62. Reliance was also placed on the observations of a Bench of Jammu & Kashmir High Court in *Sk. Ghulam v. State of Jammu & Kashmir*, AIR 1965 J & K 78 to the effect that a statute is to be regarded as always speaking and that the use of the present tense in a section, must, in appropriate circumstances, be deemed to include past tense or past participle.

63. Mr. Satyamurthy, learned counsel for an individual workman impleaded as a respondent in one of those petitions, placed strong reliance on the decision of a Bench of the Delhi High Court in *National Productivity Council v. S. N. Kaul*, (1969) 2 Lab LJ 186 (Delhi) in which it was held that the case of a workman dismissed before coming into force of Section 2-A, could be validly referred for adjudication under Section 10 of the Act. Kapur, J., said in his leading judgment, that the emphasis in the section, is not on the date of dismissal or discharge but on any dispute or difference between an individual workman and his employer connected with or arising out of discharge or dismissal. His Lordship added that Sec. 2-A takes note of every dispute arising out of or connected with termination, etc., and confers on such dispute the status of industrial dispute and that in the nature of things the date of termination cannot be treated as crucial.

Deshpande, J., in his separate but concurring Judgment, referred to the decision in *Rex v. St. Mary Whitechappel (Inhabitants)*, (1848) 12 QB 120 in which the relevant statutory provision read:

"No woman residing in any parish with her husband at the time of his death shall be removed from such parish within twelve months next after his death if she so long continues a widow".

While construing that provision, Lord Denman observed:

"It was said that the operation of the statute was confined to persons who had become widows after the Act was passed, and that the presumption against retrospective statute being intended supported this construction, but we have before shown that the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing."

Deshpande, J., said that the above observations are sufficient to show that the use of present tense or past tense is not decisive and that the language has to be considered in conjunction with other factors. His Lordship added that it cannot be stated as invariable rule that the use of the present tense or of the past or of the present perfect tense alone, is sufficient to show whether the statute applies only to the future events or to the past events also.

64. While we agree with respect with his Lordship that the use of the present tense alone is not sufficient to infer that the statute does not apply to past events also, it cannot be denied that the use of present tense, is one of the relevant factors in ascertaining whether the Legislature intended that the statute should apply to past events, conduct or facts also.

65. From the observations of Hidayatullah, J., (as he then was) in AIR 1965 SC 1206:

"A statute is not necessarily retrospective when the power conferred by it is based on conduct anterior to its enactment. It would be another matter if there was a vested right which was taken away.". It follows that it is not an invariable rule that a statute does not operate retrospectively when the power conferred on it, is based on facts, events or conduct anterior to its enactment.

66. Mr. M. C. Narasimhan, learned counsel who intervened, argued that Section 2-A deals with merely a procedural matter and not with any substantive rights of parties. According to him, Section 2-A which states that certain individual disputes shall be deemed to be industrial disputes, merely provides for

adjudication of such disputes by the Industrial Tribunal or the Labour Court instead of such disputes being adjudicated by ordinary Civil Courts.

67. This argument of Mr. Narasimhan overlooks the important distinction between adjudication by an ordinary Civil Court and adjudication by the Industrial Tribunal or the Labour Court. We think Mr. Vishwanath Rai is right in contending that an Industrial Tribunal or Labour Court not merely adjudicates existing rights and liabilities but can also create new rights and liabilities and enforce them. While under the ordinary law, a workman discharged, dismissed or retrenched, can only get compensation for wrongful dismissal, an Industrial Tribunal or Labour Court can order reinstatement of such workman together with back wages. Thus, we are unable to agree with Mr. Narasimhan, that Section 2-A merely deals with a procedural matter and hence has retrospective effect.

68. Mr. Narasimhan next submitted that the relevant point of time for determining whether a dispute is or is not an industrial dispute, is when the Government refers that dispute under Section 10 of the Act to the Labour Court or the Industrial Tribunal, and that if at the time of making such reference, Section 2-A is in force, there is no retrospective application of Section 2-A even if such dispute relates to dismissal, discharge, retrenchment or termination of services which took place prior to it coming into force.

69. It is true that a dispute should be an industrial dispute at the time of referring that dispute for adjudication under Section 10 of the Act; but, if a dispute relating to discharge, dismissal, retrenchment, or termination of services, was not an industrial dispute at the time of such discharge, dismissal, retrenchment or termination took place, to treat it subsequently i.e., at the time of making the reference as an industrial dispute, by the application of Sec 2-A, would, as seen earlier, amount to retrospective application of that section.

70. We think the real question is whether the Legislature has manifested an intention that Sec. 2-A should apply to past transactions and affect vested rights. The learned Government Advocate submitted that it is reasonable to hold that the Legislature has manifested such intention. He sought to derive support from the decision in *Barber v. Piggden*, (1937) 1 All ER 115. There, the question that arose was whether Section 3 of the Law Reforms (Married Women and Tortfeasors) Act, 1935, was applicable to a tort committed before passing of that Act. Sec. 3 of that Act provides:

Subject to the provisions of this part of this Act, the husband of a married woman shall not, by reason only of his being her husband, be liable— (a) in respect of any tort committed by her whether before or after the marriage, or in respect of any contract entered into, or debt or obligation incurred, by her before the marriage; or (b) to be sued, or made a party to any legal proceeding brought, in respect of any such tort, contract, debt, or obligation.

By Sec. 4 of that Act, it is provided that nothing in Part I of the Act, should affect any legal proceedings in respect of any tort if the proceeding had been instituted in respect thereof before the passing of that Act.

Greer, L.J., said that notwithstanding the strong presumption against construing statutes as retrospective by reason of the words in Section 3(b) and Sec. 4 (1) (b), it must be inferred that a retrospective effect was clearly intended.

Scott, L.J., said that the language of Part I discloses an intention to make a clean sweep of the old legal fiction of the common law that a woman on marrying became merged in the personality of her husband and ceased to be a fully qualified and separate human person. His Lordship added that a statute abolishing old legal fictions, is so nearly akin to a procedural statute that the canon against retrospective interpretation, can have little, if any, application.

Thus the decision in 1937-1 All ER 115 depended upon the language of the provisions of that particular statute and the circumstance that the Act abolished a legal fiction. We do not see what assistance the learned Government Advocate can derive from that decision.

71. On the other hand, in its very recent decision, *Ranjit Chandra Choudhury v. Mohitosh Mukherjee*, (1969) 2 SCJ 661 = (AIR 1969 SC 1187) the Supreme Court has reiterated that it is a well-accepted canon of interpretation of statutes that a substantive right cannot be taken away retrospectively unless the law expressly states so or there is a clear intentment. There, the question that arose was whether in a suit for eviction filed when the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, was in force, the provisions of Section 24 of the West Bengal Premises Tenancy Act, 1956, which repealed the former Act, would be applicable. Section 24 of the latter Act reads:

24. When there is no proceeding pending in Court for the recovery of possession of the premises, the acceptance of rent in respect of the period of default in payment of rent by the landlord from the tenant shall operate as a waiver of such default.

The tenant relied upon the above Section and contended that acceptance of rent by the landlord operated as waiver of default. *Hidayatullah, C. J.*, who spoke for the Court, held that the section creates a charge in the substantive rights and therefore must be held to be prospective in operation and not retrospective.

72. The learned Government Advocate next contended that no serious inconvenience will result to employers by construing Section 2-A as having retrospective effect because it is in the discretion of the Government to make or not to make a reference under Sec. 10 of the Act and that the Government is not likely to refer for adjudication a dispute relating to discharge, dismissal, retrenchment, or termination of services of an individual employee, if it took place long before Section 2-A came into force.

73. The above contention cannot be accepted, for two reasons. Firstly, the question whether a statutory provision has or has no retrospective operation, does not depend upon what the Government is or is not likely to do in its discretion. Secondly, even if the Government refers under Sec. 10, only those disputes which relate to discharge, dismissal, retrenchment or termination of services of individual workmen which took place not too long before 1-12-1965, the rights which vested in the employers during the period prior to 1-12-1965, however short that period may be will be affected.

74. The principle as to when a statutory provision imposing new obligations on employers in relation to their workmen, should be construed as retrospective or not retrospective in operation, has been well set out, if we may say so with respect, by the Judicial Committee of the Privy Council in *Sunshine Porcelain Potteries v. Nash*, (1961) 3 All ER 203. Under Sec. 18 of the Workmen's Compensation Act, 1928, compensation was payable in respect of scheduled industrial diseases, which did not include silicosis. By the amendment Act, of 1946, it was provided, *inter alia*, that where a medical practitioner certifies that a worker is suffering from a disease and is thereby disabled from earning full wages at the work at which he was employed, the worker shall be entitled to compensation under the principal Act as if the disease was a personal injury by accident arising out of and in the course of that employment.

75. A worker was disabled by silicosis after that Amending Act came into force. It was contended by her employer that the Amending Act had no retrospective effect. Lord Reid who delivered the judgment of the Judicial Committee, stated the principle thus at page 206:

"Generally there is a strong presumption that a legislature does not intend to impose a new liability in respect of some-

thing that has already happened, because generally it would not be reasonable for a legislature to do that. So, if a worker has already sustained injury or contracted a disease at a time when the employer is under no statutory liability to him arising out of that injury or disease, there would in general be a presumption that an Act bringing that injury or disease within the scope of compensation would not apply to that case; otherwise there would be liability on the employer arising out of a state of things which existed before the Act was passed. But this presumption may be overcome not only by express words in the Act but also by circumstances sufficiently strong to displace it."

78. But, in the particular circumstances of that case, his Lordship held that that Amending Act must be construed as having retrospective effect because, notoriously silicosis is a disease of slow onset and it cannot be supposed that the Legislature intended that every worker disabled after 1946, must prove that the disease was contracted or that the damage was done to him after 1946, which would involve there being a long period of many years of uncertainty.

79. But in regard to Sec. 2-A of the Act, no compelling reason has been pointed out to construe that Section as having retrospective effect. With great respect to Kapur and Deshpande, J.J., we think that Section 2-A has no application to discharge, dismissal, retrenchment or termination of services of an individual workman, which took place prior to Sec. 2-A coming into force.

80. As the dismissal or discharge of the individual worker in each of these three petitions, had taken place prior to 1-12-1965, the Commissioner of Labour was in error in not disposing of the appeals before him under Section 39 of the Shops and Establishments Act and in issuing a circular advising workmen who had preferred such appeals, to consider the desirability of withdrawing such appeals and approaching the Conciliation Officers for taking up the matter under the provisions of the Act.

81. The conciliation proceedings initiated by the Conciliation Officer under Section 12 of the Act, in respect of such discharge or dismissal of individual workmen, are without jurisdiction and hence the Conciliation Officer should be prohibited from proceeding with them.

82. Mr. Vishwanatha Rao stated that he had no objection to our issuing a direction to the Commissioner of Labour to dispose of the appeals under Sec. 29 of the Shops and Establishments Act, in spite of workmen having made applications for withdrawing those appeals. Accordingly, we issue such a direction to the Commissioner.

83. In the result, we reject the prayer for declaring Section 2-A of the Act as invalid. But, we issue a writ of prohibition restraining the Conciliation Officer from proceeding under Sec. 12 of the Act in respect of the disputes relating to such discharge or dismissal of these individual workmen. We also give a direction to the Commissioner to dispose of the appeals under Sec. 39 of the Shops and Establishments Act, before him, according to law.

84. In the circumstances of these petitions, we direct the parties to bear their own costs.

Order accordingly.

AIR 1970 MYSORE 185 (V 57 C 47)

A. NARAYANA PAI AND
C. HONNIAH, JJ.

K. H. Srinivasan, Appellant v. State of Mysore, by Chief Secretary to Govt. and others, Respondents.

First Appeal No. 23 of 1964, D/- 15-1-1970, from decree of Dist. J., Coorg, Mercara, in O. S. No. 13 of 1961.

(A) Land Acquisition Act (1894), S. 6 — Land validly acquired for public purpose — Possibility of some land being surplus or unnecessary for original purpose for which it is acquired — Acquisition not invalidated — Manner in which surplus land is dealt with can have no effect on validity of acquisition either.

Once a declaration of the existence of a public purpose is made under S. 6 the declaration becomes conclusive by force of statute. The only way in which the said finality can be got rid of is by proving what in law is regarded as fraud on power. If, as a matter of fact a public purpose does exist for making a compulsory acquisition, the acquisition itself will be beyond the reproach that it is in violation of any fundamental right. Once an acquisition is therefore perfectly valid, the possibility of some land being surplus or unnecessary for the original purpose for which it is acquired, cannot operate retrospectively to invalidate the acquisition either fully or in part.

(Paras 12, 25)

The position in regard to the utilisation of the surplus land has to be dealt with upon considerations which are quite consistent with the fact that the original acquisition is perfectly valid. If, upon facts the original acquisition is not open to the objection of lack of public purpose, then the manner in which the surplus land is dealt with cannot, have any effect on the validity of the acquisition nor can the purpose stated for acquisition have any relevance to the validity of the manner in

which the surplus land has been dealt with. If the circumstances are such that the declaration of the public purpose in the notification under Section 6 itself may be looked upon with suspicion, it may be a case for investigation and decision whether the process of compulsory acquisition is not resorted to as a cloak for an unlawful purpose.

The question therefore, has to be dealt with as one of fact in all the circumstances of each case and not one which can be disposed of on a general principle of law.

(Paras 25, 36, 37)

(B) Municipalities — Coorg Municipal Regulation (2 of 1907), S. 51 — Land or other property belonging to committee — Local Authority has power of disposal by way of sale.

There is nowhere in the Regulation any specific prohibition against disposal of land or any other property belonging to the committee by way of sale or otherwise. Although sub-section (1) of Section 51 uses the words "direction, management and control" but not such words as "sale or disposal", the express terms of the first part of sub-section (1) by which the property is described as being vested in and belonging to the committee taken along with the fact that there is no prohibition against sale, must be regarded as recognising the normal principle that the ownership of property carries with it the normal right of disposal. In case of the local authority governed by Section 51, therefore the same amplitude of power must be conceded to it subject only to the special reservations, if any, made by the State Government.

(Para 31)

G. R. Ethirajulu Naidu, for Appellant; N. Venkatachala (for No. 1); S. R. Ramnathan (for No. 2) and A. C. Nanjappa (for No. 3), for Respondents.

NARAYANA PAI, J.:— This appeal is by the unsuccessful plaintiff in O. S. No. 13 of 1961 on the file of the District Judge, Mercara.

2. The relevant facts may be briefly summarised as follows:— For the purpose of opening of footpath giving access to a High School and the expansion of the Market place at Chowdalu village within the limits of Somwarpet notified area, a notification dated 3-1-1956 under Section 4 (1) of the Land Acquisition Act was published proposing to acquire 3 acres 21 cents of land. After necessary statutory investigation, a further notification under Section 6 of the Act dated 17-5-1956 was published declaring that 2 acres and 10 cents of land described therein is required for a public purpose mentioned above. Out of the land so acquired 47 cents out of survey No. 191/1 and 48 cents out of survey No. 193/4 belonged to the appellant Srinivasan. He did not file any objection during the acquisition proceedings.

3. The entire extent of 2 acres 19 cents however, was not actually put to the use for which the land was declared to be necessary to be acquired. 24 cents were utilised for the footpath and 1 acre 30 cents for extending the market. It is in evidence that either due to lack of funds or on account of an injunction or order of stay obtained by another person pending a writ petition presented to this Court questioning the acquisition, no regular buildings to house the market have been put up. But in the area allotted for market or for running a shandry the vendors and merchants using the market area themselves put up their temporary sheds.

4. Respondent 3 Chinnappa who owned 14 cents of land near the acquired land, obtained from the President of the notified area one Mogappa sanction for putting up a permanent cinema theatre in his said 14 cents of land in August 1957. He later made two applications to the local authority on 13-8-1957 and 13-10-1957 to sell to him 25 cents and 15 cents respectively out of the acquired land remaining unutilised by the local authority. By a resolution dated 7-11-1957 the Committee of the notified area resolved to sell 40 cents of land to respondent 3. Exhibit D-32 is a copy of the relevant proceedings. The proposal of the local authority for the said sale was approved by the State Government and the approval communicated by Exhibit D-16. Exhibit D-35 dated 4-8-1958 is the sale deed executed in favour of Chinnappa in respect of the said 40 cents of land.

5. By a subsequent resolution Exhibit D-18, dated 31-8-1958, further 25 cents of land was resolved to be sold. That proposal was also approved by the Government and the approval communicated by Exhibit D-17 dated 20-10-1958. The sale deed in respect of the said 25 cents is Exhibit D-36 dated 24-6-1959.

6. The appellant-plaintiff states that he came to know of the sales much later when he found respondent 3 (defendant 3) doing preliminary work on the land for putting up some structures on the land. He issued a notice dated 6-9-1960 Ex. P. 1 addressed to the State Government, the President of the notified area and defendant 3 Chinnappa, questioning the legality or propriety of the sales to Chinnappa and informing all of them that they should reconvey the lands in his favour. This notice was issued through a lawyer. The suit was filed on 23-3-1961 praying for a decree declaring that the original land acquisition proceedings were null and void that the two sales in favour of defendant 3 were also null and void and did not convey any title, declaring that the plaintiff was entitled to a right of pre-emption and directing the defendants to execute reconveyance of the 65 cents of land sold

to Chinnappa for a consideration of Rs. 4,750 or in the alternative, for damages in the sum of Rs. 5,000.

7. The case made out in the plaint was that while the plaintiff had bona fide believed at the time of the original compulsory acquisition that the same was being made for the public purposes expressed in the relevant notifications, he had since discovered that the said proceedings were a mere cloak for making available to defendant 3 Chinnappa a portion of land belonging to the plaintiff after acquiring the same compulsorily and that the said nefarious purpose was put through by the then President of the notified area one Mogappa. It is also stated that in any event when the land acquired from the plaintiff was not actually used for the purpose for which it had been acquired, the State Government as well as the local authority impleaded as defendants 1 and 2 were bound to give the first option to the plaintiff to repurchase the land. It is on the basis of these allegations that the several prayers mentioned above have been made.

8. The defence put forward by the first two defendants was that apart from the lands of the plaintiff, adjacent lands of two other owners were also acquired under the Land Acquisition Act, that after utilising 1 acre 44 cents of land for the purpose for which the acquisition had been made 65 cents of land which remained as surplus were sold to defendant 3 as the notified area Committee was of the opinion that it was no longer necessary for the purposes mentioned above. The notified area Committee further pleaded that while selling the land it had made certain stipulations in public interest or for benefit of the public such as that the theatre when built should be made available for public functions of the local authority and also pleaded that a theatre properly run will augment the tax resources of the notified area also.

9. Defendant 3 resisted the suit on the ground that the plaintiff who had not originally objected to the compulsory acquisition was not entitled to question the same as illegal, that the legal basis for the plaintiff's claim was not tenable and that the sales in his favour were not liable to be set aside on any of the grounds depended upon by the plaintiff.

10. The District Judge in his judgment has rejected all the contentions of the plaintiff. He held that the plaintiff has failed to prove any fraud or other informative circumstances sufficient to set at naught the legal effect of the compulsory acquisition and has also failed to make out a case of collusion or mala fides on the part of the then President of the notified area, Mogappa and

defendant 3. Ultimately he dismissed the suit.

11. In this appeal, the prayers based on the right of pre-emption for a reconveyance of land to the plaintiff has not been pressed. The arguments have been confined in the last analysis to the validity or propriety of the sales in favour of defendant 3.

12. So far as the compulsory acquisition itself is concerned, we do not think that it is at all possible for the plaintiff-appellant either on facts or upon any legal principle, to impugn its validity. There is no doubt that the purposes stated to be the ones for which the acquisition was being made in the relevant notifications are public purposes which would furnish sufficient constitutional foundation for compulsory acquisition. It is also found frankly admitted by the plaintiff himself in his evidence before the trial Court that at the time of the acquisition he had bona fide believed that such purposes existed and that land was being acquired for the said purposes. Further, once a declaration of the existence of a public purpose is made under Section 6 of the Land Acquisition Act, the declaration becomes conclusive by force of statute. The only way in which the said finality can be got rid of is by proving what in law is regarded as fraud on power. There is no allegation of any such fraud on the part of the Government or any individual officer of the Government who was concerned with the acquisition, much less, therefore, any evidence on it.

13. We therefore, proceed to discuss the contentions on the footing that the compulsory acquisition originally made was perfectly valid and not open to question.

14. So far as the sales made in favour of defendant 3 Chinnappa are concerned, it will be convenient to discuss the arguments under two different heads:

(i) in relation to powers of the notified area to dispose of the land and the requirements of law governing the same, and (ii) the facts relating to the case of mala fides or improper conduct on the part of Mogappa to benefit Chinnappa defendant 3.

15. Taking up the second part first, the entire case seems to rest upon a collusion between Mogappa and Chinnappa. Admittedly Mogappa was the President of the notified area during the years 1953 to 1957. It is also in evidence that during that period the Committee for the notified area was not functioning and that all the functions and powers of the committee were being discharged and exercised by the said Mogappa as President. We have also

stated earlier that it was this Mogappa who had given sanction to Chinnappa to construct a cinema theatre so early as in August 1957 although the permission was with reference to Chinnappa's own land of 14 cents in extent. Chinnappa has admitted that it was Mogappa who told him that further land adjacent to his land belonging to the local authority was available. Mogappa has admitted in his evidence that he did not publish the proposal to sell the land in the Gazette.

It is also pointed out that there was at least one other application by one Channabasappa, son of Adike Nanjappa, dated 15-2-1957 for purchase of the land but that the same was by-passed for the benefit of defendant 3 by keeping it pending and unattended to. A reference is also made to a letter by two merchants of the locality Exhibit D-19 dated 14-9-1959 complaining that the land had been sold for a low price when they themselves were prepared to pay much higher price for the same.

16. As against the above circumstances and the documents, the respondents have relied upon other indisputable, or what they describe as indisputable facts. Although at the time applications for sale of the land were made Mogappa was the President of the Local authority, when the decision to sell was taken he had ceased to be the President, and one Chandrasekharaiah was the President, and further there was also the Committee functioning. The two resolutions to which we have already made a reference are resolutions passed by the entire Committee and were unanimously passed. Before the resolutions were given effect to, the permission of the Government was sought. For enabling the Government to decide whether or not to accord an approval, the Deputy Commissioner of Coorg had made a local inspection and submitted a report recommending that approval may be accorded to the resolutions of the local authority.

The respondents contend that there is no evidence, nor even any suggestion that either Chandrasekharaiah or the members of the Committee or any of the Officers of the Government acted in bad faith or that Mogappa and/or Chinnappa had such influence or could exert such influence upon any one of them to act otherwise than in the course of bona fide exercise of power. It is not even the case of the plaintiff either in his plaint or in his evidence that any one of these persons had acted mala fide or in the interest of Chinnappa.

17. It appears to us that the weight of probabilities is entirely against the case of the plaintiff. It is true as indicated by one of the documents that Mogappa was living as a tenant in one of the

bouses belonging to Chinnappa. It is also pointed out that in the application made by Chinnappa himself, he has stated that besides the 14 cents of land in Chowdalu village and 1 acre of wet land somewhere else, he was not possessed of any other properties. It is on these two circumstances the first suggestion is made that although the purchase is sought to be made in the name of Chinnappa, he being a person of such impecunious circumstances, the real benefit was going to be secured by Mogappa. Apart from the fact that the basis is too slender for this large inference, the argument itself is destructive of the main case that Mogappa was abusing his power or position for the benefit of a private individual like Chinnappa.

The argument that even the Government were misled by thinking that the land that was sought to be sold had been purchased by the local authority as appears from the report of the Deputy Commissioner, is of no value for two reasons. First, in the file in which this matter was dealt with, there is the report of the Subedar of Somwarpet Taluk giving full particulars to the effect that the land had been compulsorily acquired for the benefit of the local authority and transferred to the local authority who had paid the compensation thereof. Secondly, when the very Deputy Commissioner who had made that report has given evidence and was available for cross-examination by the plaintiff, not a single suggestion was put to him to the effect that either he was misled or he deliberately misled the Government by describing the land compulsorily acquired as merely land purchased by the local authority.

18. The oral evidence in the case is singularly devoid of any support for the case of mala fides. The plaintiff who has given evidence has not stated any details or any matter relating to his case of mala fides. Mogappa has admitted certain facts to which we have already made a reference, but has rejected the only suggestion put to him in regard to this case of mala fide as follows:—

"It is not true that no possession of the acquired land have been taken by the notified area at the time when defendant 3 offered to purchase the land. It is not correct to state that I took the application from Chinnappa on the first instance and then proceeded to acquire the lands."

From Chinnappa the admission has been elicited that it was Mogappa who told him that the land was available. Excepting that fact, there is nothing else elicited from him which lends any support to the case of mala fides. In his chief-examination he has deposed that

he has accepted the sale subject to the conditions mentioned in the agreements Exhibits D-1 and D-2, that at the time of his purchase Mogappa had ceased to have any connection with the local authority but that its affairs were being managed by a Committee of 12 persons. The value of these answers has not been taken away or weakened by anything elicited in the course of his cross-examination.

19. We are not satisfied, therefore, that the plaintiff could successfully attack the sales in favour of defendant 3 on the ground of mala fides or abuse of power.

20. The legal argument is to a considerable extent linked with the purposes of the compulsory acquisition and the circumstances attending the same. Indeed it is not possible for the plaintiff to construct his case completely without some reliance being placed upon either the infirmities in the first compulsory acquisition or the circumstances in which the said acquisition had been made.

21. The general background of the argument is that compulsory acquisition is a restriction on a fundamental right, that the restriction can be placed beyond reproach only if the acquisition is made for a public purpose. Unless such a public purpose exists and the land compulsorily acquired is used either wholly or to a very substantial extent for the said purpose, there is no constitutionally justifiable basis for depriving a citizen of his land on the principle of subordinating private interest for public purpose.

22. The next step in the argument is that if after acquisition it is found that a portion thereof is not required for the purpose for which it had been acquired, the same cannot be diverted to any other purpose, because to do so would be to lead to a result that the fundamental right of the original owner had been unnecessarily infringed. A modification of this line of argument is that if the land so utilised is of a substantial extent, irrespective of whatever proportion it may bear to the total acquired, the legal value of the situation should be dealt with as if the said land alone was the subject of acquisition, with the result that the entire acquisition itself may become open to attack on the ground that no public purpose existed for its acquisition.

23. Finally it is stated that if there is such surplus land, the only proper thing to do is to reconvey the land to the person from whom it had been acquired, because in the light of the effect which the acquisition has on the fundamental rights of citizens, that is the only way in which the acquisition may be completely placed beyond reproach.

24. Although the colour given to the argument in the light of fundamental rights makes it *prima facie* attractive, we

find it difficult to give full effect to it for the reason that it may lead to consequences which are clearly opposed to established principles.

25. The fundamental right consists in this, namely, that a person shall not be deprived of his property except for a public purpose. If, as a matter of fact, a public purpose did exist for making a compulsory acquisition, the acquisition itself will be beyond the reproach that it is in violation of any fundamental right. Once an acquisition is therefore perfectly valid, it will be too wide a proposition to state that the possibility of some land being surplus or unnecessary for the original purpose for which it was acquired, could operate retrospectively to invalidate the acquisition either fully or in part. The position in regard to the utilisation of the surplus land has to be dealt with upon considerations which are quite consistent with the fact that the original acquisition is perfectly valid.

26. Those principles have to be looked for in the ordinary law of property. After all, compulsory acquisition is a mode of acquisition resulting in the transfer of title from an individual to the State or an authority or another person. When land is compulsorily acquired by the Government, it becomes Government land. When land is acquired by the Government for a local authority and the same is transferred to the local authority, the land belongs to or becomes the property of the local authority. In normal circumstances and in the absence of any conditions or stipulations laid down by the law in public interest, the land becomes subject to the normal right of ownership which gives the owner all the rights of holdings, enjoying, managing, controlling or disposing of that property. If the acquirer is not an individual but a statutory body, the ownership or proprietorship of the statutory body is as complete as that of an individual subject only to this that in the matter of utilisation and disposal of that property the statutory body is governed or controlled by the provisions specially made in the statute governing the same.

27. When, therefore, a statutory body, like the local authority has become the owner of land, the question that has to be considered is whether it has the power of disposing of the surplus land, and if so, subject to what conditions?

28. Before proceeding to deal with that question, we might dispose of another argument namely, that the sale in this case was an attempt to divert the property to a purpose other than the one for which it has been acquired, and that therefore, the same is invalid or should be set aside. The only basis for this argument is that the land has been sold

for the purpose of putting up a theatre by a private individual, that running a theatre is not one of the purposes within the competence of the local authority, and that permitting the individual to do so is to divert the property to a private purpose. It appears to us that the building of a theatre is an immaterial circumstance. The essence of the matter is, property is being sold by the local authority to an individual. If it can sell the property, then the use to which the purchaser puts the property is of no consequence so far as the power of disposal is concerned.

The fact that in this case the purchaser happened to be one who wanted to put up a cinema theatre and the local authority taking advantage of the situation made certain stipulations in its own interest such as reserving the right to use the theatre for its public functions, should not make any difference to the essence of the matter, namely, the transaction was a simple sale of land by the local authority to defendant 3.

29. So far as the powers of the local authority are concerned, the relevant statute is the Coorg Municipal Regulation, 1907 (Regulation II of 1907). Section 51 deals with the topic of property vested in the committee. Sub-section (1) thereof reads:

"Subject to any special reservation which may be made by the State Government, all property of the nature hereinafter in this section specified and situated within the limits of the municipality shall be vested in and belong to the committee, and shall, with all other property which may become vested in the committee, be under its direction, management and control, and shall be held and applied by it for the purposes of this Regulation."

The sub-section thereafter enumerates various types of property, Immoveable and moveable including dust, dirt, dung, ashes etc. Sub-section (2) reads:

"The State Government may, by notification in the official gazette, direct that any property which has vested under sub-section (1) in the committee shall cease to be so vested, and thereupon the property specified in the notification shall cease to be so vested, and the State Government may pass such orders as they think fit regarding the disposal and management of such property."

30. Reliance is placed on both these sub-sections as affording an inference that the local authority has the power of disposal of surplus property and also for the proposition that the actual disposal in this case may well be related to the power of the State Government under sub-section (2).

31. There is nowhere in the Regulation any specific prohibition against dis-

possession of land or any other property belonging to the local authority by way of sale or otherwise. Although sub-sec. (1) uses the words "direction, management and control" but not such words as "sale or disposal", it is argued that the express terms of the first part of sub-section (1) by which the property is described as being vested in and belonging to the committee taken along with the fact that there is no prohibition against sale, must be regarded as recognising the normal principle that the ownership of property carries with it the normal right of disposal, and that in the case of a local authority governed by this section the same amplitude of power must be conceded to it subject only to special reservations, if any, made by the State Government.

32. It appears to us that the last mentioned proposition is sound and should be accepted. As we have already pointed out, the difference between an individual owner and a statutory body in the matter of an enjoyment of property is that whereas an individual has full liberty to deal with the property in any way he likes without injuring the rights of others, in the case of a statutory body the user or disposal of the property is governed by the nature of the statutory duties imposed upon the statutory body and the restriction, if any, placed by the statute in the matter of its user and disposal. In the case of statutes governing local authorities, the usual way in which control is exercised is providing for previous approval or sanction or control etc., by the State Government or any other named Officer of the Government.

33. In this view, we do not think it necessary to examine the correctness of the alternative argument, namely, that the two orders of the Government Exhibits D-16 and D-17 already referred to may be regarded as notified orders under sub-section (2) divesting the local authority of the property and the Government themselves making a disposal thereof. In this case, the orders are clearly in the nature of approval by the Government of a disposal by the local authority itself and not an order which first divests the property from the local authority and then places it at the disposal of the Government followed by an order of Government directing the manner of disposal.

34. The actual case is one of a simple sale by the local authority of surplus land, the Government having accorded approval thereto.

35. The only remaining portion of the argument bearing on this aspect of the case is that because the land was of an extent of 65 cents which is clearly a substantial area, the acquisition should be

viewed as if the said land alone had been subject of acquisition. This argument was put forward in answer to the argument on behalf of the respondent that out of 2 acres and 19 cents acquired for footpath and market a substantial portion thereof having been utilised for the said purpose, no argument of any invalidity can be pressed in respect of the disposal of the balance.

36. It appears to us that the basic assumptions made in both these arguments are insufficient to furnish support for anything like a principle of general application, because the extent of the land acquired, the extent of the land which remains surplus and the proportion which one may bear to the other are not the only circumstances, much less circumstances of decisive value for examining the question of the validity or otherwise of its user or disposal in the light of the purpose stated for original compulsory acquisition. Before one could entertain or express any opinion on the validity of disposal of surplus, further circumstances which have a direct bearing on the original acquisition of the land itself have to be considered. If, as we have already stated, upon facts the original acquisition is not open to the objection of lack of public purpose, then the manner in which the surplus land is dealt with cannot, in my opinion, have any effect on the validity of the acquisition nor can the purpose stated for acquisition have any relevance to the validity of the manner in which the surplus land has been dealt with. If the circumstances are such that the declaration of the public purpose in the notification under Section 6 itself may be looked upon with suspicion, it may be a case for investigation and decision whether the process of compulsory acquisition was not resorted to as a cloak for an unlawful purpose.

37. The question therefore, has to be dealt with as one of fact in all the circumstances of each case and not one which can be disposed of on a general principle of law. Upon facts in this case, we have found that there was no infirmity attaching to the original compulsory acquisition and no mala fides or abuse of power sufficient to invalidate the sales in favour of defendant 3.

38. This is sufficient to dispose of the argument addressed on behalf of the appellant.

39. We will only notice one further argument addressed on behalf of the respondents though not raised in the trial Court. It is pointed out that under Section 33 of the Coorg Municipal Regulation, no suit can be instituted against a committee or any of its officers etc. in respect of anything done or purporting to have been done under the Regulation until after the expiry of two months

next after the notice in writing stating the cause of action and other particulars mentioned in sub-section (1) thereof, and that sub-section (2) expressly states:

"Every such suit shall be dismissed unless it is instituted within six months from the date of the accrual of the alleged cause of action and service of such notice, as aforesaid is admitted or proved."

40-41. The argument is that because the question is purely one of law and the facts necessary to decide it are admitted or clearly appear on record, the suit must be dismissed even at appellate stage because what is provided in sub-section (2) is mandatory direction to the Court to dismiss the suit in the circumstances stated therein.

42. As, however, this question has not been examined, especially the question whether the present suit is of a nature which can be said to come directly within the scope of Section 33, it is unnecessary to express any opinion thereon.

43. Our findings on the merits of the case are a better reason for confirming the trial Court's decree dismissing the suit.

44. The appeal is dismissed with costs.

Appeal dismissed.

AIR 1970 MYSORE 191 (V 57 C 48)
K. R. GOPIVALLABHA IYENGAR AND
M. SADANANDASWAMY, JJ.

K. Eranna and others, Petitioners v. Commissioner for Hindu Religious and Charitable Endowments, Bangalore and others, Respondents.

Writ Petns. Nos. 4785 and 6542 of 1969, D/- 20-2-1970.

(A) Constitution of India, Art. 26 — Religious denomination — Hindus including all sections of Hindus constitute a religious denomination within the meaning of the Article.

Hindus, in the larger sense, including all sections of Hindus constitute a religious denomination within the meaning of Art. 26. AIR 1959 Orissa 5, Rel. on.

(Para 6)

While appreciating the significance of the word "religious denomination" the Court should take a common sense view and be guided by considerations of practical necessity. It is not necessary to consider the exact connotation of the term "religion." "Hinduism" in ordinary parlance is understood as representing a religion. It is a religious denomination of a large magnitude. It is, because, certain religious denomination like Hinduism, Christianity or Islam are large and consist of sub-divisions that Art. 26 refers

to a section of such denomination.

(Para 6)

(B) Madras Hindu Religious and Charitable Endowments Act (19 of 1951), Sections 39 and 41 — Appointment of trustees in respect of Public Hindu Temples under — Area committee has no power of, as Ss. 39 and 41 are invalid as violative of Art. 26 of the Constitution.

The Area Committee has no power to appoint trustees in exercise of its power under Section 41 read with Section 39 in respect of Public Hindu Temples as Sections 39 and 41 which vest such power in Area Committee are invalid as violative of Art. 26 of the Constitution. AIR 1960 Mys. 18, Rel. on.

(Para 8)

It cannot be said that in view of the provisions of Sections 9 and 22 of the Act, as the right to administer the property of the temples in question are not taken away from the religious denomination, viz. Hindus in such case, Art. 26 is not attracted.

(Para 8)

The sections other than Sections 39 and 41 clearly indicate that the Government has reserved to itself absolute powers to administer the properties of the institutions. The religious denomination is not left with any power. Trustees appointed under the Act would virtually be servants of the State through whom the State will exercise its own power of management and control. The provisions of Sections 9 and 22 of the Act which prescribe that the officers and trustees of the religious institutions shall be persons professing the Hindu Religion do not affect the absolute character of the powers vested in the Government. These provisions do not save the right of the religious denomination to administer the property of the temples.

(Para 8)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 1501 (V 51) =

1964-7 SCR 32, Raja Bira Kishore Deb v. State of Orissa 7

(1960) AIR 1960 Mys 18 (V 47), K. Mukundaraya Shenoy v. State of Mysore 4, 5, 8

(1959) AIR 1959 Orissa 5 (V 46) =

ILR (1958) Cut 369, Ram Chandra Deb v. State of Orissa 7

(1954) AIR 1954 SC 282 (V 41) =

1954 SCR 1005, Commr. Hindu Religious Endowments, Madras v. Lakshmindra Thirtha Swarniar 8

(1954) AIR 1954 SC 383 (V 41) =

1954 SCR 1055, Ratilal Panachand Gandhi v. State of Bombay 6, 8

W. P. 4785/69:—

C. S. Kothavale, Advocate for the Petitioner; K. S. Puttaswamy, H. C. Govt. Pleader for Respondents 1 to 4 and M. R. Achar for Respondents 5 to 9.

W. P. 6542/69:—

S. C. Bhat, Advocate, for Petitioners; K. S. Puttaswamy, for Respondents 1

and 2 and M. R. Achar, for Respondents 8 to 7.

ORDER:— As common questions arise for consideration in these two writ petitions, they are heard together and a common order is passed.

2. The petitioner in Writ Petition No. 4785 of 1969 has been the trustee of three temples, viz., Mallikarjuna Swamy Temple, Anjaneya Temple and Somalapura Anjaneya Swamy temple, situate at Malapanagudi village in Hospet Taluk, Bellary District. He is also a devotee of the temples. It is alleged that prior to his being appointed as a trustee, his father was the trustee of the above-said institutions, and on his resignation, the petitioner was appointed as a trustee for the aforesaid institutions in November 1960. The Area Committee of Bellary passed a resolution on 30-5-1969, appointing respondents Nos. 5 to 9 as trustees of the above said temples. The petitioner being aggrieved by the aforesaid resolution, filed a revision petition before the first respondent under S. 18 of the Madras Religious and Charitable Endowments Act, 1951. The first respondent passed orders on 21-8-1969 dismissing the petitioner's revision petition. The petitioner, therefore, has filed this writ petition praying that the resolution bearing No.142/ADC/68-69, passed by the Area Committee, Bellary, on 30-5-1969, and the Order dated 21-8-1969 passed by the first respondent be quashed.

3. Petitioners in W. P. No. 6542 of 1969 are also devotees of the temples in question. The first petitioner is a hereditary Pujari of Mallikarjuna Swamy Temple. They are also aggrieved by the resolution made by the Area Committee on 30-5-1969, appointing respondents 3 to 7, who are respondents 5 to 9 in the connected writ petition, as trustees for a period of five years. The petitioners being aggrieved by the aforesaid resolution, have filed the writ petition for a declaration that the resolution dated 30-5-1969 passed by the Area Committee, is illegal, null and void; and respondents 3 to 7 are not legally constituted Trustees of the temples in question.

4. From the true copy of the resolution of the Area Committee, it is seen that the appointment of the trustees is made in exercise of its powers under Section 41 read with Section 39 of the Madras Hindu Religious and Charitable Endowments Act, 1951 (hereinafter called the Act). It is contended by the petitioners that the Area Committee, was not competent to pass the abovesaid resolution, in view of the fact that Sections 39 and 41 of the Act have been struck down as being invalid by this Court in its decision reported in AIR 1960 Mys 18

K. Mukundaraya Shenoy v. State of Mysore.

5. The respondents contend that the decision above referred to does not apply to the temples in question. They state that "the temples in question are public Hindu Temples. All Hindus are entitled to worship in the said temples. The decision cited by the petitioners applies to sectional or denominational temples. Art. 26 of the Constitution is wholly inapplicable to the present temples. Therefore, it is not correct to state that under Section 41 read with Section 39 of the Act the Area Committee has no power to appoint trustees in respect of Public Hindu Temples" In the decision reported in AIR 1960 Mys 18 K. Mukundaraya Shenoy's case, the question relating to the validity of Sections 39 & 41 was raised in connection with the temples founded, owned and administered by a community called Gowd Saraswath Brahmin Community of Kaup Peta. This Court considered that the said community constituted a religious denomination which had the right to administer the property of the temples in accordance with law. The Court proceeded on the basis that under the scheme of management the denomination was exercising powers of control and management by appointing trustees of its own choice. In other words, the denomination was exercising its power of control, management and supervision over these institutions through their own representatives elected for that purpose. On an examination of the provisions of the Act, it was observed as hereunder:

"..... trustees can no longer be elected by the denomination but are to be appointed by the Commissioner or the Area Committee as the case may be, then the denomination ceases altogether to have any control over the management of the institutions in question. This being the position, it can rightly be contended that the Act in question by virtue of these sections has completely taken away the right of administration from the hands of the religious denomination and has vested it in another authorities and as such violated the right guaranteed under Art. 26 of the Constitution.

Trustees appointed under the Act would virtually be servants of the State through whom the State will exercise its own power of management and control. Even the existing trustees who had been appointed by the denominations would have to function as trustees under the Act. In other words, they will be deemed to have been appointed by the authorities concerned and would be liable to be removed and dismissed by the said authorities."

They came to the conclusion that Sections 39 and 41 are ultra vires the Con-

tute as a whole and other circumstances which will naturally vary from case to case, a duty to make a judicial approach may be inferred. As section 17 does not make provision for hearing the holder of the license, the principle of natural justice was not violated.

We are unable to subscribe to the aforesaid view. The principle of natural justice has now been given a wide connotation in (1969) 1 S. C. A. 605 = (AIR 1970 SC 150) A. K. Kraipak v. Union of India. At page 614 their Lordships observed thus:

"The aim of the rules of natural justice is to secure justice, or, to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words, they do not supplant the law of the land but supplement it. The concept of natural justice, has undergone a great deal of change in recent years. In the past it was thought that it included just two rules, namely (1) no one shall be a judge of his own case and (2) no decision shall be given against a party without affording him a reasonable hearing. Very soon thereafter, a third rule was envisaged and that is, that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently, it was the opinion of the courts that unless the authority concerned was required, by the law under which it functioned, to act judicially, there was no room for the application of the principles of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcated administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far-reaching effect than a decision in a quasi-judicial enquiry."

The aforesaid dictum widens the vista of the concept of natural justice.

13. As the right of the petitioner to hold the license is clearly affected by the order of cancellation, the petitioner is entitled to a hearing by the original revoking authority and a reasonable opportunity of defending this right. Section 17, doubtless, makes no provision for hearing the party. It is exactly here

that the principle of natural justice would be invoked to supplement the law.

14. That the principle of natural justice should be followed in revoking the license is also apparent from the provision for appeal. Under Section 18 (5) no appeal can be disposed of unless the appellant has been given a reasonable opportunity of being heard. The right of appeal would be wholly illusory and hush if the delinquent had no opportunity of placing materials before the revoking authority on the strength of which the order appealed against could be assailed. Otherwise, if the original revoking authority is careful enough to pass a reasoned order in support of his subjective satisfaction, the right of appeal has no value.

15. Though the statute makes no specific provision for a right of hearing at the initial stage the same could be legitimately inferred from the provision in appeal.

This view gets full support from AIR 1957 Mad 692, (Ponnambalam v. Saraswati); AIR 1966 All 265, (Jai Narain Rai v. District Magistrate, Azamgarh); AIR 1967 Mys 238, (Nanappa v. Divisional Commr. Bangalore Division). We respectfully differ from the view expressed in AIR 1969 Assam and Nagaland 50 (FB) and some other decisions like AIR 1954 Raj 264, Kishore Singh v. State of Rajasthan and AIR 1960 Madh Pra 157, Moti Miyan v. Commr. Indore Division on which the Assam case is based.

16. On the aforesaid analysis, we hold that the two impugned orders are without jurisdiction inasmuch as the petitioner was given no reasonable opportunity of being heard and of placing materials in support of his case and challenging the materials placed by the Police. We quash the two orders and direct that the petitioner's gun be restored to him with a proper license.

17. In the result the application is allowed. The impugned orders are quashed by issuing a writ of certiorari. A writ of mandamus be issued commanding opposite party No. 1 to restore the gun to the petitioner with a valid license, as soon as the petitioner applies for license. In the circumstances there will be no order as to costs.

18. R. N. MISRA, J.:— I agree.
Petition allowed.

AIR 1970 ORISSA 113 (V 57 C 40)

G. K. MISRA, C. J. AND

R. N. MISRA, J.

Sisir Kumar Mohanty, Petitioner v. State of Orissa and another, Opposite Parties.

O. J. C. No. 351 of 1968, D/- 24-9-1968.

LM/AN/G28/69/GDR/M

Industrial Disputes Act (1947), Section 25-FFF — Closure of an undertaking — Statutory dissolution of Khadi Board under Section 4 (2), proviso of Orissa Khadi and Village Industries Board Act (3 of 1956) is covered under Section 25-FFF — Clerk of a Board whose service is terminated on dissolution of Khadi Board is entitled for compensation — He must work out his remedies under Industrial Disputes Act — Writ under Article 226 not maintainable.

Section 25-FFF of the Industrial Disputes Act 1947 covers cases of closure of an Industrial undertaking for any reason. A statutory closure or dissolution is covered also under Section 25-FFF. The Khadi Board constituted under the Orissa Khadi and Village Industries Board Act, 1956, is an industry and is governed by the provisions of the Industrial Disputes Act. The statutory dissolution prescribed under the proviso to Section 4 (2) of the Khadi Board Act is also covered by Section 25-FFF of the Industrial Disputes Act, 1947. Consequently, where on dissolution of the Board the service of a person who was appointed as a clerk in the Board is terminated, he is entitled to certain compensation under Section 25-FFF of the Industrial Disputes Act. He must, however, work out his remedies, under the provisions of the said statute. It is difficult to go into the matter in a writ application and examine and compute the advantages to which he becomes entitled.

(Paras 6, 7 and 8)

R. Mohanty, for Petitioner; Advocate General, for Opposite Parties.

R. N. MISRA, J.:— This is an application under Article 226 of the Constitution of India by a person who had been appointed as a clerk on 30-1-52 under the Orissa Khadi and Village Industries Board. Under Orissa Act 3 of 1956 (the Orissa Khadi and Village Industries Board Act, 1956) (hereinafter referred to as the Act) with effect from 15-6-56 the Orissa Khadi and Village Industries Board was constituted. It was dissolved on 12-3-68, and on the following day the Director of Industries was put in charge of the affairs of the said Board. The petitioner's service was terminated by a notice dated 1-5-68 with effect from 15-6-68. The petitioner challenges his termination of service and along with it questions the action of the State Government in dissolving the Board.

2. Before discussing the points raised by Mr. Mohanty for the petitioner, it is necessary to make some reference to the provisions of the Act in order to appreciate his contentions. The relevant sections, with which the disposal of this writ application is concerned, are Sec-

tions 3, 4 and 15. For convenience the said sections are extracted:—

"3. (1) The State Government with effect from such date as they may by notification appoint in this behalf, shall establish for the purposes of this Act a Board to be called the Orissa Khadi and Village Industries Board.

(2) The Board established under subsection (1) shall be a body corporate incorporated by its name with perpetual succession and common seal and may sue and be sued in its corporate name and shall be competent to acquire and hold and dispose of property both movable and immovable and to contract and do all things necessary for the purposes of this Act.

4. (1) The Board established under Section 3 shall consist of fifteen members both official and non-official, including the President and Secretary to be nominated by the State Government:

Provided that—

(a) the President of the Board shall be a non-official person nominated by the State Government;

(b) the Secretary shall be an officer of the State Government nominated as such;

(c) not more than one-third of the total number shall be official members of the Board.

(2) The President, Secretary and other members of the Board shall hold office for such period as the State Government may, by general or special order, direct:

Provided that if at any time the State Government on being satisfied that the Board constituted under this Act is not functioning properly or is incompetent to discharge its functions, decide that it shall be dissolved, they may lay such proposal before the Orissa Legislative Assembly and on such proposal being accepted by a resolution of the Assembly, the Board shall stand dissolved on and from the date on which such resolution is passed.

(3) No member of the Board shall receive or be paid from the Fund of the Board any salary or other remuneration for services rendered by him in any capacity, whatsoever but shall be allowed travelling allowance as prescribed:

Provided that the President may receive such monthly allowance as may be prescribed.

15. On the Board ceasing to exist by dissolution under the proviso to subsection (2) of Section 4—

(i) all funds and other properties vested in the Board shall vest in the State Government; and

(ii) All liabilities, legally subsisting and enforceable against the Board shall be enforceable against the State Government to the extent of the funds and properties vested in the State Government under Cl. (i)".

3. On an analysis of Sections 3 and 4 it would be clear that Section 3 concerns itself with the incorporation of the Board and once the Board is incorporated the law of Corporation seems to have been applied and perpetual succession and common seal are provided for. Section 4 concerns itself with the constitution of a particular Board and provides that 15 members, both official and non-official, including the President and the Secretary all of whom are to be nominated by the State Government will constitute the Board. There is clearly distinction between incorporation of the Board and its constitution. The proviso to Section 4 (2) provides the machinery for dissolving the Board, and it is stated that once the State Government on being satisfied that the Board does not function properly or is incompetent to discharge its functions lays a proposal before the Orissa Legislative Assembly and the said proposal is accepted by a resolution of that Assembly, the Board stands dissolved. Mr. Mohanty's contentions with reference to these two sections are as follows:—

(1) Section 3 provides for a corporeal status for the Board once it is incorporated. The scheme of Section 3 clearly indicates that permanency is attached to the Board once it is incorporated.

(2) Section 4 deals with the constitution of the Board from time to time and while the body incorporated is a permanent one the Board at any particular time which consists of 15 members to be nominated by the State Government is available to change.

(3) The dissolution contemplated under the proviso to Section 4 (2) is of the Board which is constituted under Sec. 4 and the process embodied in the said proviso does not have the effect of disincorporation of the Board, but only dissolution of the Board which is constituted under Section 4. To clarify his submission on this point Mr. Mohanty contends that once the resolution of the Assembly accepts the proposal of the Government, the particular Board with 15 members stands dissolved and the scheme of the Act requires the State Government to nominate a new Board in the manner indicated in Section 4 (1) of the Act.

4. With reference to Section 15. Mr. Mohanty's contention is that it contemplates a temporary arrangement between the termini of two points of time i.e., the dissolution of the Board under the proviso to Section 4 (2) and the constitution of the new Board under Section 4 (1). According to him, once the Board is reconstituted the properties revert in the Board. The learned Advocate General, appearing for the opposite parties, contends that the effect of the

proviso to Section 4 (2) is disincorporation and in the absence of any particular statutory provision to reconstitute the properties when a Board is reconstituted, Section 15 has to be given full effect and when all these three sections are read together it is clear that with the dissolution, in terms of the proviso to Section 4 (2), there is an end to the Board. Besides these aspects Mr. Mohanty also contends that the State Government acted in an arbitrary and high-handed manner in placing their decision to dissolve the Board before the Legislature. As a matter of fact a committee had been appointed by the State Government to review the activities of the Board as early as 1967 and the Committee furnished its report on 8-3-68. But before the report was in the hands of the Government, the Government took their decision to dissolve the Board and placed the draft resolution before the Legislative Assembly on 6-3-68. Ultimately the resolution was passed by the Legislature on 12-3-68, but the report of the Committee, which went into the affairs of the Board at length, was never taken into account. On these facts Mr. Mohanty's contention is that the requirements of the proviso to Section 4 (2) have not been satisfied. He contends that there was no satisfaction reached by the State Government in the matter, particularly because the materials for satisfaction, if any, had not reached their hands and the Committee, as indicated above, had not reported by the time it is said that the State Government became satisfied.

5. While all these contentions were formulated by Mr. Mohanty, at the time of argument he indicated to us that he would confine his argument in this case mainly to one aspect, namely, that the Khadi Board is an 'Industry' and is governed by the provisions of the Industrial Disputes Act. On the aforesaid premises he next contended that the provisions of Section 25-FFF of the Industrial Disputes Act were attracted and the State Government as the successor of the Board who was the employer of the petitioner, was bound to make payment of the dues in terms of Section 25-FFF to the petitioner. He indicated to us that if this aspect of the matter is decided, he would reserve his other contentions to be raised in some other suitable proceeding, and since the petitioner is only a workman he is not interested to canvass the longer issues referred to above.

6. The learned Advocate General concedes before us that the Orissa Khadi and Village Industries Board is an 'Industry'. He, however, disputes the application of Section 25-FFF to the facts of this case and contends that statutory dissolution prescribed under the proviso to Sec. 4 (2)

of the Act is not covered by Sec. 25-FFF of the Industrial Disputes Act. Section 25-FFF provides,—

“(1) Where an undertaking is closed down for any reason whatsoever every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of sub-section (2), be entitled to notice and compensation in accordance with the provisions of Section 25-F, as if the workman had been retrenched provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer the compensation to be paid to the workman under Clause (b) of Section 25-F shall not exceed his average pay for three months.

Explanation—An undertaking which is closed down by reason merely of financial difficulties (including financial losses) or accumulation of undisposed of stocks shall not be deemed to have been closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this sub-section.

“X X X X X X X”
On a comparison of the provisions in Sections 25-FF and 25-FFF we are satisfied that closure of an undertaking for whatever reason is covered under Section 25-FFF. While Section 25-F deals with the case of retrenchment of a workman at the volition of the employer and Section 25-FF deals with retrenchment in certain exigencies, Section 25-FFF covers cases of closure of an Industrial undertaking for any reason. A statutory closure or dissolution is covered also under Section 25-FFF. On the admitted position that the Industrial Disputes Act applies to the Khadi Board and on our finding that the petitioner is entitled to the benefits of Section 25-FFF, the position emerges that the petitioner is entitled to certain compensation.

7. The next point for consideration is in what manner the said compensation has to be computed. The benefit prescribed under Section 25-FFF is a special one not under the general law but under the Statute. A machinery is provided under the Statute to work out such beneficial provisions. It is difficult to go into the matter in a writ application and examine and compute the advantages to which the petitioner becomes entitled. Once we find that the petitioner is entitled to compensation under the Industrial Disputes Act, he must work out his remedies under the said Statute.

8. We consider it proper to advert to the submissions of the learned Advocate General in this aspect of the matter

with reference to Section 15 of the Act. Therein it has been provided that ‘all liabilities, legally subsisting and enforceable against the Board shall be enforceable against the State Government to the extent of the funds and properties of the Board vested in the State Government. Therefore, after the Industrial Tribunal quantifies the compensation payable, if any, to the petitioner, the liability of the State Government would be limited to the extent of funds and properties belonging to the Khadi Board which came to be vested in the Government. That would be a matter which would arise for examination after the dues of the petitioner are computed in a suitable proceeding under the Industrial Disputes Act. We, therefore, hold that the petitioner is entitled to the advantages of Section 25-FFF of the Industrial Disputes Act and he must work out his remedies under the provisions of the said Statute. While leaving all the other questions open and on the aforesaid finding that the petitioner has his remedy under the Industrial Disputes Act, we do not propose to enter into the computation of the compensation and decline to make any further orders.

9. In the circumstances, the writ application fails and is dismissed, but without costs.

10. G. K. MISRA, C. J.:— I agree.
Petition dismissed.

AIR 1970 ORISSA 116 (V 57 C 41)

B. K. PATRA AND S. ACHARYA, JJ.

Koutuki Sabatani, Appellant v. Raghu Sethi, Respondent.

Second Appeal No. 392 of 1964, D/- 30-10-1969, from order of Addl. Sub-J., Behrampur, D/- 18-3-1964.

Limitation Act (1963), S. 12, Explanation — “Time requisite for obtaining copies” — Time taken for preparation of decree before application for copy is to be included.

The time taken by the Court for preparation of a decree before an application is made for copy thereof should be included in time requisite for obtaining copies for the purpose of filing an appeal against the judgment. AIR 1966 Pat 1 (FB) & (1967) 33 Cut LT 958 Foll.

(Para 9)

If the expression “shall not be excluded” does not mean “shall be included”, it is difficult to see how else the time taken by the Court to prepare a decree or order before an application for copy thereof is made is to be treated. In computing the time requisite for obtaining the copy, the Court cannot exclude the

period because the Statute says definitely that it shall not be excluded.

(Para 7)

The meaning to be given to an Explanation must depend upon its terms and no theory of its purpose can be entertained unless it has to be inferred from the language used. The Court cannot also assume a mistake in an Act of Parliament.

(Para 6)

Cases Referred: Chronological Paras
(1967) 33 Cut LT 958 = ILR (1966)

Cut 874, Ram Chandra Panda v.
K. Dandapani Dora 7

(1966) AIR 1966 Pat 1 (V. 53) =
ILR 45 Pat 393 (FB), State of
Bihar v. Md. Ismail 7

(1961) AIR 1961 SC 832 (V. 48) =
(1961) 2 SCR 918, Jagat Dhish

Bhargava v. Jawahar Lal Bhargava 6

(1936) AIR 1936 Pat 45 (V. 23) =
ILR 15 Pat 284, Gabriel Christian
v. Chandra Mohan 6, 8

R. C. Patnaik, for Appellant, H. G.
Panda, for Respondent.

PATRA, J. :— This is an appeal against a reversing judgment of the Additional Subordinate Judge, Behrampur dismissing the plaintiff-appellant's suit for declaration of title to the suit lands and for an order of injunction restraining defendant No. 1 from interfering with her possession thereof or, in the alternative, for recovery of possession of the lands.

2. According to the plaintiff-appellant, the suit lands are ryoti lands belonging to one Buchi Ram Das, the land-holder of village Dwargam where the lands are situated. Buchi Ram Das had gifted away these lands to the villagers of Dwargam free of rent and since after the grant, the villagers have acquired occupancy right therein. Some time afterwards Buchhi-ram sold his interest in Dwargam estate to defendant No. 27 Kontho Chowdhury. The latter demanded rent for the lands from the villagers and when they resisted, he started some cases against them and to meet the litigation expenses, the villagers had incurred a loan from the husband of the plaintiff. Ultimately the villagers succeeded in the suit and thereafter they sold the disputed lands to the plaintiff under a registered deed of sale dated 1-5-1957. Since then the plaintiff was in peaceful possession of the lands. Defendant No. 1 however claiming the suit lands as his washerman's service lands began to disturb the possession of the plaintiff over the same and ultimately instituted a proceeding under Section 145 Cr. P. C. against her on the ground that the lands belonged to him and were in his possession and that the same had been recorded in his name in the current settlement. It is in these circumstances that the plaintiff filed the suit giving rise to this appeal.

(2A) Defendant no. 1, who alone contested the suit, pleaded that the suit lands were granted to his ancestor by the ex-zamindar of Dwargam for rendering washerman's service and since then the lands are in the possession of his family. His ancestor and after him, defendant no. 1 had been in peaceful possession of the lands till 1960 when the plaintiff made an attempt to dispossess him. He, therefore, instituted a proceeding under Section 145 Cr. P. C. which was decided in his favour. He denied the plaint allegation that either the plaintiff or before her the villagers of Dwargam had ever been in possession of the suit lands.

3. The learned Munsif decreed the suit in favour of the plaintiff, but in appeal by defendant no. 1 the learned Addl. Subordinate Judge held that the plaintiff has failed to establish the title of her vendors in the suit property. He held on the other hand that defendant no. 1 has established that he has got occupancy right in the suit lands. He, therefore, allowed the appeal and dismissed the plaintiff's suit. Hence this second appeal.

4. A preliminary objection is taken by Mr. H. G. Panda, learned Advocate appearing for the respondent that this appeal having been filed beyond time is barred by Limitation. To appreciate this contention, it is necessary to refer to the following facts in chronological order:

Date of judgment appealed	18-3-1964
against	
Decree signed	1-4-1964
Copy application filed	24-4-1964
Folios called for	25-4-1964
Folios supplied	29-4-1964
Copy ready	13-5-1964
Appeal filed	13-7-1964

5. The contention of Mr. Panda is that a period of 17 days, being the time requisite for obtaining copies in this case, can be excluded in computing the period of limitation for appeal under Section 12 of the Indian Limitation Act 1963 (hereinafter referred to as the Act) and so excluded, the ninety days' period of limitation prescribed for filing the appeal expressed on 2nd July 1964. But as the Court was closed till 7th July, 1964, the appeal ought to have been filed on the 7th July, 64. But as the appeal was filed on the 13-7-64 it is barred by limitation by six days. It is, on the other hand, contended by Mr. Patnaik appearing for the appellant that over and above the period of 17 days referred to above the period from 18-3-1964 when the decree was actually prepared should be included in the period requisite for obtaining the copy of the decree and in that case the 90 days period of limitation would expire on 18-3-64. But as the appeal is filed on 13th, it is in time. In making the submissions, both the learned

Advocates have relied on Section 12 of the Act and particularly on the explanation which has been added in the new Act for the first time. It is therefore necessary to quote Section 12 of the Act.

"12. Exclusion of time in legal proceedings. — (1) In computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded.

(2) In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded.

(3) Where a decree or order is appealed from or sought to be revised or reviewed, or where an application is made for leave to appeal from a decree or order, the time requisite for obtaining a copy of the judgment on which the decree or order is founded shall also be excluded.

(4) In computing the period of limitation for an application to set aside an award the time requisite for obtaining a copy of the award shall be excluded.

Explanation.—In computing under this section the time requisite for obtaining a copy of a decree or an order, any time taken by the court to prepare the decree or order before an application for a copy thereof is made shall not be excluded."

6. Sub-sections (1) to (4) in the new Act do not materially differ from sub-sections (1) to (4) of the old Act excepting the fact that the old sub-sections did not make any provision for revision while such provision has been made in sub-sections (2) and (3) of the new Act. We are here concerned mainly with sub-section (2) of the new Act. Sub-section (2) as it appeared in the old Act may be quoted for comparison.

"Section 12(2).—In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded."

Where there is an interval of some days between the pronouncement of the judgment and signing of the decree, the question arose under the old Act whether such interval should or should not be excluded in computing the period of limitation for an appeal against the decree. On this point, there was a conflict of opinion between the High Courts, Patna, Calcutta and Bombay High Courts

taking the view that the entire period taken by the Court for preparing the decree after pronouncement of the judgment should be included in computing the time requisite for obtaining a copy of the decree irrespective of the fact that whether the application for such copy is made either before or after the decree is prepared; and some other High Courts like Nagpur taking the view that if an application for copy is not made before the decree is prepared by the Court, the period between the date of judgment and the date of preparation of the decree should not be taken as time requisite for obtaining a copy of the decree, and consequently, should not be excluded in computing the period of limitation. In Jagat Dhish Bhargava v. Jawahar Lal Bhargava, AIR 1961 SC 832 which was a case decided before the new Act came into force, the question arose what the time requisite for obtaining a copy of decree is under Section 12 (2) of the old Act when the decree was not drawn up immediately after the judgment. Shortly stated the facts in that case are that a suit was dismissed on 12-3-1954. On 24-3-1954, an application was made for certified copy of the judgment and decree passed in the suit. It is unnecessary to refer to certain events which took place thereafter. Suffice is to say that an appeal was filed accompanied only by a certified copy of the judgment because the decree had not been drawn up till then and hence no certified copy thereof was issued to the party concerned. The decree was prepared only in December, 1959 and the certified copy was supplied to the applicant on 23-12-1959 and was filed by him in Court that very day. Their Lordships held that as under Order 41, Rule 1 it is necessary that an appeal has to be accompanied by a copy of the decree appealed from and of the judgment on which it is founded, the appeal in that case must be deemed to have been validly filed on 23-12-1959 when the copy of the decree was filed in Court and this was nearly five and half years after the judgment was delivered. The question arose whether the appeal was in time. This was answered by their Lordships in paragraph 9 of the judgment.

"(9) The answer to the question as to whether the presentation of the appeal on December 23, 1959, is in time or not would depend upon the construction of Section 12, sub-section (2) of the Limitation Act. We have already noticed that the period prescribed for filing the present appeal is 90 days from the date of the decree. Section 12, sub-section (2), provides, inter alia, that in computing the period of limitation "the time requisite for obtaining a copy of the decree

shall be excluded." What then is the time which can be legitimately deemed to have been taken for obtaining the copy of the decree in the present case? Where a decree is not drawn up immediately or soon after a judgment is pronounced, two types of cases may arise. A litigant feeling aggrieved by the decision may apply for the certified copy of the judgment and decree before the decree is drawn up, or he may apply for the said decree after it is drawn up. In the former case, where the litigant, has done all that he could and has made a proper application for obtaining the necessary copies, the time requisite for obtaining the copies must necessarily include not only the time taken for the actual supply of the certified copy of the decree but also for the drawing up of the decree itself. In other words the time taken by the office or the Court in drawing up a decree after a litigant has applied for its certified copy on judgment being pronounced, would be treated as a part of the time taken for obtaining the certified copy of the said decree."

It therefore appears to us that the above view of the Supreme Court is not in consonance with the view taken by the Patna, Calcutta and Bombay High Courts that the entire period taken by the Court for preparing the decree after the pronouncement of the judgment should be included in computing the time requisite for obtaining the certified copy of the decree, but is in consonance with the contrary view that only the time which elapses between the date of application for a certified copy and the date when the decree is signed would be excluded. This is made further clear in paragraph 11 of the judgment where their Lordships say —

"The position, therefore, is that when the certified copy of the decree was filed by the respondents in the High Court on December 23, 1959, the whole of the period between the date of the application for the certified copy and the date when the decree was actually signed would have to be excluded under Section 12, sub-section (2)" of the old Act. (AIR 1961 SC 832).

It, therefore, follows from this that in computing the time requisite for obtaining a copy of the decree, only the period between the date of application for the certified copy and the date when the decree was signed was being included therein and the period between the date of the judgment and the date of application for certified copy of the decree was being excluded from such computation. It is against this back-ground that the new Limitation Act was enacted adding to Section 12 of Explanation. The Law Commission in its third Report on the

Limitation Act, 1908 expressed its view that the delay in the office in preparing the decree before an application for copy is made should not count in favour of the party and suggested that an Explanation should be added to Section 12 to make it clear. The Explanation suggested by them was this:—

"Any time taken by the Court to prepare the decree or order before an application for copy thereof is filed shall not be regarded as time requisite for obtaining the copy within the meaning of this Section."

The Explanation suggested by the Law Commission is in accordance with the view expressed by the Supreme Court in AIR 1961 SC 832, referred to above and goes contra to the other view reflected prominently in a case decided by seven learned Judges of the Patna High Court in *Gabriel Christian v. Chandra Mohan*, AIR 1936 Pat 45. But despite this suggestion of the Law Commission and the draft of the proposed Explanation suggested by them, the Explanation that has ultimately found its place in the Statute is something materially different. It is legitimate to argue that if the Legislature wanted to adopt the view expressed by the Law Commission on this subject and felt the necessity, as did the Law Commission, to add an Explanation to Section 12 to resolve the conflict which then existed between the different High Courts, nothing was easier for them than to adopt the Explanation the Law Commission had suggested. But it appears to us that the Explanation which was actually added to Section 12 of the Act means just contrary to the suggestion of the Law Commission. It is argued that as in the Statement of Objects and Reasons of the new Limitation Act the reason for adding the Explanation to Section 12 was to make it clear that any delay in the office or the Court in drawing up of a decree or order before the application for a copy thereof is made shall not be excluded, the Explanation actually added must be interpreted in such a manner that it would be in accord with the Statement of Objects and Reasons and that therefore the correct interpretation of the Explanation should be to exclude, in computing the time requisite for obtaining a copy of the decree, the interval that elapses between the date of judgment and the date on which the application is made. The meaning to be given to an Explanation must depend upon its terms and no theory of its purpose can be entertained unless it has to be inferred from the language used. We cannot also assume a mistake in an Act of Parliament. If we do so, we would render many Acts uncertain by putting different constructions on them according to our individual conjectures. The draftsman of the Act may have made

a mistake; if that be so, the remedy is for the Legislature to amend it.

7. After the new Act came into force, the interpretation of the Explanation newly added to Section 12 of the Act came up directly for consideration before a Full Bench of the Patna High Court in the State of Bihar v. Md. Ismail, AIR 1966 Pat 1 (FB). The question posed before the Full Bench was whether the time taken by the Court to prepare the decree, before application for copy thereof had been made, should be excluded in favour of the appellant as time requisite for obtaining a copy of the decree, or whether, the time should be excluded from consideration as time not requisite for obtaining a copy of the decree. Mahapatra, J. speaking for the majority favoured the first interpretation. The minority view expressed by U. N. Sinha, J. was in favour of the second interpretation, that is to say, the time taken by the Court to prepare the decree before application for copy thereof is made shall not be excluded in favour of the appellant as time requisite. His Lordship rejected the contention advanced on behalf of the State that the Explanation should mean that the time taken by the Court to prepare the decree before application for copy thereof is made "shall be included" as the time requisite, as the Explanation states that it shall not be excluded, because in his Lordship's view Section 12 is not concerned with any "inclusion" of time at all, but is concerned with "exclusion" of time and therefore it is not possible to interpret the Explanation by holding that the expression "shall not be excluded" means "shall be included" as time requisite for obtaining the copy of the decree. With great respect to the learned Judge, we are unable to accept this reasoning. If the expression "shall not be excluded" does not mean "shall be included," we fail to see how else the time taken by the Court to prepare a decree or order before an application for copy thereof is made is to be treated. In computing the time requisite for obtaining the copy, we cannot exclude the period because the Statute says definitely that it shall not be excluded. If we are to follow the above reasoning of the learned Judge, we cannot also include it in the time requisite. An interpretation which leads to such a situation cannot be accepted. The majority view which did not accept the interpretation of the learned Judge is stated by Mahapatra, J. at page 5 as follows:

"If we read 'shall be included' for 'shall not be excluded' in the explanation, there cannot be the slightest doubt that the thing in which the inclusion is meant is the time requisite for obtaining a copy. If the opening words of the explanation would have been 'In computing the period of Limitation' as it is in

sub-sections (1), (2) and (4), the meaning would have been certainly different. But the language was purposefully different and the whole explanation is about the computation of 'the time requisite for obtaining a copy of a decree or an order.' I cannot, therefore, see how learned Counsel can successfully contend, on the language of the explanation, that the period, preceding an application for a copy of a decree or an order, shall not be excluded from or shall be included in the period of limitation. The only meaning, in my view that flows from the explanation is that, for purposes of exclusion from the prescribed period of limitation while computing the extent of time requisite for obtaining a copy of the decree or an order appealed from, in all cases, the time taken by the Court to prepare the decree or order before the application for copy thereof is made, shall be taken as a part of the time requisite for obtaining the copy. Besides that, the period otherwise taken for supply of the copy shall also be included in 'the time requisite', and that will also be excluded in computing the period of limitation. Both on an analysis of the section and the explanation and on the construction of the sentence in the explanation, this conclusion is inescapable."

On a correct interpretation of the Explanation, as it stands, the majority view aforesaid, if we may say so with respect, appears to us to be the correct view. This is also the view expressed in Ram Chandra Panda v. K. Dandapani Dora, (1967) 33 Cut LT 958. G. K. Misra, J. (as he then was) relied on the aforesaid decision of the Patna High Court and held that on the plain language of the Explanation, it is clear that the entire time taken by the Court for the preparation of the decree shall be included within the time requisite for obtaining a copy of the decree.

8. The view that a litigant wishing to file an appeal against a decree should not be allowed to take advantage of a delay in office in preparing the decree before he himself has filed an application for a copy of the decree does not appear to be unreasonable. Take a case where the decree is prepared immediately after the judgment and the would-be appellant filed an application for copies a fortnight later. This interval of a fortnight before he files an application for copy is counted against him in computing the period of limitation for appeal and the time taken after such application in furnishing to him the copy of the decree is counted in his favour. The reason is that after he does his duty in applying for the copy, he is not responsible for any delay thereafter in supplying the copy to him. What happens in the office before

he files an application is not his concern. This is the view which the Law Commission had taken and which found expression in the Explanation to Section 12 as suggested by them. But having regard to the wording of the Explanation which ultimately found its place in the Statute book, it must be assumed that the Legislature deliberately inserted a beneficial provision in favour of the litigants thereby giving a statutory recognition to the view expressed in the Full Bench decision of the Patna High Court in Gabriel Christian's case, AIR 1936 Pat 45 that the words "time requisite for obtaining a certified copy of the decree appealed from" in Section 12 of the Act mean the time which would have been necessary in any case for obtaining a copy of the decree appealed from.

9. We are, therefore, of opinion that the period between 18-3-1964 and 1-4-1964 should be included in the time requisite for obtaining the copy of the decree and, so included, the appeal is in time and is not barred by limitation.

10. Turning now to the merits of the appeal, the plaintiff-appellant claims her title to the suit property on the basis of the sale deed, Ext. 1 executed in her favour by defendants 3 to 26. The finding of the trial Court that exhibit 1 is genuine was not assailed before the learned Additional Subordinate Judge but its validity was disputed on the ground that the plaintiff has failed to establish that her vendors had title to the property. The learned Subordinate Judge, after an elaborate consideration of the evidence has held that the plaintiff has failed to establish her vendors' title. Nothing has been brought to our notice to show that the finding of the learned appellate Judge on this point is incorrect. We, therefore, find that although the appellant succeeds on the question of limitation, she has no case on merits.

11. In the result, this appeal fails and is dismissed with costs.

12. ACHARYA, J. :— I agree.
Appeal dismissed.

AIR 1970 ORISSA 121 (V 57 C 42)

B. K. PATRA AND S. ACHARYA JJ.

District Transport Manager, State Transport, Petitioner v. Satrugghana Guru and another. Opposite Party.

Civil Revn. No. 252 of 1965 and O. J. C. No. 742 of 1969 D/- 7-10-1969, against order of Sub-divisional Magistrate, Sambalpur, D/- 20-7-1965.

(A) Civil P. C. (1908), S. 115 — Court Subordinate to High Court — Authority

AN/AN/A144/70/MLD/M

appointed under Section 15 of Payment of Wages Act is not Court subordinate to High Court — Authority not subject to revisional jurisdiction of High Court. AIR 1946 Lah 316 & AIR 1951 Pat 140, Dissented from; AIR 1950 All 80 (FB) & AIR 1950 Nag 14 & AIR 1954 Bom 537 & AIR 1949 Bom 188 & AIR 1964 Pun 242 & AIR 1958 Ori 123, Relied on. (Para 5)

(B) Payment of Wages Act (1936), Ss. 15 (1) and S. 2 (vi) (b) — S. 15 (1) — Jurisdiction of Authority under—Amount due to an employee of State Transport Company in respect of work done by him on days of rest and public holidays — Amount due falls within definition of Wages under the Act — Authority has jurisdiction to decide the claim by the employee for the amount due.

Authority under S. 15 (1) has jurisdiction to decide claim of an employee of State Transport Company for extra wages in respect of work done by him on days of rest and public holidays as by virtue of Section 25 of Motor Transport Workers Act, the provisions of the Wages Act are applicable to motor transport workers. (Para 9)

It cannot be said that the jurisdiction of the Authority is limited only to decide claims arising out of deductions from the wages or delay in payment of wages and this necessarily postulates that the quantum of wages to be paid must be undisputed and the moment the claim for wages is disputed, it would not be a case either of deduction from wages or delay in payment of wages to give jurisdiction to the Authority to determine the matter. That the Authority has power not only to decide cases of deduction from wages or delay in payment of wages but also matters incidental to such claims will be clear from S. 15 (1) as amended by Act 53 of 1964 which inserted the words "including all matters incidental to such claims" in sub-section (1) of Section 15 of the Act after the words "of persons employed or paid in that area". Although the position is clarified after amendment, it will not be correct to say that before the amendment, the Authority had no jurisdiction to consider matters incidental to claims on the ground of deduction from wages or delay in payment of wages, and that the scope of enquiry under Section 15 has been enlarged by the amendment made in 1964. (Para 6)

Moreover the amount due to that employee towards over-time wages will fall within the definition of "Wages" under the Wages Act. While paying wages to the employee for the period of his work when this portion of the wages had not been paid to him it will be a clear case of deduction from wages bringing the case within the purview of Section 15 (1). (Para 9)

Cases Referred: Chronological Paras

- (1970) AIR 1970 Orissa 76 (V 57) = Civil
 Revn. No. 26 of 1966, D/- 12-8-1969
 Rameshwar Lal v. Jogendra Das 4, 5
 (1964) AIR 1964 Punj 242 (V 51) =
 ILR (1963) 2 Punj 623, Divnl. Supdt.
 Delhi Divn. Northern Rly. v.
 Satyander Nath Kapur Chand 5
 (1961) AIR 1961 SC 970 (V 48) =
 63 Bom LR 497, Ambika Mills v.
 S. B. Bhatt 8
 (1958) AIR 1958 Orissa 123 (V 45) =
 24 Cut LT 272, Labangalata Del
 v. Sk. Azizullah 5
 (1954) AIR 1954 Bom 537 (V 41) =
 ILR (1954) Bom 1389, Sitaram Ram-
 charan v. H. N. Nagrashna 5
 (1951) AIR 1951 Pat 140 (V 38) =
 ILR 30 Pat 896, A. Hasan v. Mohd.
 Shamsuddin 5
 (1950) AIR 1950 All 80 (V 37) =
 1950 All LJ 200 (FB), H. C. D.
 Mathur v. E. I. Railway 5
 (1950) AIR 1950 Nag 14 (V 37) =
 ILR (1949) Nag 905, Sawatram
 Ramprasad Mills Co. Ltd. v.
 Vishnu Pandurang Hingnekar 5
 (1949) AIR 1949 Bom 188 (V 36) =
 ILR (1948) Bom 863, Manager,
 Spring Mills Ltd. v. G. D. Ambekar 5

- (1946) AIR 1948 Lah 318 (V 33) =
 ILR (1947) Lah 1, Works Manager,
 Carriage & Wagon Shops Mahal-
 pura v. K. G. Hashmat 5

Standing Counsel, for Petitioner (in both appeals), Y. S. N. Murthy (Amicus Curiae), for Opposite Parties (in both appeals).

PATRA, J. :— Opposite party Satrughana Sahu, who is a driver of the State Transport Service, Sambalpur filed an application under Section 15(2) of the Payment of Wages Act (hereinafter referred to as the Wages Act) through the General Secretary of the All Orissa Transport Employees Union, Sambalpur for realisation of Rs. 15,601.30 p. towards his dues on account of his claim for extra wages in respect of the work done on days of rest and public holidays amounting to Rs. 1418-30 and compensation of ten times the claim amounting to Rs. 14,183-00, thus making the total of Rs. 15,601-30 p. The period for which the claim was made was from the 1st August, 1958 up to the 30th June, 1962. The petitioner opposed the application inter alia on the grounds that the opposite party driver being a Government servant is not entitled to claim extra wages for the work done on public holidays and weekly rest days, that he is governed by the provisions of the Orissa Service Code and other rules framed by the Government of Orissa and that the provisions of the Wages Act are not applicable to him. It was also contended that the claim is

not correct and is not maintainable in law and is also barred by limitation prescribed in the first proviso to sub-section (2) of Section 15 of the Wages Act. It was lastly contended that as the claim does not arise out of deduction from wages or delay in payment of the same, the provisions of the Wages Act are not applicable to him.

2. The matter was enquired into by the Authority appointed under Section 15 of the Wages Act and he held that the claim up to 10-2-1962 is barred by time as that portion of the claim relates to a period which is beyond six months from the date of presentation of the application and that the claim for the period beginning from 11-2-1962 upto 30-6-1962 is in time. Regarding the merits of the claim he relied on Sections 19, 20, 25 and 26 of the Motor Transport Workers Act, 1961 (hereinafter referred to as the Workers Act) which was enforced in this State with effect from 1-2-1962 and held that the opposite party was entitled to a day of rest for every period of seven days or in lieu thereof compensatory rest days as provided in the Workers Act and after consideration of the duty chart (Ext. A) which shows the days on which the opposite party had worked, he came to the conclusion that the opposite party had worked on 9 weekly rest days for which he is entitled to extra wages. As there was no dispute that the daily wage of the opposite party was Rs. 3-60 p. per day he found him entitled to a total amount of Rs. 32-40 p. towards extra wages. He also allowed him a like amount towards compensation and ultimately passed an order allowing the claim to the extent of Rs. 64.80 p.

3. Being aggrieved by this order, the petitioner filed Civil Revision No. 252 of 1965 in this Court, praying that the order passed by the authority should be set aside. A preliminary objection was taken on behalf of the opposite party that an Authority appointed under Section 15 (1) of the Wages Act is not a Court and much less a Court subordinate to the High Court and that therefore the High Court has no jurisdiction to revise an order passed by such Authority. During the hearing on this preliminary point, the petitioner filed an application under Articles 226 and 227 of the Constitution stating that the order passed by the Authority is without jurisdiction and should therefore be quashed. This application is numbered as OJC No. 742 of 1969, Civil Revision 252/65 and O. J. C. No. 742/69 were analogously heard and this order would govern both.

4. In Rameshwar Lal v. Jogendra Das, Civil Revn. No. 26 of 1966 decided by us on 12-8-1969 = (AIR 1970 Orissa 76) the question arose whether a revision lies against an order passed by the District

Judge under Section 17 of the Wages Act 1936 and while answering the question in the affirmative we had occasion to refer to cases which involve the question whether revision lies against an order passed by the Authority under Section 15 of the Wages Act. Under Section 115 of the Code of Civil Procedure, the High Court has undoubted jurisdiction to revise under circumstances mentioned therein of orders passed by courts subordinate to the High Court. Unless, therefore, the Authority pronouncing the order is a Court and also subordinate to the High Court, Section 115 of the Code of Civil Procedure would not apply.

5. Mr. Mohapatra appearing for the petitioner relies on a Full Bench decision of the Lahore High Court in Works Manager, Carriage & Wagon Shops, Mahalpura v. K. G. Hashmat, AIR 1946 Lah 316 wherein their Lordships laid down the tests to determine whether a Tribunal is a Court or not and those tests are whether it exercise jurisdiction by reason of the sanction of law or whether jurisdiction is given to it by the voluntary submission of the parties to a dispute, secondly whether it can take cognizance of a lis and thirdly whether in exercising its functions it proceeds in a judicial manner. Having laid down the tests, their Lordships proceeded to observe that the provisions of the Payment of Wages Act, 1936, and the Rules make it perfectly obvious that the 'Authority' under S. 15 of the Payment of Wages Act performs the delegated judicial functions of the State and in exercising its functions it proceeds in a judicial manner and hence the Authority appointed under Section 15 of the Wages Act must be regarded as a Civil Court and Court subordinate to the High Court within the purview of Section 115 C. P. C. A Division Bench of the Patna High Court in A. Hasan v. Mohammad Shamsuddin, AIR 1951 Pat 140 took the same view and held that a review of the provisions of the Payment of Wages Act very clearly establishes that the Authority under Section 15 of the Wages Act acts as a Court. He is bound to decide judicially the matter in dispute before him and has to give his decision after hearing the parties and on materials produced before him, according to certain definite and specified rules of procedure laid down under the Wages Act as also supplemented by Statutory rules framed thereunder for his guidance, and his decision is subject to appeal to the District Court binding on the parties. It was therefore held that it is a Civil Court subordinate to the High Court and revision lies against his orders under Section 115 C. P. C. The Full Bench decision of the Lahore High Court referred to above was considered by a Full Bench of the Allahabad High Court in H. C. D. Mathur

v. E. I. Rly., AIR 1950 All 80 and was disapproved. The reasons which impelled their Lordships to hold that the Authority under Section 15 of the Wages Act is not a Court are set out by us in Rameswar Lal's case, Civil Revn. No. 26 of 1966, DJ- 12-8-1969 = (AIR 1970 Orissa 76) referred to above and it is unnecessary to repeat the same. It would suffice to say that their Lordships held that the Authority invested with jurisdiction under Section 15 of the Wages Act is not a Court subordinate to the High Court within the meaning of Section 115 C. P. C. Dissenting from the Full Bench decision of the Lahore High Court, a Division Bench of the Nagpur High Court in Sawatram Ramprasad Mills Co. Ltd. v. Vishnu Pandurang Hingnekar, AIR 1950 Nag 14 held that the Authority appointed under Section 15 of the Wages Act is not a Civil Court but an Administrative Tribunal and as such is not subject to the revisional jurisdiction of the High Court exercisable under Section 115 of the Code of Civil Procedure. A Division Bench of the Bombay High Court in Sitaram Ramcharan v. M. N. Nagrashna, AIR 1954 Nag 537 held the same view following an earlier decision of that Court in AIR 1949 Bombay 188, Manager, Spring Mills Ltd. v. G. D. Ambekar. The same view was reiterated by another Division Bench of the Punjab High Court in Divisional Superintendent, Delhi Division Northern Rly. v. Satyander Nath Kapur Chand, AIR 1964 Punj. 242 and by Barman, C. J. of this Court in Laban-galata Dei v. Sk. Azizullah, AIR 1958 Orissa 123. The preponderance of the authority therefore is in favour of the view that the Authority under S. 15 of the Wages Act is not a Court subordinate to the High Court and therefore an order passed by him is not revisable by the High Court under Section 115 C.P.C. Civil Revision 252 of 1965 must therefore be dismissed as not maintainable.

6. The next question is whether in exercise of our power under Article 227 of the Constitution we should interfere with the impugned order passed by the Authority under Section 15 of the Wages Act. Mr. D. P. Mohapatra for the petitioner contends that we should do so because according to him the order is one passed without jurisdiction. According to him the jurisdiction of the Authority is limited only to decide claims arising out of deductions from the wages or delay in payment of wages and this necessarily postulates that the quantum of wages to be paid must be undisputed and the moment the claim for wages is disputed, it would not be a case either of deduction from wages or delay in payment of wages to give jurisdiction to the Authority to determine the matter. It

may be stated here that Section 15 (1) of the Wages Act was amended by Act 53 of 1964 which inserted the words "including all matters incidental to such claims" in sub-section (1) of Section 15 of the Act after the words "of persons employed or paid in that area". It is contended that as the claim in this case relates to a period anterior to the aforesaid amendment, this case should be decided on the basis of S. 15 (1) as it stood before the amendment. We are not prepared to subscribe to the view that by the amendment referred to above and that the scope of enquiry under Section 15 of the Wages Act has been enlarged. In fact, the amendment was necessitated only to give effect to judicial pronouncements which held that Section 15 (1) in its unamended form gave power to the Authority not only to decide cases of deduction from wages or delay in payment of wages but also matters incidental to such claims. In *Ambika Mills v. S. B. Bhatt* (1960) 63 Bom. LR 497 decided by the Supreme Court the question arose whether the employees were workers of the Mills. A standardisation award covering the mill industry in Ahmedabad was made by the Industrial Tribunal on April 21, 1948. It fixed the wages for different categories of workers in the textile mills at Ahmedabad, leaving the question of clerks open. The case of hand-folders amongst the categories came up for consideration and it was argued that the wages awarded were too low, as they did the same work as cut-lookers in Bombay where they were paid higher wages. Sufficient evidence however was not forthcoming regarding the actual work done by the hand-folders. The Industrial Tribunal had said "At the same time, we desire to make it clear that if there are persons who are doing cut-looking as well as folding, they should be paid the rate earned by the cut-lookers in Bombay." The employees claimed that they were doing the work of cut-looking and were entitled to the benefit of that direction. The Authority considered the duties of the employees and allowed claim. Before the Supreme Court, the question of jurisdiction was raised. Mr. Justice Gajendragadkar speaking for the Court observed that in a sense the jurisdiction of the Authority was limited by Section 15 and in another sense it was exclusive as prescribed by Section 22 and that while deciding the question of wages or delayed wages, the Authority would inevitably have to decide all questions incidental to the said matters. Considering the definition of wages in its unamended form. His Lordship said at page 502 (of Bom. LR) = (at p. 975 of AIR).

"... Now, if a claim is made by an employee on the ground of alleged illegal

deduction or alleged delay in payment of wages several relevant facts would fall to be considered. Is the applicant an employee of the opponent?; ... If the said fact is admitted, then the next question would be: what are the terms of employment? Is there any contract of employment in writing or is the contract oral? ... In some cases a question may arise whether the contract which was subsisting at one time had ceased to subsist and the relationship of employer and employee had come to an end at the relevant period. In regard to an illegal deduction a question may arise whether the lockout declared by the employer is legal or illegal. In regard to contracts of service sometimes parties may be at variance and may set up rival contracts, and in such a case, it may be necessary to enquire which contract was in existence at the relevant time ...". Applying the principles formulated to the question at hand, the learned Judge said at page 503 (of Bom. LR) = (at p. 975 of AIR).

"... In our opinion, on these facts, the question as to whether a particular employee is an operative falling under the Award or one who is above an operative and below the clerk falling under cl. 5 is a question which is so intimately and integrally connected with the problem of wages as defined under S. 2 (vi) that it would be unreasonable to exclude the decision of such a question from the jurisdiction of the Authority under Section 15."

It is thereafter that the Legislature thought fit to amend the provisions of the Wages Act by adding the last words in sub-sec. (1) of section 15. This in effect brought the section in line with the judgment of the Supreme Court. Although the position is clarified after amendment, it would not be in our opinion correct to say that before the amendment, the Authority had no jurisdiction to consider matters incidental to claims on the ground of deduction from wages or delay in payment of wages.

7. In the present case, the opposite party approached the Authority under the Wages Act with an application under Section 15 (2) of the Act complaining that over-time wages which were due to him had not been paid. To the application was appended a schedule giving particulars of the claim. All that was contended on behalf of the petitioner in reply to the claim is that the opposite party being a Government servant is not entitled to claim extra wages for the work done on public holidays and weekly rest days, that, therefore, the provisions of the Wages Act are not applicable to the facts of the case and that the amount claimed is also incorrect. It was also contended that as the establishment where

he is working is not a factory, the provisions of the Wages Act are not applicable. The Workers Act came into force in this State on 1-2-1962. We are in this case concerned with a claim relating to the period from 11-2-1962 to 30-6-1962, that is the period during which the Workers Act was in force in this State. Section 25 of this Act provides that the Payment of Wages Act, 1936, as in force for the time being, shall apply to motor transport workers engaged in a motor transport undertaking as it applies to wages payable in an industrial establishment as if the said Act had been extended to the payment of wages of such motor transport workers by a notification of the State Government under sub-s. (5) of Section 1 thereof, and as the motor transport undertaking were an industrial establishment within the meaning of the said Act. Sections 19 and 20 of the Workers Act which are relevant for our purpose may be quoted:

"19. (1) The State Government may, by notification in the official Gazette, make rules providing for a day of rest in every period of seven days, which shall be allowed to all motor transport workers.

(2) Notwithstanding anything contained in sub-section (1) an employer may, in order to prevent any dislocation of a motor transport service, require a motor transport worker to work on any day of rest which is not a holiday so, however, that the motor transport worker does not work for more than ten days consecutively without a holiday for a whole day intervening.

(3) Nothing contained in sub-section (1) shall apply to any motor transport worker whose total period of employment including any day spent on leave is less than six days.

20. Where, as a result of any exemption granted to an employer under the provisions of this Act from the operation of section 19, a Motor transport worker is deprived of any of the days of rest to which he is entitled under that section, the motor transport worker shall be allowed within the month in which the days of rest are due to him or within two months immediately following that month, compensatory days of rest of equal number to the days of rest so lost."

8. By sub-section (4) of Section 1, the Act is made applicable to every motor transport undertaking employing five or more motor transport workers. In fact, it is not disputed before us on behalf of the petitioner that the opposite party is entitled to the benefits of the provisions of this Act. It is clear from S. 19 thereof that the opposite party is entitled to a day of rest in every period of seven days. A combined reading of Sec-

tions 19 and 20 show that where, subject to the limits set therein a motor transport worker is required to work on a day of rest he is entitled to be compensated in the manner laid down in Section 20. Section 27 provides for payment of extra wages for over-time work and for work on any day of rest. Relying on these provisions and after taking into consideration Ext. A which is a copy of the duty chart relating to the opposite party, and which appears to have been supplied to him on behalf of the petitioner, the learned Authority held that a sum of Rupees 32-40 p. is due to him towards the extra wages and adding thereto compensation of like amount he passed the impugned order allowing the opposite party's claim to the extent of Rs. 64-80 p. No evidence has been produced by the petitioner before the Authority to indicate that the claim is incorrect. In fact, as stated above, the overtime wages due to the opposite party have been calculated on the basis of materials supplied by the petitioner himself. We are therefore satisfied that on merits, the order passed by the Authority cannot be assailed.

9. The only question therefore that remains for consideration is whether this is an order passed by the Authority without jurisdiction. The expression "wages" is defined in Section 2 (vi) of the Wages Act thus:

"2. (vi) "Wages" means all remuneration (whether by way of salary, allowances or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and include—

xx xx xx
(b) any remuneration to which the person employed is entitled in respect of over-time work or holidays or any leave period."

The amount which the Payment of Wages Authority has found due to the opposite party towards over-time wages would thus fall within the definition of "wages" under the Wages Act. While paying wages to the opposite party for the period of his work when this portion of the wages had not been paid to him it would be a clear case of deduction from wages bringing the case within the purview of Section 15 (1) of the Wages Act and by reason of Section 25 of the Workers Act the Authority under Section 15 of the Wages Act would have jurisdiction to decide the claim. We are therefore of the view that the impugned order is not one passed without jurisdiction so as to warrant interference under Article 227 of the Constitution.

10. Before closing we would like to record our appreciation of the assistance

rendered by Mr. Y. S. N. Murty, who appeared amicus curiae for the opposite party.

11. In the result, both the applications fail and are dismissed.

12. ACHARYA, J.: I agree.

Order accordingly.

AIR 1970 ORISSA 126 (V 57 C 43)

G. K. MISRA, C. J. AND R. N. MISRA, J.

Saroj Kumar Ghosh, Petitioner v. Chairman, Orissa State Electricity Board, Opposite Party.

O. J. C. No. 687 of 1969, D/- 3-10-1969.

(A) Industrial Employment (Standing Order) Act (1946), S. 4 — Certification of standing order containing clause relating to superannuation — Clause not covered by Schedule of the Act nor by Model Standing Order — Certification is improper — Failure of employee to challenge such provision cannot add enforceability to it.

Where a Standing Order is certified by the certifying officer containing a clause relating to superannuation, not covered by the Schedule of the Act nor by the model Standing Order, such certification cannot be a valid certification under section 4 of the Act. The certification cannot add enforceability to it merely on the ground that the workers did not challenge such provision before the certifying officer. AIR 1960 SC 665, Rel. on.

(Para 11)

(B) Industrial Employment (Standing Orders) Act (1946), Ss. 2 (2), 3 (2), Schedule, Item 8 — Distinction between termination of employment and superannuation — Termination does not cover superannuation. AIR 1960 Mad 107, Dissented from.

The clause termination of employment in item 8 of the Schedule cannot be equated with the word superannuation. The dictionary meanings of the two also do not indicate that there is any similarity in the two processes. (Para 11)

Superannuation is an event which comes more or less in an automatic process. An age is fixed on the reaching of which the holder of an office is required to go out of office. There is no volition in the act. With the lapse of time the event automatically comes. Both the parties, that is, the employer and the employee have notice of the matter long before and it is an event which cannot be arrested by them if the rule is to be followed. On the other hand, termination is a positive act by which one party even against the desire of the other can bring about the end to an employment.

In these circumstances the two processes are essentially different and there is hardly any room to equate one with the other. AIR 1960 Mad 107, Dissented from. (Para 11)

Cases Referred: Chronological Paras
(1968) Civil Appeal 967 of 1966, D/- 29-11-1968 (SC), Management of Orissa State Electricity Board v. Workmen

(1966) AIR 1966 SC 1471 (V 53) =
(1966) 2 SCR 863, R. & H. Districts Electric Supply Co. Ltd. v. State of Uttar Pradesh

(1960) AIR 1960 SC 665 (V 47) =
(1960) 2 SCR 974, Associated Cement Co. Ltd. v. P. D. Vyas

(1960) AIR 1960 Mad 107 (V 47) =
1960-1 Lab LJ 187, Hindu v. Hindu Office and National Press Employees Union

R. C. Ram and N. N. Swain, for Petitioner; B. B. Rath and U. Nanda, for Opposite Party.

R. N. MISRA, J.: In this application under Articles 226 and 227 of the Constitution the petitioner before us is the General Secretary of the City Distribution Division, Electrical Worker's Union and the Cuttack Electric Supply Workers' Union.

2. The short point that arises for consideration in this case is as to whether the opposite party Board is entitled in law to call upon the workmen in the employment of the Cuttack Electric Supply Co. Ltd., whose services have now been taken over by the Orissa State Electricity Board, to retire from service on attaining the age of 55.

3. It is not disputed that the Cuttack Electric Supply Co. Ltd. which was being managed by the Managing Agency M/s. Octavus Steel Co. Ltd. was taken over by the State of Orissa and was placed under the Orissa State Electricity Board. The Company came before this Court in O. J. C. No. 31 of 1962 challenging the order of the State Government in taking over the undertaking and cancelling its licence. Ultimately the matter was settled on certain terms and the services of 135 workmen hitherto in the employment of the Company were taken over by the State Electricity Board. The Board issued fresh orders of appointment to the workmen and attempted to change the conditions of service. A dispute arose which led to tripartite agreement on 1-7-63 to which the State, the Electricity Board and the Union were parties. It was decided, inter alia, (1) that the workmen previously serving under the Company would be entitled to the same conditions of service as were applicable to them under the Board, and (2) that the Board would take urgent steps for drafting a set of standing orders and getting them

certified in accordance with law.

4. It is alleged that the opposite party Board committed violation of the terms of the agreement. Ultimately an industrial dispute was referred to the Tribunal in the following terms:

"Whether the workers of the Company which was purchased by the Board are entitled to continuity of service without any change in their conditions of service they were enjoying under the Company." The Tribunal, after a regular enquiry, came to hold.

"I conclude that the employees under the Company would have continuity of service while working under the Board without any change in their important conditions of service. But regarding other matters comparatively less important they would be governed by the Boards' Rules."

It is further contended by Mr. Ram for the petitioner that no rules have yet been framed by the Board in regard to less important conditions of service. The opposite party Board came before this Court mainly for expunction of the direction in the Tribunal's Award that the workmen should have continuity of service while working under the Board without any material change in their conditions of service. The said writ application was dismissed on 15-3-65. The matter was carried in appeal before the Supreme Court and their Lordships of the Supreme Court by their judgment in Civil Appeal No. 967 of 1966 D/- 29-11-1968 (SC) dismissed the same.

5. On 21-6-69, the Board superannuated some of the employees now working under the Board on the ground that they had reached the age of 55 and were, therefore liable to superannuate.

6. The challenge in the writ application is that the direction to the workmen to superannuate on the ground that they have reached the age of 55 is without authority of law and such a direction runs counter to the direction in the Award. In 1950, there were a set of standing orders of the Cuttack Electric Supply Co. Ltd. There was no provision for age of superannuation therein. The contention of Mr. Ram is that superannuation is one of the important conditions of service and the direction in the Award is that in respect of such conditions the company's workmen employed by the Board are to be governed by the terms of service in vogue under the Company, and, therefore, the Board, in the face of the direction in the Award and having lost its cause before the Courts, is not entitled to direct superannuation of these workmen. For the first time in the counter affidavit filed before us the Board took the plea in paragraph 7 of the counter affidavit in the following way:

"... The conditions of service of the employees of the Company prior to their coming over to the Board were governed by the certified standing orders, certified in respect of the Cuttack Electric Supply Co. Ltd. The aforesaid Standing Orders inter alia provided for retirement after serving for 30 years or on reaching the age of 55 years. The relevant clause of the standing Order reads as follows:

'32. An employee who has served 30 years or who has reached the age of 55 shall be retired.'

It is contended by Mr. Rath, appearing for the Board, that such a term of superannuation was already the condition of service in respect of the workmen under the Cuttack Electric Supply Co. Ltd., and as such even in terms of the Award the workmen under the defunct Company, while working under the Board, are bound by these terms. He, therefore, justifies the order of superannuation on this score.

7. The petitioner has contended that clause 32 as referred to above was a part of the Standing Orders which have never been in force. Mr. Ram contended before us that the Management of the Company carried an appeal before the learned District Judge of Cuttack against the order of the Certifying Officer under S. 5 (2) of the Industrial Employment (Standing Orders) Act of 1946 and the said appeal was ultimately dismissed for default. The appellate authority, that is, the District Judge of Cuttack did not comply with the requirements of Section 6 (2) of the said Act, and as such the said Standing Orders never came into force. Therefore, they were not existing conditions of employment of the employees of the Company at the time the opposite party Board took over their service. Mr. Ram next contends that the provision for superannuation could not be made in the Standing Orders, and, therefore, even if it is conceded that there was such a clause as referred to above and the Standing Orders had been in force, such a term was without the authority of law and the matter of superannuation could not be provided in the Standing Orders.

8. It is conceded before us by both parties that if it is ultimately found that the clause of superannuation could not be provided in the Standing Orders, then the petitioner is entitled to succeed and it cannot be held that the existing conditions of service in respect of the Company's workmen made provision for superannuation at the age of 55. In the circumstances we proceed to examine the correctness of the contention of Mr. Ram as to whether superannuation could be provided for in the Standing Orders. This will require a detailed examination of the scheme provided under the Industrial Employment (Standing Orders) Act, 1946.

The scheme of that Statute, as far as relevant for the present purpose, is found in Ss. 3 and 4 of the Schedule appended to the Act. For convenience, the said provisions are extracted hereunder:

"3. Submission of draft standing orders.

(1) Within six months from the date of which this Act becomes applicable to an industrial establishment, the employer shall submit to the Certifying Officer five copies of the draft standing orders proposed by him for adoption in his industrial establishment.

(2) Provision shall be made in such draft for every matter set out in the Schedule which may be applicable to the industrial establishment, and where model standing orders have been prescribed, shall be, so far as practicable, in conformity with such model.

xx xx xx

4. Conditions for certification of standing orders.—

Standing Orders shall be certifiable under this Act, if—

(a) provision is made therein for every matter set out in the Schedule which is applicable to the industrial establishment, and

(b) the standing orders are otherwise in conformity with the provisions of this Act;

and it shall be the function of the Certifying officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions of any standing orders.

The Schedule:

Matters to be provided in Standing Orders under this Act.

1. Classification of workmen, e.g., whether permanent, temporary apprentices, probationers, or badlis.

2. Manner of intimating to workmen periods and hours of work, holidays, pay-days and wage rates.

3. Shift working.

4. Attendance and late coming.

5. Conditions of procedure in applying for, and the authority which may grant, leave and holidays.

6. Requirement to enter premises by certain gates, and liability to search.

7. Closing and reopening of sections of the industrial establishment, and temporary stoppages of work and the rights and liabilities of the employer and workmen arising therefrom.

8. Termination of employment, and the notice thereof to be given by employer and workmen.

9. Suspension or dismissal for misconduct, and acts or omissions which constitute misconduct.

10. Means of redress for workmen against unfair treatment or wrongful exactions by the employer or his agents or servants.

11. Any other matter which may be prescribed."

9. None of the 11 items of the Schedule, as extracted above, covers the case of superannuation. Mr. Ram's contention, therefore, is that in respect of a matter which is not covered in the Schedule, there was no scope to provide for in the Standing Orders, and no provision could have been certified in the Standing Orders unless it was in conformity with the provisions of the Act. His contention is that clause 32 of the Standing Orders in question was not certifiable under the Act. Even if the workmen had not questioned the propriety of the said provision, since it was a case of jurisdiction it cannot be contended that in the absence of a dispute regarding the term, by the rule of acquiescence, the term regarding superannuation becomes enforceable.

10. Under Section 15 of the Act, authority has been conferred to provide for any other matter to be added to the 11 items already appearing in the Schedule so as to confer jurisdiction on the relevant bodies under the Act to make, certify and approve Standing Orders in respect of such matters. (Admittedly there has been no addition to the 11 items appearing in the Schedule in the State of Orissa). Mr. Rath for the Board contends that "termination of employment" really covers a case of superannuation. According to him, superannuation is a process of termination, and termination being a term of comprehensive import superannuation which is a class of termination must be taken to be included in it and, therefore, no provision has been separately made. In support of Mr. Rath's contention he has placed reliance on a decision in (1960) 1 Lab LJ 187 = (AIR 1960 Mad 107), *Hindu v. Hindu Office & National Press Employees Union* wherein a learned Single Judge of the Madras High Court has taken the view that termination would cover superannuation. We do not accept the contention of Mr. Rath as the reasonings in the said decision do not appeal to us.

11. Termination and superannuation cannot be equated. The dictionary meanings of the two also do not indicate that there is any similarity in the two processes. The meaning of 'superannuation' as in the dictionary is "to cause to retire from service on a pension, to pension off, to become too old for a pension, to reach an age at which one retires from an office", and the meaning of 'termination' is "cessation, closure, conclusion, the act of bringing a matter to an end". Superannuation seems to us to be an event which comes more or less in an automatic process. An age is fixed on the reaching of which the holder of an office is required to go out of office. There is

AIR 1970 PATNA 209 (V 57 C 33)

ANWAR AHMAD AND M. P.
VARMA, JJ.Bhadar Munda and another, Appellants
v. Dhuchua Oraon, Respondent.

A. F. O. D. No. 449 of 1964, D/- 18-4-1969, from decision of 2nd Addl. Judicial Commr. Chotanagpur, Ranchi, D/- 18-7-1964.

(A) Land Acquisition Act (1894), Ss. 18, 30 and 53 — Provisions of O. 22, Civil P. C. not applicable — The reference must be disposed of whether or not parties appear and adduce evidence. (Civil P. C. (1908), O. 22 and O. 1, R. 10)

A claim in a reference under S. 18. or S. 30 of the Land Acquisition Act does not get barred for failure to bring on record the Legal Representatives of a deceased claimant. The provisions under O. 22 of Civil P. C. do not apply to these proceedings notwithstanding S. 53 of the said Act which states that provisions of Civil P. C. shall apply to all proceedings under the Act. The application of O. 22 is inconsistent with the very nature and scope of the proceedings under Ss. 18 and 30. (Para 9)

Further, the court under O. 1, R. 10 has power to add a person as a party if it appears to the court to be just to do so; and particularly if the court finds that the presence of such person may be necessary in order to enable it effectively and completely to adjudicate upon and settle all questions involved in the case. Application of O. 1, R. 10 is not inconsistent to a reference under S. 30 of the Act. AIR 1967 Pat 243, Foll.

(B) Civil P. C. (1908), S. 96 — Trial Court's decision based solely on appreciation of title deeds and oral evidence as to possession — First appellate court can disturb the finding on reassessment of the evidence, documentary and oral — Plea that the appellate court did not have the advantage of observing the demeanour of witnesses rejected.

In a case where the trial Court's decision hinged on a clear appreciation of the title deeds of the parties and the evidence as to possession as given by the various witnesses and the court had nowhere noted about the demeanour of witnesses:

Held, that the appellate court in the first appeal which has got to consider and assess the value of the documentary and oral evidence as produced by the parties in the trial court, could disturb the finding on such reassessment. AIR 1950 PC 90, Ref. (Para 10)

(C) Evidence Act (1872), Ss. 91 and 79 — Original sale deed said to have been eaten away by white ants — Certified

copy of sale deed marked as exhibit in trial Court — No objection raised by the other side — Witness deposing as to the fact of sale — Question, held, could not be agitated as to the mode of proof in appeal. (Para 7)

Cases Referred: Chronological Paras (1967) AIR 1967 Pat 243 (V 54) =

ILR 46 Pat 580, Mt. Sakalbaso

Kuer v. Brijendra Singh 9

(1950) AIR 1950 PC 90 (V 37) =

77 Ind App 76, Bank of India

Ltd. v. Jamsetji A. H. Chinoy 9

A. K. Chatterjee, for Appellants; S. Sarwar Ali and Sultan Ahmad, for Respondent.

M. P. VARMA, J.: This appeal arises out of an award given by the Second Additional Judicial Commissioner of Chotanagpur at Ranchi in Land Acquisition Reference No. 300 of 1963, made to him under the provisions of Sec. 30 of the Land Acquisition Act.

2. The short facts of the case are as follows: In village Bhusur, Police-station Ranchi, the Government acquired 380.92 acres of lands for Hatia township. Declaration No. 714 dated the 20th January, 1960 was published in the Bihar Gazette (Extraordinary) of the 21st January, 1960. In the present case, we are concerned with only 1.82 acres comprised within plot no. 520 of khata no. 17 (Tanr II land). When the Collector made his award in this case and fixed the amount of compensation at Rs. 11,553.36 paise, two claimants appeared before him to claim the compensation money. The first party was Chapru Munda, who later on died and was substituted by his two grandsons Bhadar Munda and Jainath Munda, through their guardian Jisting Munda a brother of Chapru Munda, who are the appellants in this case; and second party was Dhuchua Oraon, who is the respondent here.

The case of Dhuchua Oraon was that he had purchased this plot from Lodo Munda by virtue of a registered sale deed dated the 4th January, 1943 and since that date he was coming in possession of this land, and he paid rent to the State of Bihar after his name was mutated. Before that, he used to pay rent of Rs. 1-8-0 to Lodo Munda who used to grant him receipts. According to him, Chapru Munda or his heirs had no concern with the land in question. It was, therefore, submitted on his behalf that he was entitled to receive the entire compensation money which was to be paid for this acquisition.

3. On behalf of Jisting Munda it was asserted that he had purchased the eastern half of this plot (O. 92 acre) from Lodo Munda under a registered sale deed dated the 8th April, 1942 and had paid Rs. 100/- as consideration for the same. Later on, his elder brother, Chapru Munda, purchased the remaining half

from the said Lodo Munda under a registered sale deed dated the 26th January, 1945. Therefore, both these brothers held the entire plot since the time of their purchase. Jisting Munda was all along in Government service at Patna Secretariat and, in his absence, Chapru Munda used to look after the affairs. He, therefore, claimed the entire compensation money.

4. Before the learned Additional Judicial Commissioner, both parties filed their deeds of title and six witnesses were examined on behalf of Jisting Munda and eight witnesses were examined on behalf of Dhuchuwa Oraon. The learned Additional Judicial Commissioner after a consideration of the evidence before him, came to the conclusion that Dhuchuwa Oraon was the competent person to receive the entire compensation money. Against this order, the present appeal has been filed.

5. Mr. A. K. Chatterjee, learned Counsel for the appellants, has argued that the learned Additional Judicial Commissioner had failed to take into consideration the various registered sale deeds which had been produced on behalf of the parties, and, therefore, he came to a wrong conclusion because of the non-consideration of those sale deeds. He further argued that it was not a proceeding under section 145 of the Code of Criminal Procedure that only the question of possession would be relevant. In the present case it has to be seen that there are three registered sale deeds, all executed by Lodo Munda on various dates.

The earliest document is Ext. 1/a dated the 8th April, 1942, by which Lodo transferred 0.92 acre of plot no. 520, along with another plot, to Jisting Munda for a sum of Rs. 100/-. So far as this plot is concerned, it was indicated in the sale deed that it was the half area towards the east. The second sale deed in point of time is Ext. B, dated the 4th January, 1943, by which Lodo transferred the entire area of this plot, namely, 1.84 acre, to Dhuchuwa Oraon for a sum of Rs. 73/- only. The third document in point of time is Ext. 1, dated the 26th January, 1945, executed by Lodo in favour of Chapru Munda in respect of the entire area of this plot, namely, 1.84 acre for a sum of Rs. 200/-. It is not the case of any party that any of these sale deeds was a sham transaction or was obtained by fraud, collusion or undue influence, so, taking these three documents at their face value it must be said that Jisting Munda was first in time to acquire half of this plot towards the east and then Dhuchuwa Oraon could purchase only the remaining half of this plot on the western side. He could not have any title to the entire plot, because before his purchase, half of the area had already passed to Jisting

Munda. Chapru, perhaps, did not know the earlier situation and he purchased the entire plot much later, that is, on the 26th January, 1945, under Ext. 1. So, prima facie, he would not be entitled to claim any share in this land which had already passed to the other two purchasers.

6. Mr. S. Sarwar Ali, appearing on behalf of the respondent, has laid great stress on the fact that the title deeds would not determine as to which party was in actual possession of this land, and so the case of each party should be decided with reference to the oral evidence which has been adduced in this case. The learned Additional Judicial Commissioner has summarised the evidence of all the witnesses who had been examined on behalf of both parties and he has given his own comments on their evidence. But when the entire evidence of the witnesses is perused and the same yardstick is applied, I do not think that either party has given a better type of evidence than the other.

A. W. 1 Bhaiya Ram Munda, who spoke about the possession of Chapru Munda, stated that Chapru used to pay rent of the land in dispute to Lodo, who himself paid the rent for the entire land to the landlord, but granted no receipt to Chapru. A. W. 3 Jisting Munda was, of course, the party claimant, and he stated that Chapru was his elder brother and lived joint with him. According to him, Chapru used to cultivate the entire land and paid rent to Lodo. This witness was working as a peon in the Patna Secretariat and had retired only a few months earlier. According to his evidence, the land was purchased by the joint family consisting of himself and Chapru Munda. So, the family unit would be represented by any member of the family. Jisting Munda nowhere claims to have interest only in half the land, apart from Chapru. So, if Jisting Munda or his heirs are not on the record to claim the compensation, I do not think that the claim of the descendants of Chapru would be jeopardised only because of the fact that the earliest sale deed stood in the name of Jisting Munda. It is a matter for the family of Jisting Munda and Chapru Munda to decide between themselves; and as against outsiders, all the members represent one unit of the joint family. He denied the suggestion that he was separate from Chapru. A. W. 5 Sukhnath Singh also spoke about Chapru's possession. Similarly, A. W. 6 Mahadeo Munda also supported the possession of Chapru for the last 20-22 years. All these witnesses denied the claim of Dhuchuwa Oraon so far as the possession over this land was concerned.

On the other hand O. P. W. 1 Dhuchuwa Oraon, of course, spoke about his own

acquisition and possession. It was suggested to him that Lodo wanted to sell some other land, but he (Dhuchuwu) collusively got the land in question mentioned in the sale deed. He probed the rent receipts Exts. A to A/10, which were also probed by O. P. W. 4, along with another receipt, Ext. A/11, who was a literate person. These rent receipts do not mention the year nor can they be easily connected with the land in question. They do not bear the thumb impression of Lodo, who is said to be illiterate. Moreover, it is a matter of common experience that printed pucca receipts are not granted by a tenant to another tenant, who is a transferee of some land from him. O. W. 2 Etwa Oraon has spoken about the possession of Dhuchuwu. Similarly, O. W. 3 Kalua Munda spoke about the possession of Dhuchuwu Oraon; but the boundaries of the land given by him do not tally with those given by O. W. 1 or O. W. 4 or O. W. 5 Mangal Oraon.

O. W. 6 Mangra Oraon, who is a friend of Dhuchuwu Oraon and who has sold his land to him (Dhuchuwu), admitted towards the end of his cross-examination that the dispute between Dhuchuwu and Chapru had been going on for the last 20 years or so regarding the land in dispute, and that Chapru forcibly cultivated the land in dispute about 20 years ago; and Dhuchuwu had filed a case, but had lost it. So this admission by a witness goes to weaken the case of possession as set up by Dhuchuwu Oraon. It is, therefore, clear from the above analysis of the evidence that neither party gave evidence of such a type which could be accepted at once as a good and reliable piece of evidence concerning possession. There is no case of burden of proof or onus in a dispute like this. Both the parties had to satisfy the Court as regards their title and possession in respect of the land in question. The expression "possession" is a legal term which would not show as to what sort of actual possession the party was exercising. No witness examined on behalf of either party has said that Dhuchuwu, Jisting or Chapru grew such and such crop on the land and harvested the same. In what manner the act of possession was exercised was not stated by any witness. One witness on each side has said that his party was in cultivating possession. So, on a consideration of the oral and documentary evidence available in this case, I think the right conclusion would be that Jisting Munda and his family could get half of the compensation because they had acquired half of the land earliest in point of time. Dhuchuwu Oraon should get the remaining half of the compensation money because he had acquired the remaining half of the land under his sale deed (Ext. B).

7. On behalf of the appellants, an objection was raised that the sale deed of Dhuchuwu Oraon (Ext. B) was not legally proved. The original sale deed was said to have been eaten away by white ants and only two bits of that sale deed were produced in court. Those two bits are already on the record, but they were not formally proved in the court below. In such circumstances, secondary evidence was admissible to prove this document. O. W. 7 Janak Narain looking at the certified copy of the sale deed, said that it was copied by Md. Razaque, an extra clerk in the Registration Office, whose handwriting he knew, and it was copied from the copy in the Registration Register which was in the pen of Baqar Ali. O. W. 8 Kasim Ali further stated that Chapru Munda (which is obviously a mistake for Lodo Munda) had executed a sale deed in favour of Dhuchuwu in his presence and the contents were the same as that of the certified copy. It was then marked as Ext. B. It is, however, to be noted from the list of documents admitted in evidence that when Ext. B was admitted into evidence, it was done so without objection. So, in my opinion, when once this document has been marked as an exhibit in the lower court without any objection from the other side, the same question cannot be successfully agitated so far as the mode of proof is concerned.

8. On behalf of the respondent, another argument was advanced that Jisting Munda or his sons were not claiming any interest in this land. Jisting Munda died during the pendency of the appeal in this court and thereafter his grandson, Ramrati Munda, was appointed as guardian of the minor appellants, Bhadar Munda and Jainath Munda. It is further apparent from the order-sheet of the lower court that Jisting Munda had also applied to be substituted in place of Chapru Munda, along with his two grandsons. By order dated the 3rd. July, 1964, the learned Additional Judicial Commissioner allowed only the names of the minor grandsons of Chapru to be substituted, and not of Jisting Munda. Thereafter, Jisting Munda prayed and his prayer was allowed to the effect that he was made guardian of these two minor appellants. As already observed, Jisting Munda has no interest adverse to the appellants and all of them constitute one joint family. So it does not matter if only one or two members of the family are on the record. The benefit will enure to the entire family consisting of both the branches of Chapru and Jisting.

9. Another argument which was advanced on behalf of the respondent was to the effect that the substitution of the appellants in place of Chapru Munda was

barred by limitation. This argument was based on the language of section 53 of the Land Acquisition Act, which lays down that the provisions of the Code of Civil Procedure shall apply to all proceedings before the court under the said Act. It is to be noted that this point was also raised in the court below and the court, below, after considering all the matters before it, allowed the substitution to be made. The date of knowledge about the proceeding is the 12th March, 1964 and the date of petition for substitution is the 12th June, 1964. Any way, the question of abatement does not arise in a proceeding like this.

In Sanjiva Row's Law of Land Acquisition and Compensation, revised and enlarged by J. P. Singhal, Fifth (1966) edition, at page 808, under item (k), it has been stated that "order XXII of the Code of Civil Procedure cannot be applied to proceedings under S. 18 of the Act Once a reference is made under S. 18, the court must make an award under Section 26, irrespective of whether the person, at whose instance the reference has been made, does or does not appear before the court, or fails to produce evidence in support of his objection. A reference proceeding cannot abate. The application of Order XXII of the Code is inconsistent with the very nature and scope of the proceeding under S. 18. If the person, at whose instance the reference is made, dies and no one comes forward to represent him, it is the duty of the Government to supply to the Court the names and addresses of the legal representatives of the deceased claimant to enable the court to issue fresh notice to them under S. 20".

Of course, these observations have been made in respect of a proceeding under Section 18 of that Act, but this proceeding is under Section 30. But even in the present proceeding the case of substitution was raised and decided by the lower court and the delay, if any, must be taken to have been condoned. In such circumstances, I do not think this point can be successfully urged on behalf of the respondent. Moreover, in the case of *Mt. Sakalbaso Kuer v. Brijendra Singh*, AIR 1967 Pat 243 it was observed that there was nothing inconsistent with the application of the provisions of Order I, Rule 10, of the Code of Civil Procedure in regard to a reference under Section 30 of the Land Acquisition Act, and that, in that view of the matter, the Court has power to add a person as a party if it appears to the court to be just to do so, and particularly if the Court finds that the presence of such a person may be necessary in order to enable it effectually and completely to adjudicate upon and settle all the questions involved in the case. In

that view of the matter also, this argument must be negated.

10. Mr. Sarwar Ali has further contended that the appellate court should be reluctant to reverse the finding of the trial court which had the advantage of marking the demeanour of the witnesses so as to appraise the value of their evidence. But in this case I do not find that the learned Additional Judicial Commissioner has noted about the demeanour of any witness. I may meet this point by simply referring to the observation of their Lordships of the Privy Council made in the case of *Bank of India Ltd. v. Jamsetji A. H. Chhoy*, AIR 1950 PC 90 to the effect that the appellate court would be reluctant to differ from the conclusion of the trial Judge if his conclusion is based on the impression made by a person in the witness box. If, however, the trial Judge based his finding and his opinion of the person on a theory derived from documents and a series of inferences and assumptions founded on a variety of facts and circumstances which, in themselves, offer no direct or positive support for the conclusion reached, the right of the appellate Court to review this inferential process cannot be denied. In the present case, there is not a single sentence in the judgment of the learned Additional Judicial Commissioner about the demeanour of any witness. The case hinged on a clear appreciation of the title deeds of the parties and the evidence of possession as given by the various witnesses. I have already given a summary at some earlier stage to show that the oral evidence of either party is not of superior type over the other. So this objection raised on behalf of the respondent must be left out of consideration, because the appellate Court in the first appeal has to consider and assess the value of the documentary as well as oral evidence as produced by the parties in the trial court.

11. In the result, this appeal succeeds in part. The award of the learned Additional Judicial Commissioner is modified to this extent that half of the compensation money would be paid to the appellants on behalf of the joint family, and the other half would be paid to Dhuchuwa Oraon. In the circumstances of the case, there will be no order as to costs.

12. ANWAR AHMAD, J.: I agree.

Appeal partly allowed.

AIR 1970 PATNA 212 (V 57 C 34)

U. N. SINHA, J.

Union of India as owner of the Eastern Railway Administration. Petitioner v. Kedar Prasad, Opposite Party.

Civil Revn. No. 1468 of 1968, D/- 16-5-1969, against order of Small Cause Court Judge (Sub. J.), Begusarai, D/- 31-8-1969.

LM/CN/G290/69/YPB/E.

Civil P. C. (1908), Ss. 80, 20(c) — Notice under S. 80 does not form cause of action — Place of sending notice does not give jurisdiction to Court of that place to entertain suit. AIR 1956 Assam 85, Dissented from; AIR 1953 Cal 235, held, impliedly overruled by AIR 1960 Cal 391.

(Para 3)

Cases Referred: Chronological Paras
(1960) AIR 1960 Cal 391 (V 47) =

64 Cal WN 502, Niranjan Agarwalla v. Union of India 3

(1956) AIR 1956 Assam 85 (V 43) =

ILR (1956) 8 Assam 51, Pratap Chandra Biswas v. Union of India 2, 3

(1953) AIR 1953 Cal 235 (V 40) =

90 Cal LJ 295, Raj Kumar Shaw v. Dominion of India 2, 3

(1952) AIR 1952 Cal 35 (V 39) =

56 Cal WN 83 (FB), Banshi v. Governor-General in India 3

(1950) ILR (1950) 2 Cal 551, Dunlop Rubber Co. (India) Ltd. v. Governor-General in Council 2, 3

(1949) AIR 1949 Cal 622 (V 36) =

84 Cal LJ 175, Dominion of India v. Jagadish Prasad Pannalal 2, 3

P. K. Bose, for Petitioner; Krishna Nandan Prasad Singh, for Opposite Party.

ORDER: This application has been filed under Section 25 of the Provincial Small Cause Courts Act by the defendant. It is directed against an order passed by the trial court, in Small Cause Court Suit No. 39/41 of 1967, dated the 31st August, 1968, holding that the court had jurisdiction to try the suit.

2. The relevant facts are as follows: The plaintiff-opposite party has filed the suit in question in the court of the Subordinate Judge, Begusarai, claiming compensation against the defendant for loss of goods by non-delivery to the plaintiff. It is alleged that certain goods had been booked from Varanasi for Monghyr. The plaintiff is said to have given notice under Section 80 of the Code of Civil Procedure to the defendant from Begusarai. The defendant objected to the jurisdiction of the Court at Begusarai to try the suit and the learned Judge has held that as giving of notice under Section 80 of the Code of Civil Procedure forms part of the cause of action, the suit is maintainable at Begusarai. The learned Judge has followed a decision of the Calcutta High Court in the case Raj Kumar Shaw v. Dominion of India, AIR 1953 Cal 235. The learned Judge has stated that this decision has been followed by the Assam High Court in the case of Pratap Chandra Biswas v. Union of India, AIR 1956 Assam 85. The learned Judge deciding Raj Kumar Shaw's case, AIR 1953 Cal 235 stated that he was bound to follow the decision of the Calcutta High Court in the case, Dunlop Rubber Co. (India) Ltd. v. Governor General

in Council, ILR (1950) 2 Cal 551 and the case, Dominion of India v. Jagdish Prasad Pannalal, 84 Cal LJ 175 = (AIR 1949 Cal 622).

3. Learned counsel for the petitioner has submitted that Dunlop Rubber Co.'s case, ILR (1950) 2 Cal 551 has been overruled by Division Bench of the Calcutta High Court in the case, Niranjan Agarwalla v. Union of India, AIR 1960 Cal 391. Learned counsel has further argued that the decision of the Dominion of India's case, 84 Cal LJ 175 = (AIR 1949 Cal 622) has been held to have been wrongly decided, in the case, Banshi v. Governor-General in India in AIR 1952 Cal 35 (FB) at p. 38. It may be mentioned that the decision reported in AIR 1952 Cal 35 (FB) has been mentioned in Raj Kumar Shaw's case, AIR 1953 Cal 235. From what has been stated above, it appears that the view taken in AIR 1953 Cal 235 must give way to the decision of the Division Bench of the Calcutta High Court in the case of AIR 1960 Cal 391. So far as the Assam High Court is concerned, the case AIR 1956 Assam 85 purported to follow the decision of the Calcutta High Court in Raj Kumar Shaw's case, AIR 1953 Cal 235. Therefore, the view expressed by the Division Bench in Niranjan Agarwalla's case, AIR 1960 Cal 391 should be followed in the instant case. It must, accordingly, be held that the court at Begusarai trying the suit has no jurisdiction to try it. The plaint must, therefore, be returned to the plaintiff for presentation to the proper Court. The civil revision is, therefore, allowed, but there will be no order for costs.

Revision allowed.

AIR 1970 PATNA 213 (V 57 C 35)

S. C. MISRA, C. J., AND
KANHAIYAJI, J.

Surya Vijoy Singh and another, Petitioners v. The State of Bihar and others, Respondents.

C. W. J. C. Nos. 206, 238 and 532 of 1968, D/- 7-4-1969.

Bihar Town Planning and Improvement Trust Act (35 of 1951), S. 32 — Power of State Government to set aside order or resolution passed by trust — Exercise of.

Though S. 32 under which the State Government has power to set aside any order or resolution passed by the trust does not expressly say that notice must be given to the party who is to be affected prejudicially by the order of the Government, it is well established as a matter of law that in such a case a notice is necessary to be given by the authority to

LM/CN/F551/69/YPB/P.

a person who is prejudicially affected by the order which is to be ultimately made. As a matter of necessary legal implication, the Government is bound to act in accordance with natural justice before exercising the statutory powers conferred by S. 32. The absence of a notice before passing such an order violates the principle of natural justice and makes the order ultra vires. AIR 1964 Pat 41, Rel. on.

(Para 9)

Cases Referred: Chronological Paras

- (1964) AIR 1964 Pat 41 (V 51)=
1964 BLJR 606, Ram Kripalu
Misra v. University of Bihar 9
(1963) 2 All ER 66 = 1964 AC 40,
Ridge v. Baldwin 9
(1960) AIR 1960 Pat 333 (V 47)=
1960 BLJR 282, Abdul Majid v.
State Transport Appellate
Authority 10

Messrs. Ranen Roy, Mahendra Prasad Pandey and Pralay Kumar Sinha, for Petitioners; Messrs. Basudeva Prasad, Narendra Prasad, and Ravinandan Sahay, Yadunath Saran Singh and K. P. Verma, for Respondents (in C.W.J.C. No. 206/68); Messrs. Basudeva Prasad, Narendra Prasad and Ravinandan Sahay, for Petitioner; Messrs. B. C. Ghosh, S. K. Chattopadhyaya, Yadunath Saran Singh and K. P. Verma, for Respondents (in C.W.J.C. Nos. 238 and 538/68).

KANHAIYAJI, J.:— All the three cases have been heard together, but I shall take up C.W.J.C. No. 206 of 1968 first. In this case, petitioner Shri S. V. Singh was appointed as a technical assistant of the Patna Improvement Trust, hereinafter referred to as 'the Trust', in the year 1955. He was promoted to the rank of the Assistant Trust Engineer on the 22nd February, 1956. Respondent No. 5, Shri R. K. Akhauri, was appointed Assistant Engineer in the Trust on the 22nd July, 1955. The seniority of the Assistant Engineers was determined by resolution Nos. 4 and 5 of 1957. Shri R. K. Akhauri was No. 4, whereas Shri S. V. Singh was placed as No. 7. A permanent post of Executive Engineer fell vacant with effect from the 1st April, 1958, against the vacancy caused by the resignation of Shri J. P. Das, Executive Engineer. In 1966, two permanent posts of Executive Engineers came to be filled up—one against the vacancy caused by the resignation of Shri J. P. Das, as said earlier, and the other with effect from the 10th January, 1966, as a result of the resignation of Shri S. R. Munipali, Executive Engineer.

2. In the year 1961, two divisions were created by the Trust Resolution No. 210/61, and the Government sanctioned the creation of these two divisions by their Memo No. 6501 dated the 9th August, 1962. These two posts were filled up by Shri R. K. Akhauri and Shri

S. V. Singh, who were temporarily appointed as Executive Engineers for a period of six months under the second proviso to Section 28 (c) of the Bihar Town Planning and Improvement Trust Act, 1951, hereinafter referred to as 'the Act'. The Public Service Commission was, in the meantime, accordingly moved through the Government for concurrence in their appointment as Executive Engineers. The concurrence of the Public Service Commission was received in the month of March, 1963. The Public Service Commission observed that concurrence in their appointment was without prejudice to the claim of Shri Ranjit Sinha. The Trust by its Resolution No. 198/64 dated the 27th September, 1964, regularised the appointment of these two officers:

"Resolved unanimously that the appointment of Shri R. K. Akhauri and Shri S. V. Singh as Executive Engineers with effect from the 1st October, 1961, be approved in accordance with the recommendation of the Public Service Commission, Bihar."

3. Meanwhile, Shri R. K. Akhauri sought employment under the Magadh University and he was relieved from the services of the Trust to join his new assignment on the 6th October, 1963. He was granted lien on his substantive post of the Assistant Trust Engineer.

4. Petitioner Shri S. V. Singh moved the Trust by letter dated the 17th March, 1966, for his substantive appointment as Executive Engineer with effect from the 1st October, 1961. Sarvashri R. K. Akhauri and Ranjit Sinha also made representations to the Trust for their appointment to the permanent posts of Executive Engineers caused by the resignations of Shri J. P. Das and Shri S. R. Munipali, Executive Engineers. The Trust by its Resolution No. 4-Spl. 66 considered the representations of the three officers and passed the following resolution:

"Resolved unanimously that Shri S. V. Singh be appointed on probation with effect from 1-10-61 against the permanent post of Executive Engineer caused by the resignation of Shri J. P. Das and further that he be confirmed on the said post with effect from the 1st October, 1963.

The question regarding filling up the vacancy of the permanent post of Executive Engineer caused by the resignation of Shri S. R. Munipali be taken up for consideration when both (Shri R. K. Akhauri and Shri R. Sinha) or either of them returns back to the Trust."

5. On the date the resolution was passed, the petitioner was the only Executive Engineer holding a temporary appointment in the Trust as Shri R. Sinha had gone out of India and Shri R. K.

Akhauri was in the employment of the Magadh University. Shri R. K. Akhauri, who was serving under the Magadh University holding a lien in the Trust, came back to the Trust and joined his service on the 28th February, 1967. Shri R. K. Akhauri filed a representation before the Government under Section 32 of the Act for the cancellation of the resolution of the Trust being No. 4-Spl. 66 appointing and confirming the petitioner in the permanent post of Executive Engineer. The Government treated the representation as an appeal and cancelled Resolution No. 4-Spl. 66, appointing and confirming the petitioner in the permanent post of Executive Engineer, under Section 32 of the Act. According to the order passed by the Government, the resolution of the Trust was in excess of the powers conferred by law.

6. The petitioner has obtained a rule from this Court calling upon the respondents to show cause as to why the order of the Government dated the 16th January, 1968, should not be quashed by the High Court by a writ in the nature of certiorari under Article 226 of the Constitution.

7. Cause has been shown by the Advocate-General and other counsel on behalf of the respondents to whom the notices of the rule were ordered to be given.

8. On behalf of the petitioner, learned counsel put forward the argument that the order passed by the Government under Section 32 of the Act was unconstitutional as there was violation of the principle of natural justice. Section 32 of the Act reads as follows:

"The State Government may set aside any resolution of the Trust or any order of the Chairman or of the Trust, if in the opinion of the State Government the resolution or order is in excess of the power conferred by law."

9. On behalf of the petitioner, great stress was laid on the fact that no notice was given to the petitioner either by the Trust or by the Government before the order was passed setting aside the resolution passed by the Trust. This position is admitted on behalf of the respondents and, in the affidavit filed on behalf of the State, it is conceded that no notice was given to the petitioner before the impugned order was made. It is true that Section 32 of the Act does not expressly say that notice must be given to the party who is to be affected prejudicially by the order of the Government, but it is well-established as a matter of law that in a case of this description, a notice is necessary to be given by the authority to a person who is prejudicially affected by the order which is to be ultimately made. As a matter of necessary legal implication, the Government is bound to act in

accordance with natural justice before exercising the statutory powers conferred by Section 32 of the Act. The principle is enunciated in *Ridge v. Baldwin* (1963) 2 All ER 66. A Division Bench of this Court in *Ram Kripalu Mishra v. University of Bihar*, AIR 1964 Pat 41, after considering a series of decisions of the English Courts on the point held that in a case of this description a notice was necessary. The absence of a notice before passing an order which prejudicially affected a party to the proceeding violates the principle of natural justice and makes the order ultra vires.

10. Mr. Basudeva Prasad, learned counsel appearing for respondent No. 5, on the other hand, raised the contention that the Government was competent to pass the order under Section 32 of the Act. He pointed out on the basis of the counter-affidavit filed on behalf of respondent No. 5 that the order passed by the Trust was illegal and prejudicial to the seniority of respondent No. 5. He urged that by virtue of the resolution the petitioner has obtained seniority over respondent No. 5 without consideration of the material fact that the seniority of respondent No. 5 had already been determined by the Trust. It was further argued that the writ of certiorari is not a writ of course. It is a discretionary remedy. The very object of this writ is to foster justice and right a wrong. Before a person can be entitled to invoke the prerogative power of the Court under Article 226 of the Constitution, it must be shown that the order to be set aside must have occasioned injustice to the party. In support of his contention, learned counsel relied on a decision of this Court in *Abdul Majid v. State Transport Appellate Authority*, AIR 1960 Pat 333 at p. 338. In this case, this Court held:

"The very object of this writ is to foster justice and right a wrong arising from the subordinate tribunals or bodies or officers acting wholly without jurisdiction or in excess or denial of it, or in violation of the principles of natural justice, and, therefore, where such wrong occurs, the Court intervenes and issues such prerogative writs, orders or directions, where the subordinate tribunals or bodies or officers act wholly without jurisdiction or in excess of it, or in violation of the principles of natural justice, or refuses to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record and such act or omission or error, or excess, has resulted in manifest injustice."

In that case, the impugned order did not work injustice to any party, rather it cured manifest illegality, and, therefore, the extraordinary jurisdiction of the Court was refused to be invoked. In my

opinion, the facts of that case are clearly distinguishable and not applicable to the facts of the present case.

11. Applying the principle of natural justice to the present case, it is manifest that the order of the Government dated the 16th January, 1958, which is Annexure '7' to the writ application, is ultra vires and it must be quashed by a writ in the nature of certiorari under Art. 226 of the Constitution. Accordingly, the application is allowed, but there will be no order as to cost.

C.W.J.C. No. 238 of 1968.

12. In this writ application, the petitioner, Shri Ranjit Sinha, has prayed for a declaration that the resolution passed by the Trust dated the 27th May, 1966, Annexure 6 of this petition, should be held illegal, ultra vires and of no effect and the Government order dated the 16th January, 1958, setting aside the above resolution be held as a valid order, and for the issue of a writ in the nature of mandamus restraining opposite party Nos. 1 and 2 giving effect to the impugned decisions and to make the appointment of the petitioner as Executive Engineer of the Trust from the 1st April, 1958.

13. Most of the material facts have already been given in C.W.J.C. No. 206 of 1968. The additional facts, which will be necessary for the decision of this application, are that the petitioner was appointed by the Trust in the design and planning section as Assistant Engineer on the 17th February, 1955, and he was third in the rank of the Assistant Engineers of the Trust. The seniority of the Assistant Engineers was fixed by the Trust by its resolution Nos. 4 and 5 of 1957. By virtue of these resolutions, the position of Shri Ranjit Sinha was fixed as the third, whereas that of Shri R. K. Akhauri was the fourth and of Shri S. V. Singh was the seventh (vide Annexure 'A' of the counter-affidavit in C.W.J.C. No. 206 of 1968). In 1957, the topmost two Assistant Engineers were promoted as Executive Engineers, and one Shri J. P. Das had been directly appointed as one of the Executive Engineers of the Trust. In March, 1958, Shri J. P. Das resigned and consequent upon his resignation a post of Executive Engineer fell vacant on the 1st of April, 1958.

14. The Trust, opposite party No. 1, decided to fill up the vacancy caused by the resignation of Shri J. P. Das, and a resolution in this connection was passed on the 30th April, 1958, as follows:

"Resolved unanimously that the recommendation of the Chief Engineer to promote Shri Ranjit Sinha, the Senior-most Assistant Trust Engineer to this post be accepted as required under Rule 23 of the Bihar Improvement Trust's Officers and Servants (Appointment, Classifica-

tion, Conduct, Control and Punishment) Rules, 1956. His name be forwarded to the Public Service Commission through the State Government together with all the particulars for concurrence to the proposed promotion.

Resolved further unanimously that as Shri Sinha has already been placed in charge of the Division with effect from 1st April, 1958 afternoon and is discharging his duties as such, he may be given a special duty allowance of Rs. 100.00 per month and car allowance of Rs. 100.00 per month with effect from the date till the question of his promotion to the post of Executive Engineer is finally decided and in case he is ultimately promoted to the post of the Executive Engineer, then he be given the pay and allowance of this post with effect from the date of his actual holding charge of the Division, i.e., the 1st April, 1958 (afternoon)."

15. It is material at this stage to quote Rule 23 of the Bihar Improvement Trust's Officers and Servants (Appointment, Classification, Conduct, Control and Punishment) Rules, 1956, hereinafter referred to as 'the Rules':

"When appointment to any of the posts referred to in Cls. (b) and (c) of Sec. 23 is to be made by nomination the following procedure shall be followed:

(i) The Chairman of the Trust shall forward to the Commission through the State Government the names of the candidates nominated for appointment by the Trust and along with the proposal for nomination the following information shall also be sent to the Commission by the Chairman of the Trust:—

(a) Academic and other qualifications and age of the candidate or candidates;

(b) Service Books of the candidates;

(c) Character Roll of the candidate or candidates; and

(d) A copy of the resolution of the Trust nominating such candidate or candidates for appointment.

(ii) The Commission shall after proper examination of the service records and other qualifications of the candidates either concur in the proposal of the Chairman or express its inability to do so for the specific reasons to be stated by it.

(iii) In no circumstances the candidate in whose appointment the Commission has not concurred shall be appointed by the Trust."

16. In pursuance of the aforesaid resolution, the Chairman of the Trust, opposite Party No. 2, sent his recommendation to the Public Service Commission (hereinafter to be referred to as the Commission) for concurrence, but the Commission disagreed to concur in the promotion of the petitioner, which will appear from Annexure '1'. On receipt of the aforesaid letter of the Commission, the Chairman of the Trust called for a fresh report from

the Chief Engineer about the petitioner's record of service, and the matter was again referred to the Commission seeking them to reconsider the case of the petitioner for concurrence. This time, the Commission desired that in order to enable them to reconsider the matter, a fresh resolution of the Trust was essential. In the circumstances, the matter was placed before the Board of the Trust (hereinafter referred to as 'the Board') again with a proposal that the Board may pass a suitable resolution. On the 11th February, 1963, the Board passed a resolution reiterating their previous decision taken in their previous resolution referring the case of the petitioner to the Commission for consideration and concurrence. On the 13th March, 1964, the Commission sent the recommendation to the Trust concurring in the promotion of the petitioner to the post of Executive Engineer with effect from the 1st January, 1962 (vide Annexure '3'). The Trust on the aforesaid recommendation by its resolution No. 224/64 dated the 31st October, 1964, approved the appointment of the petitioner as Executive Engineer with effect from the 1st January, 1962 (vide Annexure '2-1'). The petitioner made a representation to the Chairman of the Trust requesting that his appointment should be made effective from the 1st April, 1958, in accordance with the decision of the Board on the 30th April, 1958. The representation of the petitioner is contained in Annexure '5.'

17. The petitioner, while functioning as Executive Engineer of the Trust, secured leave for advanced training abroad, and on the 16th July, 1966, he went out of India. In the meantime, on the 27th May, 1966, the impugned resolution was passed appointing Shri S. V. Singh, petitioner of C. W. J. C. No. 206 of 1968 and opposite Party No. 3 of this petition, on probation with effect from the 1st October, 1961 against the permanent post of Executive Engineer caused by the resignation of Shri J. P. Das and further confirming him on the said post with effect from the 1st October, 1963.

18. The petitioner filed a writ application (C. W. J. C. No. 563 of 1967) for quashing the order of the Board and for mandamus for his appointment as Executive Engineer in the Trust with effect from the 1st April, 1958; but before the final hearing of the above mentioned case the petitioner came to know that the resolution (Annexure 6) had been set aside by the Government of Bihar. In view of the above mentioned Government order and the assurance given on behalf of the Trust that the petitioner's representation would be disposed of within three months, the said petition was withdrawn on the 20th March, 1968.

19. Thereafter, opposite party No. 3, Shri S. V. Singh filed a writ petition (C. W. J. C. No. 206 of 1968) challenging the validity of the above mentioned Government order which was admitted by this Court on the 27th March, 1968. Hence, the petitioner filed the present writ petition.

20. The contention on behalf of the petitioner is that the appointment of opposite party No. 3, Shri S. V. Singh, as Executive Engineer with effect from the 1st October, 1961, was illegal. The grounds given on behalf of the petitioner in support of the contention are that the appointment was not in pursuance of the recommendation of the Commission conveyed in the letter to the Government dated the 25th March, 1963 (vide Annexure '8'). In this letter, the Commission had observed that two officers in order of seniority were considered as suitable for promotion to the two temporary posts of Executive Engineers in the Trust and they were (1) Shri R. K. Akhauri and (2) Shri S. V. Singh. The above recommendation was without prejudice to the claim of Shri Ranjit Sinha. Further, the appointment had been made in clear violation of R. 23 of the Rules.

21. In the counter-affidavit filed on behalf of the Trust and its Chairman, it is stated that the Trust could not have made the appointment of the petitioner in spite of its own resolution in 1958 or at any time between 1958 and 1st January, 1962 as the Commission had refused to concur in the appointment of the petitioner prior to the 1st January, 1962, and the petitioner had taken leave without a lien on the substantive post of Assistant Engineer. In the counter-affidavit filed on behalf of opposite party No. 3, the stand taken by the Trust and its Chairman was supported. There are several other supplementary affidavits filed on behalf of the parties in respect of their respective claims and counter-claims.

22. The contention of Mr. Basudeva Prasad, appearing for the petitioner, is that the Trust by its resolution No. 4-SPL/66 dated the 27th May, 1966, by which Shri S. V. Singh was appointed on probation with effect from the 1st October, 1961 against the permanent post of Executive Engineer caused by the resignation of Sri J. P. Das and further confirming him on the said post with effect from the 1st October, 1963, has prejudiced the case of the petitioner by making him junior to Shri S. V. Singh. He has submitted that the petitioner had already been appointed Executive Engineer in the vacancy caused by the resignation of Shri J. P. Das and he had a lien on the post while going out of India. Mr. B. C. Ghosh, learned Counsel appearing for opposite party No. 3, Shri S. V. Singh, contended that as both Shri Ranjit Sinha and Shri R. K. Akhauri were

on leave without lien when the Trust passed the impugned resolution, the Trust acted bona fide and within its ambit.

23. Resolution No. 79/59 passed by the Board ordered that the petitioner be allowed to hold charge of the Division with effect from the 1st April, 1958, for which he was given a special duty allowance and car allowance till the question of his promotion was finally decided. The case of the petitioner was duly recommended to the Commission for concurrence as required under Rule 23 (ii) of the Rules. Though the Commission in the first instance refused to give concurrence, but subsequently on receipt of the letter from the Chairman, the matter was considered afresh and concurrence was given by the Commission for the appointment of the petitioner with effect from the 1st January, 1962. From the papers on the record, it appears that both Shri Ranjit Sinha and R. K. Akhauri had lien on their posts when they proceeded on leave and on deputation respectively. In this situation, resolution No. 4-SPL/66 passed by the Board on the 27th May, 1966, appointing Shri Singh on probation from the 1st October, 1961, against the permanent post of Executive Engineer caused by the resignation of Shri J. P. Das and confirming him on the said post with effect from the 1st October, 1963, is contrary to the provisions of the Act and the Rules. This resolution will surely affect the seniority of the petitioner and Shri R. K. Akhauri. In my opinion, the effect of the resolution would be to give seniority to Shri S. V. Singh over the petitioner and Shri R. K. Akhauri. It is noted in the resolution that the question of filling up the vacancy to the permanent post of Executive Engineer caused by the resignation of Shri S. R. Muni-pali would be taken up for consideration when both Shri R. K. Akhauri and R. Sinha or either of them returns back to the Trust. This clearly contemplates that on the appointment of the petitioner and Shri R. K. Akhauri when made, they would rank junior to Shri S. V. Singh.

24. Learned counsel appearing for the respondents has submitted that as a matter of fact there are two more vacancies in the permanent post of Executive Engineers in the Trust, and the Trust would very likely appoint the petitioner and Shri R. K. Akhauri to those very posts and thereafter the seniority of the officers will be determined by the Trust inter se. If this be the position, I feel no hesitation in quashing the resolution No. 4-SPL/66 dated the 27th May, 1966, contained in Annexure '6', with a direction to the Trust to consider the representations made by the petitioner and Shri R. K. Akhauri vis-a-vis Shri S. V. Singh, and after appointing them to the remaining posts of Executive Engineers, settle their seniority at an early date. The Trust will also consider the

claim of the petitioner as to whether the petitioner will take appointment from the 1st April, 1958, or from the 1st January, 1962, as concurred by the Commission.

25. As a result, the application is allowed subject to the observations made above; but, in the circumstances of the case, there will be no order for cost.

C. W. J. C. No. 532 of 1968.

25. In this writ application, the petitioner, Shri Ranjit Sinha, has prayed for quashing resolution No. 4-SPL/66 of the Trust and for a direction to appoint the petitioner as Executive Engineer with effect from the 1st April, 1958, on the ground that the impugned resolution for appointment of opposite party No. 3, Shri S. V. Singh, as Executive Engineer is ultra vires of the Bihar Improvement Trust's Officers and Servants (Appointment, Classification, Conduct, Control and Punishment) Rules, 1956, hereinafter referred to as 'the Rules'.

27. This application is also similar to the writ application numbered as C. W. J. C. No. 238 of 1968. This application has been filed by the petitioner in view of the fact that the Patna Improvement Trust (opposite party No. 1) has not carried out the direction given by this Court on the 20th March, 1968, in C.W.J.C. No. 563 of 1967.

28. The facts stated and the contentions raised by the petitioner in this writ application are similar to those given in C. W. J. C. No. 238 of 1968. When C. W. J. C. No. 563 of 1967 came up for hearing it appeared from the affidavit filed by Shri Shatnajib Jha on behalf of the Trust that the representation of the petitioner was still pending and no final decision had been taken by the Trust on the same. In view of the observation made by the Hon'ble Judges who heard the case to the effect that "we trust that the Patna Improvement Trust will dispose of the representation (Annexure E) within three months from today", the writ application was withdrawn.

28-A. A counter-affidavit on behalf of the Trust has been filed in this case in which it has been explained that the disposal of the representation of the petitioner could not be done by the Trust, because the matter became pending before this Court in C.W.J.C. No. 206 of 1968 and C.W.J.C. No. 238 of 1968.

29. In view of the fact that resolution No. 4-SPL/66 dated the 27th May, 1966, has been quashed with a direction to the Trust to consider the representation made by the petitioner and Shri R. K. Akhauri vis-a-vis Shri S. V. Singh, this writ application has become infructuous. In the said case, a direction has also been given to the Trust to consider the claim of the petitioner as to whether the petitioner will take appointment from the 1st April,

1958, or from the 1st January, 1962, as concurred by the Commission.

30. For the reasons given above, it is not necessary to issue any writ or give further direction in this case. The writ application stands disposed of in terms of the order made in C. W. J. C. No. 238 of 1968. There will be no order for cost.

31. MISRA, C. J.:— I agree.
Order accordingly.

AIR 1970 PATNA 219 (V 57 C 36)

A. B. N. SINHA AND B. D. SINGH, JJ.

Muna Kuar and others, Appellants v. Lala Prasad Singh and others, Respondents.

A. F. O. D. No. 430 of 1959, D/- 21-5-1969, from decision of Addl. Sub. J., Begusarai, D/-12-8-1959.

(A) Civil P. C. (1908), S. 11 — Res judicata between co-defendants — Dismissal of appeal on preliminary point — Effect — Decision of trial Court on merits stands affirmed — Principles of res judicata apply to another suit brought on the same cause of action — Held on facts that dismissal of appeal on compromise against some of the respondents did not attract the principle of res judicata. AIR 1966 SC 1332 & AIR 1927 Lah 1 & AIR 1935 PC 139 & AIR 1932 PC 161, Dist.

(Paras 7 & 9)

(B) Civil P. C. (1908), S. 11 — Res judicata between co-defendants — Doctrine of — Requisites.

Where it is sought to apply the rule of res judicata as between co-defendants, three conditions are requisite: (1) There must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided. AIR 1931 PC 114 & (1895) ILR 18 All 65 & (1887) ILR 11 Bom 216 & (1904) ILR 31 Cal 96 & AIR 1950 PC 17, Rel. on; AIR 1970 Pat 1 & AIR 1917 Pat 653 & AIR 1939 Pat 225, Dist. (Para 10)

Cases Referred: Chronological Paras

- (1970) AIR 1970 Pat 1 (V 57) = 1969 BLJR 176 (FB), Ram Niranjan Das v. Loknath Mandal 10
- (1967) AIR 1967 SC 591 (V 54) = (1964) 2 SCR 310, P. Venkata Subba Rao v. V. Jagannadha Rao 12-13
- (1966) AIR 1966 SC 1332 (V 53) = 1966-2 SCJ 768, Sheodan Singh v. Daryao Kunwar 7
- (1963) AIR 1963 SC 454 (V 50) = 1963 BLJR 1, Suraj Ahir v. Prithinath Singh 29

- (1956) AIR 1956 SC 305 (V 43) = 1956 SCR 1, Hari Har Prasad Singh v. Deonarain Prasad 26
- (1953) AIR 1953 Trav-Co 417 (V 40) = 1953 Ker LT 254, Sivarama Iyer v. Subramonia Iyer 26
- (1950) AIR 1950 PC 17 (V 37) = 77 Ind App 27, Chandu Lal v. Khalilur Rahman 12, 13
- (1939) AIR 1939 Pat 225 (V 26) = 20 Pat LT 346, Manki Kanak Ratan v. Sundarmunda 12, 13
- (1937) 27 Trav LJ 44, Esakkimadan Nadan v. Chellamma Nadachi 26
- (1935) AIR 1935 PC 47 (V 22) = 62 Ind App 64, Radha Krishna Thakurji v. Raghunandan Sinha 25
- (1935) AIR 1935 PC 139 (V 22) = 62 Ind App 224, Kedar Nath Goenka v. Ram Narain Lal 8
- (1935) AIR 1935 Pat 167 (V 22) = ILR 14 Pat 461 (FB), Soney Lall Jha v. Darbdeo Narain Singh 21, 22
- (1932) AIR 1932 PC 161 (V 19) = 59 Ind App 247, Maung Sein Done v. Ma Pan Nyun 9
- (1931) AIR 1931 PC 114 (V 18) = 58 Ind App 158, Munni Bibi v. Tirloki Nath 10, 12-13
- (1927) AIR 1927 Lah 1 (V 14) = ILR 7 Lah 423, Obedur Rahman v. Darbari Lal 7
- (1922) AIR 1922 PC 142 (V 9) = 49 Ind App 81, Mahanth Jagannath Das v. Janaki Singh 14
- (1918) AIR 1918 Pat 398 (V 5) = 3 Pat LJ 1 (FB), Janki Singh v. Jagannath Das 14
- (1917) AIR 1917 Pat 653 (V 4) = 2 Pat LJ 159, Mittar Poddar v. Jadab Chandra 11
- (1916) AIR 1916 PC 110 (V 3) = 43 Ind App 249, Banga Chandra v. Jagat Kishore 26
- (1904) ILR 31 Cal 96 = 8 Cal WN 30, Magniram v. Mehdi Hossein Khan 10
- (1895) ILR 18 All 65 = 1895 All WN 156, Ahmad Ali v. Najabat Khan 10
- (1887) ILR 11 Bom 216, Ramchandra Narayan v. Narayan Mahadev 10
- (1843) 3 Hare 627 = 15 LJ Ch 441, Cottingham v. Earl of Shrewsbury 10

K. K. Sinha, Ram Nandan Singh and Devendra Prasad Sinha, for Appellants; R. S. Chatterjee, Prem Lall, H. R. Das, Bishwanath Agarwal, Devendra Prasad Sharma, Bachoo Prasad Singh and Ram Anugrah Prasad Singh, for Respondents.

B. D. SINGH, J.:— This appeal was preferred by Bacha Singh and others who were some of the members of the defendants first party in the trial Court. After the appeal was filed, Bacha Singh appellant No. 1 died and in his place Motromat Muna Kuar was substituted as his legal heir. Title Suit No. 44/18 of 1952/55 which has given rise to this appeal, was institut-

ed by Lala Prasad Singh and his minor son Lachmi Narain Singh impleading as many as 17 defendants. Defendant Nos. 1 to 12 were made defendants first party and Chandradeo Singh, Satnarain Singh son of Sitaram Singh, Ramharosi Singh son of Chandradeo Singh and Sheo Shankar Singh, son of Badri Narain Singh, defendants 13, 13 (a), 13 (b) and 14 respectively, were made defendants second party; whereas Choudhary Raj Rajeshwar Prasad Singh, Dr. Rameshwar Prasad and Umeshwar Prasad Singh, both sons of Choudhary Raj Rajeshwar Prasad Singh were arrayed as defendants 15, 16 and 17 respectively, constituting defendants third party.

The suit was for declaration that the plaintiffs have got eight annas share in the lands comprised in plot Nos. 894 (portion), 895, 896, 897, 898, 920 and 930, fully described under Schedule A of the plaint, and for recovery of possession to the extent of their share from the defendants first party. The plaintiffs also claimed mesne profits with respect to the land from the year, 1357 fasli, corresponding to 1950, till the recovery of the possession of land and they further claimed Rs. 2,778 from the defendants first party, being the proportionate amount of sale proceeds, which was deposited in the Court during the pendency of case under Section 145 of the Code of Criminal Procedure, which was withdrawn by defendants first party.

It may be noted that the plaintiffs' co-sharer for the other eight annas share in the aforesaid plots is Choudhary Raj Rajeshwar Prasad Singh, defendant No. 15, being brother of Lala Prasad Singh, plaintiff No. 1 (both being sons of Choudhary, Sant Saran Prasad Singh, deceased). Therefore, Choudhary Raj Rajeshwar along with his sons filed another suit being Title suit No. 46/12 of 1952/58 for a similar declaration with respect to their eight annas share in the aforesaid plots and they also claimed mesne profits and claimed half of the sale proceeds deposited in the Court during the pendency of the proceeding under Section 145 of the Code of Criminal Procedure, which was withdrawn by defendants first party. The plaintiffs of title Suit No. 44 were made defendants second party in Title Suit No. 46. Defendants first party were common in both the suits, against whom the main reliefs were sought. Chandradeo Singh and others defendants second party in suit No. 44 were settlers at one time, of the disputed land. Hence, they were made parties in the suits, but no relief was claimed against them. Both suits were made analogous and were tried together. The claim of the plaintiffs in both the suits was that the lands comprised under plot Nos. 894 to 898 were Zirat and Khudkasht lands and have been coming in possession of the ancestors of the plaintiffs and their co-

sharers, for more than 12 years continuously before the passing of the Bihar Tenancy Act, 1885; in other words, since the time of permanent settlement. Their further case was that their lands were wrongly recorded as bakasht in the record of rights. Their case, as regards plot Nos. 920 and 930 was that those lands were given in maintenance to Mossomat Domno Kumari, Parekhno Kumar and Bhonda Singh, who were the relatives of the plaintiffs. After their death, the plaintiffs and their co-sharers got those lands. On Civil Court partition, the lands under those two plots also were allotted to the share of the plaintiffs No. 1 of both suits. Therefore, the plaintiffs asserted that the lands under those two plots also were the zirat lands.

2. On the other hand, the case of the defendants first party in both the suits, in brief was that the lands covered under all the aforesaid plots were rightly recorded as bakasht in the record of rights, and they alleged in their written statement that they were raiyati lands before the last survey operation, and before the passing of the Bihar Tenancy Act but the landlords somehow or other came in possession of those raiyati lands, and got them recorded as bakasht.

3. On the pleadings of the contesting parties in both the suits various common issues were framed. Of them, only the following need be mentioned:—

1. Are the suits barred by limitation and multifariousness of cause of action?
2. Whether the suit lands are proprietors' private lands of the plaintiffs or whether the lands in suits are bakasht lands?
3. Whether the defendants first party have right of occupancy in the lands in suits?
4. Whether the settlements in the name of *Shiva Shanker Singh alias Daku Singh* and *Sits Ram Singh* with respect to the lands in suits were in favour of defendants first party?
5. Whether the plaintiffs are entitled to get a decree for declaration of title and recovery of possession and mesne profits as prayed for?
4. The parties adduced oral and documentary evidence in support of their respective cases. After considering the evidence on the record, the trial Court held that (a) the lands under plot Nos. 895 to 897 are proprietors' private land and the survey entries showing these lands as bakasht are incorrect; (b) defendants first party have not acquired occupancy right in three plots, namely, plots 895, 896 and 897; (c) plaintiffs have title over lands in plot Nos. 895, 896, 897 and 894; (d) plaintiffs are entitled to mesne profits; (e) plaintiffs' suits are not barred by limits-

tion (f) the case of oral settlement of defendants first party is false; (g) lands under plot Nos. 894, 898, 920 and 930 are not proprietors' private lands, but they are bakasht lands; (h) defendants first party being settled raiyats of the village have acquired occupancy right over the lands under plot Nos. 920 and 930, but they have not acquired any title in respect of lands in plot No. 894; (i) defendants first party are using portion of the suit land in plot No. 898, as their Bari and they were inducted by plaintiffs on the lands in plot No. 898; (j) Dahu and Sitaram were not real settlement holders but were benamidars of defendants first party with respect to the suit land (k) defendants first party are coming in possession of the disputed land since 1935; (l) plaintiffs of either suit were not in possession of lands under dispute; (m) plaintiffs have failed to prove the possession of Dahu and Sitaram from 1935 to 1942 and thereafter plaintiffs own possession; and (n) plaintiffs are not in possession after the expiry of kabuliati in 1942.

5. Thus both the suits were decreed in part as mentioned above against the defendants first party. Being aggrieved, the defendants first party filed two separate appeals against the judgment and decree of the Court below, one being the present one, namely, First Appeal 430 of 1959 which was placed before us for disposal, and the other being first Appeal No. 431 of 1959 which was placed before another Bench of this Court presided over by Mahapatra and S. N. P. Singh, JJ. which was disposed of on 11-5-1966 as per terms of compromise entered between defendants first party and Choudhari Raj Rajeshwar Prasad and others, plaintiffs of Title Suit No. 46. Therefore, at the initial stage of the hearing, we gave sufficient opportunities to the contesting parties of this appeal also to come to some settlement. But learned counsel for the parties could not succeed in persuading them to patch up their differences. Learned counsel for the appellants submitted that Lala Prasad Singh and another, plaintiffs-respondents first party, had also filed cross objection against the findings of the Court below which were against them, and the same was dismissed on 20-3-68, due to their default. Therefore, now the dispute between the parties centres round only with regard to the land comprised in the four plots, namely, 894 to 896 & 897 appertaining to tauzi No. 656, situated in Badh Dudhela in village Hajipur Kusmaut, district Muzaffarpur. The total area of lands under all these plots comes to 54 bighas 10 kathas and 1 dhur. Since plaintiffs-respondents have only eight annas share, we are concerned with the dispute in this appeal only with regard to lands measuring 27 bighas and odd.

6. Learned counsel for the appellants assailed the findings of the Court below which were against them, and raised the following points for consideration by this Court—

- (i) The suit is barred by limitation provided under the Bihar Tenancy Act as well as under the Limitation Act.
- (ii) The lands comprised under the three plots, namely, 895, 896 and 897 were the raiyati lands of the defendants first party.
- (iii) The plaintiffs have failed to establish that the lands comprised in the aforesaid three plots were their zirat lands or proprietors' private land.
- (iv) Even if it was their zirat land the defendants first party have acquired occupancy right or at least they have become non-occupancy raiyats after the expiry of the lease.
- (v) Even if it is held that those lands were proprietors' private land, the plaintiffs not being in possession at the time of the vesting under the Land Reforms Act, the same has vested in the State of Bihar under the said Act.

7. Before I take up for consideration the above points raised by learned counsel, it will be appropriate to dispose of the preliminary points, which have been vigorously argued by Mr. R. S. Chatterji, learned counsel for the plaintiffs-respondents. He submitted that the present appeal is barred by the principles of res judicata. He urged that the lands under the plots in dispute are not divided by metes and bounds between the plaintiffs-respondents of this appeal, and Choudhary Raj Rajeshwar Prasad Singh and others who were plaintiffs-respondents in the other appeal, viz. First Appeal 431. Admittedly the plaintiffs of the each suit have eight annas share. First Appeal No. 430 has arisen out of Title suit No. 44 whereas First Appeal No. 431 arose out of Title suit No. 46. Both these suits were heard together and they were disposed of by one judgment by the Court below. Common issues were framed, and the findings given by the Court below govern both the suits. The defendants first party are the appellants in both the appeals. Learned counsel has drawn our attention to the compromise petition filed in First Appeal 431 of 1959 on behalf of the defendants first party-appellants, and on behalf of Choudhary Raj Rajeshwar Prasad and others plaintiff-respondents. By the said compromise they agreed inter alia that

"the entire lands which are the subject-matter of the suit will be divided half and half between the plaintiff-respondents Nos. 1 to 3 on the one hand and the defendant-appellants on the other, that is

to say, -/8/- eight annas will go and belong absolutely to the plaintiff-respondent Nos. 1 to 3 to which the defendant-appellants or their heirs or assigns shall have no manner of claim whatsoever and -/8/- eight annas will go and belong absolutely to the defendant-appellants to which the plaintiff respondents or their heirs or assigns shall have no manner of claim whatsoever."

The compromise was recorded by order dated 11-5-1966. He submitted that Lala Prasad Singh and another, plaintiffs-respondents of First Appeal No. 430 of 1959, were also respondents 6 and 7 termed as respondents second party in First Appeal No. 431 of 1959, being co-sharers, but they did not appear in that appeal. Their Lordships, therefore, while recording the order on the said compromise petition observed:

"Learned counsel for the appellants wants that the appeal will stand dismissed as against respondents 6 and 7 who are pro forma defendants second party in the trial Court."

The other relevant portion of the order to which our attention was drawn was

"Let the compromise be recorded and the appeal be disposed of in terms thereof."

Learned counsel submitted that since the appeal stood dismissed against respondents 6 and 7 who are plaintiff-respondents in the present appeal, namely, First Appeal No. 430 of 1959, it clearly amounts to confirmation of the finding of the Court below, so far these plaintiff-respondents are concerned, and now that finding cannot be modified by this appeal. In order to support his contention he relied on a decision of the Supreme Court in Sheodan Singh v. Daryao Kunwar, AIR 1966 SC 1332. In that case the trial Court had decided on merit, four suits, namely, suit Nos. 37, 42, 77 and 91 of 1951, all of which had common issues. The appellant's father was aggrieved by these decrees. Consequently he filed two first appeals in the High Court of Allahabad. Appeal No. 365 of 1951 was against the dismissal of suit No. 37 while Appeal No. 366 of 1951 was against the dismissal of suit No. 42. He had also filed two appeals in the Court of the District Judge against the remaining two suits, Appeal No. 452 of 1951 was against the decree in suit No. 77, while Appeal No. 453 of 1951 was against the decree in suit No. 91. These two appeals which were pending in the Court of District Judge, were also transferred to the High Court. Thereafter Appeal No. 453 of 1951 arising out of suit No. 91 was dismissed by the High Court as being time barred, while Appeal No. 452 of 1951 arising out of suit No. 77 was dismissed by the High Court on the ground of failure of the appel-

lant's father to apply for translation and printing of the record as required by the rules of that High Court.

When the matter came up for hearing before the learned single judge the following question, namely, "whether the appeal is barred by Section 11 of the Code of Civil Procedure or by the general principles of res judicata as the appeals against the decisions in suit Nos. 77 and 91 of 1951 were rejected and dismissed by this Court, and those decisions have become final and binding between the parties", was referred to a Full Bench of that Court, which held that though there were four appeals originally before the High Court, two of them had been dismissed and the very same issues which arose in First Appeal Nos. 365 and 366 had also arisen in those two appeals, which had been dismissed. It further found that the terms of Section 11 of the Code of Civil Procedure were fully applicable and, therefore, the two first appeals, Nos. 365 and 366, were barred by res judicata to the extent of the decision of five issues which were common in the four connected appeals. After the decision of the Full Bench, the matter went back to the learned single Judge for decision. He dismissed the two appeals, Nos. 395 and 366, as barred by Section 11 of the Code of Civil Procedure. Aggrieved by the said judgment the appellant brought this matter to the Supreme Court. Their Lordships in paragraph 13 at page 1336-37 observed:

".....It is true that the High Court dismissed the appeals arising out of suits Nos. 77 and 91 either on the ground that it was barred by limitation or on the ground that steps had not been taken for printing the records. Even so the fact remains that the result of the dismissal of the two appeals arising from suits Nos. 77 and 91 by the High Court on these grounds was that the decrees of the Additional Civil Judge who decided the issue as to title on merits stood confirmed by the order of the High Court. In such a case, even though the order of the High Court may itself not be on the merits, the result of the High Court's decision is to confirm the decision on the issue of the title which had been given on the merits by the Additional Civil Judge and thus in effect the High Court confirmed the decree of the trial Court on the merits, whatever may be the reason for the dismissal of the appeals arising from suits Nos. 77 and 91....."

Their Lordships further observed:—

".....We cannot, therefore, accept the contention that even though the trial Court may have decided the matter on the merits there can be no res judicata if the appeal Court dismisses the appeal on a preliminary ground without going into the merits, even though the result of the dismissal of the appeal by the ap-

peal Court is confirmation of the decision of the trial Court given on the merits. Acceptance of such a proposition will mean that all that the losing party has to do to destroy the effect of a decision given by the trial Court on the merits is to file an appeal and let that appeal be dismissed on some preliminary ground, with the result that the decision given on the merits also becomes useless as between the parties. We are therefore, of opinion that where a decision is given on the merits by the trial Court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial Court on the merits itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal."

Their Lordships further in paragraph 20 at page 1339 held:

".....The result of the dismissal on a preliminary ground of the two appeals arising out of suits Nos. 77 and 91 was that the decision of the trial Court was confirmed with respect to the common issues as to title by the High Court. In consequence the decision on those issues became *res judicata* so far as appeals Nos. 365 and 366 are concerned and Section 11 of the Code of Civil Procedure would bar the hearing of those common issues over again. It is not in dispute that if the decision on the common issues in suits Nos. 77 and 91 has become *res judicata*, appeals Nos. 365 and 366 must fail."

Learned Counsel further submitted that the very object of *res judicata* is to avoid inconsistent decisions. He elaborated his contention by illustrating that in the instant case also since the lands under the plots in dispute are undivided and they are shared in equal proportion by the two sets of plaintiff-respondents first party in both the appeals, namely, First Appeal 430 of 1959 and first Appeal 431 of 1959, in view of the compromise decree in the latter, if the appeal in the former is allowed, there will be inconsistent decrees regarding the same subject-matter, and in this connection he referred to paragraph 17 of the same judgment of their Lordships, AIR 1966 SC 1332 (Supra) where their Lordships were considering the decision made in *Obedur Rahman v. Darbari Lal*, AIR 1927 Lah 1.

In that case there were five appeals before the High Court, three of which had abated. There was a common issue in all the five appeals, namely, whether a certain lease had expired or not and it was argued that in view of the abatement of the three other appeals, the decision of that issue had become *res judicata*. But their Lordships of the Lahore High Court

overruled the contention by observing that "Where there has been an appeal the matter is no longer *res judicata* but *res sub judice* and where an appeal is not finally heard and decided, any matters therein cannot possibly be said to be *res judicata*." Their Lordships of the Supreme Court held the view expressed as incorrect, and observed that if the view taken by the Lahore High Court was correct, the result would be that there may be inconsistent decisions on the same issue with respect to the point involved in that case, namely, whether a certain lease had expired or not and the very object of *res judicata* is to avoid inconsistent decisions. Their Lordships further observed that where, therefore, the result of the dismissal or abatement of an appeal is to confirm the decision of the trial Court on merit, such dismissal must amount to the appeal being heard and finally decided, and would operate as *res judicata*.

In my opinion, the principles laid down by their Lordships of the Supreme Court are not applicable to the instant case, where we have to consider the effect of the compromise order passed in First Appeal 431 on the findings in Title Suit No. 44 against which the present appeal has been filed by the defendants first party, whereas their Lordships were dealing with the question where the appeals arising out of two suits were dismissed on some preliminary ground of limitation or default in printing and, therefore, it was held that such dismissal would amount to confirmation of the two other suits, namely, suits Nos. 37 and 42 against which appeals Nos. 365 and 366 were filed.

It is true that in the instant case also the two suits were tried together and there was common issue and the plaintiffs of both the suits being co-sharers had equal shares of eight annas each in the subject-matter of dispute. Although the land was not divided but they had well defined shares. In that view of the matter, it cannot be said that the subject-matter of the two suits were the same. Besides, their Lordships in First Appeal No. 431 were concerned with the share of the other co-sharers, namely, Choudhary Raj Rajeshwar Prasad and others, the respondents first party, who had only eight annas share in the subject-matter of dispute, and who had entered into the compromise with the defendants first party-appellants. According to one of the terms of the compromise quoted earlier, the properties of Choudhary Raj Rajeshwar Prasad and others are to be divided equally between them and the defendant-appellants. Another term is that the land in dispute shall be divided by metes and bounds by a pleader commissioner to be appointed by the Court below. The compromise is limited strictly to the eight annas share of Choudhary Raj Rajeshwar

Prasad and others, the plaintiff-respondents first party of Appeal No. 431. In that view of the matter in my opinion, there will be no inconsistent decrees if this Appeal No. 430 is finally heard and decided on merit. Similarly, eight annas share of the plaintiff-respondents of this appeal can easily be carved out by appointing a pleader commissioner. Besides, in my opinion, the compromise order passed in First Appeal No. 431 does not result in confirmation of the decision of the trial Court given on merit in Title Suit No. 44, as their Lordships while recording the compromise in First Appeal 431 of 1959 only by way of recital in the order, mentioned that "learned counsel for the appellants wants that the appeal will stand dismissed as against respondents 6 and 7 who were pro forma defendants second party in the trial Court." It may be noticed that no specific order has been passed with regard to this. Learned counsel referred to the last portion of the order where it is mentioned that "let the compromise be recorded and the appeal be disposed of in terms thereof."

But, in my opinion, this also does not help the contention of learned counsel. Nowhere in the compromise petition it is stated that the appeal should be ordered to be dismissed as against respondent Nos. 6 and 7 who were pro forma defendants. No such prayer has been made in the petition. No doubt, the plaintiff-respondents of this appeal were also respondents second party in First Appeal 431, but as mentioned earlier, although notice was served on them, they did not appear in that first appeal. From the records of the case, the pleadings of the parties and the judgment of the trial Court, it appears that the two sets of the plaintiffs were not pulling on well. There are allegations and counter-allegations between these two sets of plaintiffs that they were helping and instigating defendants first party as against the other. In that view of the matter the acceptance of the contention of the learned counsel, would amount to giving absolute power and discretion in the hands of Choudhary Raj Rajeshwar Prasad, the other co-sharer to affect the right and title of the plaintiff-respondents of this appeal by entering into compromise with the defendants first party-appellants.

8. Learned counsel further relied on a decision in the case of Kedar Nath Goenka v. Munshi Ram Narain Lal, AIR 1935 PC 139 where their Lordships of the Privy Council were dealing with res judicata between co-defendants. Their Lordships observed that in a former suit it was necessary to decide the dispute between the plaintiffs and defendants as to the validity of certain sale for the purpose of giving the plaintiff appropriate relief. In the subsequent suit, the same

question as to the validity of the sale was again in issue between the same defendants, who were ranged as plaintiff and defendant 1, though the subject matter of this suit was different. Their Lordships held that the decision in the former suit was binding upon them and that issue was res judicata. In my opinion, this decision is not pertinent to the question in the instant case, first, because the plaintiff-respondents of the instant appeal, were pro forma plaintiff-respondents in the other appeal, as both were co-sharers. In the two suits also, the plaintiffs of one suit, were defendants in the other in the nature of pro forma, as no relief was sought against such defendants. As they were co-sharers they were simply made party to the suit. The most important point for consideration is that in order to attract res judicata as between co-defendants or co-respondents, there must be conflict of interest between them and it must be necessary to decide the conflict between the co-respondents in order to give the appellants the relief which they claimed. In the instant case, for recording the compromise it was neither necessary to decide nor was there any decision on the conflict of interest between the co-defendants or co-respondents. Learned counsel for the respondents also has not been able to point out that, when their Lordships were recording the compromise what was the occasion to decide the conflict of interest between the co-respondents of these two appeals to give relief which the defendants first party had claimed. In that view of the matter this decision reported in AIR 1935 PC 139 (supra) also does not lend support to the contention of learned counsel.

9. Learned counsel further referred to another decision of the Privy Council in Maung Sein Done v. Ma Pan Nyun, AIR 1932 PC 161-59 Ind App 247. In that case also their Lordships were dealing with the question of res judicata as between co-defendants. But, in my opinion, the principles laid down by their Lordships do not help the contention raised by learned counsel for the respondents. On the contrary, it helps the contention of learned counsel for the appellants, who has vehemently opposed the question of res judicata. Their Lordships in that case observed that if a plaintiff cannot get at his rights without trying, and deciding a case between co-defendants, the court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains. In the instant case, as observed

above, it was not necessary for the court to decide the conflict between the co-respondents, when the compromise was recorded in order to give relief to the appellants, nor it was decided.

Learned counsel for the respondents, in order to resist this submitted that impliedly even in the instant case, it was necessary to decide the conflicts between the co-respondents in order to give relief to the defendants first party-appellants, while the compromise was being recorded as in the case reported in AIR 1932 PC 161. He has referred to page 164 of the judgment, where their Lordships observed that in a word, the question to be determined was one between the sisters on the one hand and the brothers on the other. The rights of each sister in regard to the mother's estate were identical. They were either both of them co-heirs with their brothers or neither of them was entitled to any share. Their Lordships observed that the decision that none of the sisters was entitled to inherit to their Chinese mother in a previous suit brought by A against her sister B and their two brothers had the effect of barring a subsequent suit, under the doctrine of *res judicata* brought by B against A and the two brothers claiming a share in the property of her mother.

But, in my opinion, the facts of the case which were before the Privy Council are clearly distinguishable from the facts of the instant case. Even by implication, it cannot be said that in the instant case it was necessary for the appellate Court to decide the conflict between the co-respondents of the two appeals by giving relief to defendants first party-appellants, viz., for recording the compromise.

10. Learned counsel for the appellants, on the other hand, as mentioned above, contended that no question of *res judicata* applies in the instant case and the compromise order recorded does not amount to confirmation of the findings of the court below. Mr. Lal Narayan Sinha, who appeared at the earlier stage for the appellants, relied on a decision of Privy Council in *Mt. Munni Bibi v. Triloki Nath*, AIR 1931 PC 114=58 Ind App 158 where their Lordships were dealing with the questions of *res judicata* between co-defendants and their Lordships at page 117 observed:—

"..... The conditions under which this branch of the doctrine should be applied are thus stated by Wigram V. C. in *Cottingham v. Earl of Shresbury*. (1843) 3 Hare 627=15 LJ Ch 441 at p. 638:

"If a plaintiff cannot get at his right without trying and deciding a case between co-defendants the court will try and decide that case, and the co-defendants will be bound, but if the relief given to the plaintiff does not require or involve a decision of any case between

co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."

This statement of the law has been accepted and followed in many Indian cases; see *Ahmad Ali v. Najabat Khan*, (1895) ILR 18 All 65=1895 All WN 156; *Ramchandra Narayan v. Narayan Mahadev*, (1887) ILR 11 Bom 216, *Magniram v. Mehdi Hossein Khan*, (1904) ILR 31 Cal 95=8 Cal WN 30. It is, in their Lordships' opinion, in accord with the provisions of S. 11, Civil P. C., and they adopt it as the correct criterion in cases where it is sought to apply the rule of *res judicata* as between co-defendants. In such a case therefore three conditions are requisite: (1) There must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided."

Learned counsel for the respondents, however, contended that this decision also helps his contention that even if the plaintiff-respondent of the instant appeal did not appear in First Appeal 431, it makes no difference as they were necessary party to the suit, although no relief was sought against them. Besides, there was conflict of interest between the plaintiffs of the two suits, i.e., Title Suits Nos. 44 and 46. In order to find support for his contention, he referred to page 117 where their Lordships have observed, "that these conditions are established in the present case. There was clearly a conflict of interests between the appellant as the daughter and heir of Amar Nath, and Kashi, as the heir of Mukandi. It was only if the house belonged to Amar Nath that the plaintiff's suit could succeed; if it belonged to Mukandi it must fail. It was therefore necessary to decide between the conflicting claims of the defendants. The principal issue for decision in the 1909 suit was framed in the following terms:

"4. Was Babu Amar Nath owner of the disputed house? Is the house liable to be sold in execution of (the plaintiff's decree)?"

This issue was found against the plaintiff by the trial Judge, and "as the result" of this finding this suit was dismissed. It was decided in his favour by the High Court, and his suit was decreed. It is not suggested for the respondents that this determination was not final.

It is true that the appellant did not enter an appearance in the suit, and it is also said that she was not a necessary party to it; but their Lordships do not regard either of these factors as really material. The appellant was at all events

a proper party to the suit and had the right to be heard if she so desired. If she chose to stand by and let the plaintiff fight her battle, it could not affect her legal position. The test of mutuality is often a convenient one in questions of res judicata. If the decision had gone the other way the appellant could hardly have claimed that because she did not choose to appear she was not bound by it, and so have compelled Kashi to litigate the matter over again, and if the appellant would have been bound, so must Kashi be. There is however evidence on the record of the present suit, emanating from one of the principal witnesses for the respondents that the appellant did, in fact, support the plaintiff in the 1909 suit."

But, in my opinion, this portion of the judgment also does not help the contention of learned counsel as it has been held in *Ram Niranjan Das v. Loknath Mandal*, 1969 BLJR 176 = (AIR 1970 Pat 1) (FB), by a Full Bench of this Court, that a co-sharer has right to bring suit against trespasser for recovery of limal lands without impleading other co-sharers. In other words, their Lordships observed that it is not at all necessary to implead the other co-sharers in the suit. It will be convenient to quote the observation of their Lordships at page 177 (of BLJR) = (at p. 8 of AIR) which is to this effect:

"..... It is relevant also to consider in this connection that it is a well-settled principle of law that one of the various co-owners of a property, if in possession will be deemed to be in possession on behalf of all the co-owners and it is for this reason that his possession in law, therefore, is not regarded as adverse to other co-owners unless there is distinct proof of ouster. In that view of the matter also, the interest of an undivided co-owner or co-sharer must be taken to cover every inch of land which may be the subject-matter of dispute as belonging to the co-owners and hence it is clear that there is no support for appellant's lawyer's contention either in principle or in authority as to why a co-sharer's suit cannot be held to be maintainable without impleading other co-sharers and why it should not be decreed in respect of the entire interest of the co-owners which of course, however, will not affect the rights of other co-owners vis-a-vis a successful plaintiff in a suit against a trespasser."

In view of the above observations, in my opinion, it was not necessary at all to implead the two sets of the plaintiffs, who were admittedly co-sharers, in the two suits. Besides, I have already held that there was no conflict of interest between these two co-sharers as each set had eight annas share in the subject-matter of dispute.

11. Learned counsel for the appellants also relied on a decision in *Mittar Poddar v. Jadab Chandra*, AIR 1917 Pat 653; where their Lordships *Chamier, C. J.* and *Sharfuddin, J.* were dealing with the question of res judicata and their Lordships observed that res judicata was a matter of substance, not a matter of form. In order to ascertain what matter directly and substantially in issue was heard and finally decided in a previous suit, the pleadings and judgment in that suit might be examined. In that case the suit for delivery of a kabuliyaat was dismissed on the ground that the rent claimed was too high and in order to determine the cost to be awarded to the defendant, the Court went on to inquire what the proper rent was. Their Lordships held that inasmuch as the decision of the rent was merely incidental and recorded for a purpose collateral to the main issue, it could not operate as res judicata in a subsequent suit for rent.

In my opinion, this decision is not very relevant to the instant case. It may help us only to this extent that before we come to any conclusion we must look to the circumstances and the form in which the said compromise order was recorded by their Lordships to ascertain as to whether any question between the co-respondents of both the appeals has been finally decided. So, we have to find out the substance of the order.

12-13. The next decision which has been relied upon by learned counsel for the appellants, is in the case of *Manki Kanak Ratan v. Sundarmunda*, AIR 1939 Pat 225. In that case their Lordships were also dealing with the question of res judicata in a case where the plaintiff in a suit to set aside sale was not a party to a previous suit brought by his father and others for the same purpose, but was joined as pro forma defendant, he having refused to join the plaintiff on father's death, which suit was compromised in appeal in which the defendant's title was admitted by others. Their Lordships held at page 228:—

"The learned District Judge is also clearly wrong in holding that the present suit is barred by the principle of res judicata. As has been already stated, the suit of 1922 ultimately ended in a compromise, and the plaintiff being no party to the compromise, was not bound by it, nor can the decree passed and appeal based as it was on the compromise, operate as res judicata against him in this action"

The principle laid down under this decision is also not very much relevant to the issue to be decided in the instant appeal, but it gives some indication as to whether res judicata can apply when a compromise order is passed as against the co-respondents. A more appropriate

case to be found is in *P. Venkata Subba Rao v. V. Jagannadha Rao*, reported in 1964 (2) SCR 310 = (AIR 1967 SC 591). In that case a suit was filed in 1941 for the recovery of Rs. 50,000/-. The respondents who were the judgment-debtors prayed for the scaling down of the amount due from them under the Madras Agriculturists' Relief Act, 1938, on the ground that they were agriculturists. The suit was compromised for Rs. 37,000/-. Some payments were also made. In 1949 they filed another application for the scaling down of the debt on the ground that they were agriculturists and hence they were entitled to the benefits of the Act of 1938 as amended in 1948. The appellants who were the decree-holders, resisted the claim of the respondents on the grounds, inter alia, that the earlier compromise decree operated as *res judicata*.

Their Lordships at pages 322-23 (of SCR) = (at p. 595 of AIR) held:—

"..... The compromise decree was not a decision by the Court. It was the acceptance by the Court of something to which the parties had agreed. It has been said that a compromise decree merely sets the seal of the Court on the agreement of the parties. The Court did not decide anything. Nor can it be said that a decision of the Court was implicit in it. Only a decision by the Court could be *res judicata*, whether statutory under S. 11 of the Code of Civil Procedure, or constructive as a matter of public policy on which the entire doctrine rests. The respondents claim to raise the issue over again because of the new rights conferred by the Amending Act, which rights include, according to them, the re-opening of all decrees which had not become final or which had not been fully executed. The respondents are entitled to take advantage of the amendment of the law unless the law itself barred them, or the earlier decision stood in their way. The earlier decision cannot strictly be regarded as a matter which was 'heard and finally decided'. The decree might have created an estoppel by conduct between the parties; but here the appellants are in an unfortunate position, because they did not plead this estoppel at any time. They only claimed that the principle of *res judicata* governed the case or that there was an estoppel by judgment."

It will be also appropriate to refer to a decision of the Privy Council in *Chandu Lal v. Khalilur Rahman*, AIR 1959 PC 17, where their Lordships at page 18 in paragraph 4, quoting with approval the decision reported in AIR 1931 PC 114 (*supra*), held:—

"In 58 Ind App 158 = AIR 1931 PC 114, the conditions for the application of the doctrine of *res judicata* as between parties who have been co-defendants in a

previous suit are thus laid down: there must be (1) a conflict of interest between the co-defendants, (2) the necessity to decide that conflict in order to give the plaintiff the appropriate relief, and (3) a decision of that question between the co-defendants. It may be added that the doctrine may apply even though the party, against whom it is sought to enforce it, did not in the previous suit think fit to enter an appearance and contest the question. But to this the qualification must be added that, if such a party is to be bound by a previous judgment, it must be proved clearly that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided."

Therefore, in my opinion, there was heavy onus upon the plaintiff-respondents of First Appeal No. 431 to establish that the plaintiff-respondents of First Appeal No. 430 had notice of the compromise which was going to be effected and which will have effect on their rights, title and interest in the disputed property. On the contrary, in paragraph 4 of the compromise petition filed in First Appeal 431 it is clearly mentioned that "the defendant second party-respondents were merely pro forma defendants, having no interest in the subject-matter of the suit and they are pro forma defendants in this appeal before Hon'ble Court." In the order dated 11-5-66 recording the compromise it is also clearly mentioned that "learned counsel for the appellants wants that the appeal will stand dismissed as against respondents 6 and 7 who were pro forma defendants second party in the trial Court."

After due consideration, in my opinion, the contention of learned counsel for the respondents cannot be accepted. The appeal has got to be heard on merits.

14. Now I turn to the consideration of contention of learned counsel raised under point No. (1). He urged that in the instant case there is definite case of the plaintiffs that the terms of the lease expired in the year 1942 after which they were not in possession of the disputed land; whereas they filed Suit No. 44 on 21-10-1952, i.e., much beyond the time prescribed under Article 1(a) of Schedule 3 to the Bihar Tenancy Act, 1885, which is applicable in the instant case, as the plaintiffs were claiming those lands as their *zirat* lands and were seeking ejectment of the tenants from those lands. The period prescribed under the said Article is six months from the expiration of the term.

In order to support his contention he relied on a Full Bench decision of this Court in *Janki Singh v. Mahant Jagannath Das*, 3 Pat LJ 1 = (AIR 1916 Pat 390) wherein it was held that a suit by a

landlord to eject tenant of zirat lands on the ground of the expiration of the term of his lease, is governed by Article 1(a) of Schedule 3 to the Bengal Tenancy Act, 1885 and the operation of Article 1(a) is not excluded in such a case by Section 116 thereof. But, in my opinion, this contention of learned counsel cannot be accepted as the above decision of the Full Bench of this Court has been overruled by a decision of the Privy Council in *Mahanth Jagannath Das v. Janki Singh*, AIR 1922 PC 142 = 49 Ind App 81. Their Lordships held that Article 1(a) of Schedule 3 to the Bengal Tenancy Act, 1885 does not apply to the suits to eject persons, who were not in law non-occupancy raiyats of the land. Article 139 of the Limitation Act applies to such suits. Their Lordships were referring to the old Limitation Act and the period prescribed under the said Article is 12 years. In the instant case also old Limitation Act is applicable. Even if it is assumed that they were dispossessed in 1942, the suit having been filed on 21-10-1952, was within 12 years. Therefore, in my opinion, the suit is not barred under the Limitation Act. Thus, this contention of learned counsel fails.

15. Now I turn to the consideration of contention raised under point No. (iii) on which the result of this appeal mainly depends. It may be recalled that in this appeal we are concerned with the dispute regarding lands measuring 27 bighas and odd in plots Nos. 894 to 897. According to the plaintiffs, the lands of plots Nos. 894 to 897 are zirat and khudkasht lands. According to them, these lands are part and parcel of 200 bighas of zirat land which belonged to the ancestors of the plaintiffs and the co-sharers of their ancestors, who were 16 annas proprietors of Taluka Nao Kothl, Tauzi No. 656, and were in cultivating possession as such for more than 12 years since the passing of the Bihar Tenancy Act in the year 1885. Those zirat lands were then unsurveyed lands, and were locally recognised as kamat lands of the proprietors from time immemorial. Their further case was that after the survey the plots of the zirat lands were numbered, but by mistake they were recorded as bakasht in the record of rights, and in due course of time after partition between the ancestors of the plaintiffs and the other co-sharers the aforesaid four plots fell into the share of the plaintiffs and the defendants third party. In 1927 the lands contained under plot No. 895, along with some other lands, which are not subject matter of dispute, were leased out on Mahhunda basis for five years with the defendants first party, who executed kabuliat. The said lease expired in 1339 Fasli corresponding to 1932 when the lands came back in possession of the

plaintiffs and their brother defendant No. 15 (of defendants third party). Subsequently, in 1935 defendant No. 15, as head of the family again settled the lands of plots Nos. 895 to 897 along with lands bearing plots Nos. 920 and 930 with Sitaram Singh father of defendants Nos. 13, 13(a) and Sheo Shankar Singh, defendant No. 14, who are defendants second party, for 7 years as per term of kabuliat, executed by them, which expired in 1942. It may be noted that the Court below found that the settlees Sitaram Singh and others were farzidars of defendants first party although the case of the plaintiffs was that these settlees were the real settlees, and not the benamidars of the members of the defendants first party. The plaintiffs' case further was that after the expiry of the lease in 1942 the lands so leased came back to the possession of plaintiff No. 1 and his brother defendant No. 15. Some dispute arose between plaintiff No. 1 and the brother. Taking advantage of the difference the defendants first party, in a proceeding under Section 145 of the Code of Criminal Procedure, claimed the entire lands under dispute as their raiyati lands. The Magistrate by order dated 29-10-1949 held in favour of the defendants first party, which gave rise to the institution of the present suits by the plaintiffs, whereas the case of the defendants first party was that the lands under those plots were bakasht lands and they have been rightly recorded as bakasht lands in the record of rights. Their further case was that those lands were initially raiyati lands before the last survey operation and before passing of the Bihar Tenancy Act, but the landlords somehow or other came in possession of those raiyati lands, and got them recorded as their bakasht. The Court below, regarding lands of plot Nos. 895 to 897, held that they are proprietors' private lands, and the survey entries showing those lands as bakasht are incorrect and the defendants first party have not acquired occupancy right in the lands in these three plots. As regards land containing two huts on plot No. 894, the Court below held that it is not proprietors' private land and it is bakasht land, but the defendants first party have not acquired any title in respect thereof. Therefore, the Court below held that the plaintiffs have right and title over lands of plot Nos. 894 to 897 and they are entitled to recover possession and mesne profits etc from the defendants first party.

Learned counsel for the appellants urged that the Court below erred in holding that the lands of plot Nos. 895 to 897 were the proprietors' private land and that they were entitled to recover those lands along with the land of plot No. 894. Therefore, under this plot we have to

consider whether the plaintiffs have been able to establish that the lands comprised in plot Nos. 895, 896 and 897 are their zirat lands, as per condition contained under the Rules for the determination of proprietors' private land under Section 120 of the Bihar Tenancy Act (hereinafter referred to as 'the Act') the relevant portion of which reads as follows:—

"(1) The Revenue Officer shall record as a proprietor's private land—

(a) land which is proved to have been cultivated as Khamar, zirat, sir, nij, nijot or khamat by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of this Act, and

(b) cultivated land which is recognized by village usage as proprietor's khamar, zirat, sir, nij, nijot or khamat.

(2) In determining whether any other land ought to be recorded as a proprietor's private land, the officer shall have regard to local custom, and to the question whether the land was, before the second day of March, 1883, specifically let as proprietor's private land, and to any other evidence that may be produced; but shall presume that land is not a proprietor's private land until the contrary is shown."

It is admitted case of the contesting parties that the lands under the aforesaid plots are entered as bakasht in the survey record of rights prepared in 1908. There is presumption of correctness of the record of rights under Section 103-B of the Act. Therefore, it has been contended on behalf of learned counsel that in view of Sections 120 and 103-B of the Act there is double onus upon the plaintiff to establish that the lands under the aforesaid three plots were their private or kamat lands. Clause (3) of Sec. 103-B of the Act provides that every entry in a record of rights so published shall be evidence of the matter referred to in such entry and shall be presumed to be correct until it is proved by the evidence to be incorrect.

16. He submitted that it may be true that the plaintiffs' ancestors and their ancestors' co-sharers had at one time before passing of the Act, Kamat lands in village Kusmaut, but the plaintiffs have failed to establish that the lands under plot Nos. 894 to 897 were the part and parcel of the same zirat land. He urged that it is the admitted case of the parties that village Kusmaut is a very big village containing several Badhs including Sirisia and Dudhela Badhs. Reference may be made to Guide and Glossary to the Survey and Settlement Operations under the Bihar Tenancy Act, published under the authority of Govern-

ment of Bihar, revised in 1937, according to which 'Badh' means division of the village into different blocks. He submitted that according to the parties, the lands under these plots were situate in Dudhela Badh. He referred to the evidence of Ashok Singh who was examined as P. W. 14, who stated in cross-examination that the suit lands are in village Dudhela Badh. Similarly, P.W. 27 in cross-examination stated that the lands are in Dudhela Badh. The plaintiffs have produced Ext. 18(a) which is a certified copy of registered Thika patta executed by Choudhary Ramgulam Singh and others, 16 annas Malikis of tauzi No. 656 of village Kusmaut, in favour of Mr. George Thomas for the years 1276 Fs. to 1284 Fs. in order to establish that the plaintiffs' ancestors and the co-sharers of their ancestors, while making the settlement with Mr. Thomas, had set apart 200 bighas of khudkasht lands for their own cultivation which were excluded from the subject-matter of settlement with Mr. Thomas. The document which is marked as Ext. 18(a) is written in Urdu and has been translated into English by High Court translator and forms part of the paper book, but there was some omission in the relevant portion. Therefore, we got the original read over, the relevant portion of which reads as follows:—

"excluding according to law, Meyas Dargah Pakiran Jagir Paswan Chanda Daran and 25 bighas Kharaur, and 200 bighas khudkasht land, culturable and non-culturable in village Hajipur Kusmaut and Salimpur appertaining to Taluka Nao Kothi."

Learned counsel submitted that from Ext. 18(a), no doubt, it is clear that the plaintiffs' ancestors and the co-sharers of their ancestors had 200 bighas of khudkasht land, but from this it cannot be ascertained that these lands situated in Dudhela Badh, as nowhere in the sale deed it is mentioned as to where the khudkasht lands situated. Therefore, according to him, from this deed it cannot be ascertained that the lands under the three plots mentioned above, which are subject-matter of dispute, were part and parcel of the aforesaid 200 bighas of khudkasht lands.

Learned counsel referred to another deed of lease, Ext. 18(b), dated 13-7-1877 which was executed by eight annas co-sharer, Mod Narain Singh on the expiration of the lease contained under Ext. 18(a), with respect to his share, in village Kusmaut, and other villages, in favour of the same person Mr. George Thomas. It may be noted that this deed also was written in Urdu, which was translated into English by the translator of this Court. In this deed also, regarding his share, it is clearly mentioned that the

Thikadar, i.e., Mr. Thomas, shall have no concern with 100 bighas of former khudkasht land, and 12 bighas and 10 kathas of former kharhor land in Badh Sirsia, and jalkar 103 bighas and odd dih land situated in mauza Hajipur Kusmaut and 32 bighas 10 kathas of khudkasht land situated in mauza Raghunandanpur Dhaboli and Salimbagh Chakarda, total area in all being 145 bighas of land, jalkar and Dih. Learned counsel, with reference to this document, contended that this clearly shows that the 100 bighas, which were part of the khudkasht land as mentioned in Ext. 18(a), were situated in Badh Sirsia. According to him, Ext. 18(b) clearly supports the case of the defendants first party. The lands under dispute situated in Badh Dudhela cannot, therefore, be said to be a part and parcel of the khudkasht land owned and possessed by the plaintiffs' ancestors or their co-sharers, as those khudkasht lands situated in Badh Sirsia.

On the other hand, learned counsel appearing on behalf of the plaintiff-respondents submitted that Badh Sirsia mentioned in Ext. 18(b) refers to the Kharhor land and not to the 100 bighas of khudkasht land. He submitted that it is very unusual that both culturable and kharhor lands will situate in same Badh Sirsia.

In my opinion, this submission of learned counsel cannot be accepted. If really the khudkasht lands were situated in some other Badh, it was expected that the executant of the deed, would give details as to where those lands situated, as he has done in the case of 103 bighas of jalkar land. It is clearly mentioned therein that the jalkar lands are situate in village Hajipur Kusmaut & 32 bighas 10 kathas of khudkasht land in village Raghunandanpur. Therefore, there was no reason why the executant would not mention specifically regarding 100 bighas of khudkasht land as to where it situated. In the deed it is mentioned that 100 bighas of khudkasht land and kharhor land situated in Badh Sirsia. It must be clearly understood that the executant meant to mention that 100 bighas of khudkasht land situated in Badh Sirsia. Even if it is assumed that it is doubtful as to whether Badh Sirsia refers only to kharhor land or to both kharhor land as well as khudkasht land, the plaintiff-respondents cannot take advantage of such vagueness in the deed, which is capable of two interpretations, there being heavy onus on them to establish that the disputed lands are part and parcel of the same khudkasht lands.

17. Learned counsel for the appellants further referred to Ext. 3(m) which is a kabuliati dated 11-3-1881 in favour of Mr. Thomas, executed by Choudhary Ram-

gulam Singh and Jagdeo Singh, the ancestors of the plaintiffs, who had taken Thika of eight annas share given to Mr. Thomas by Mod Narain Singh under the lease, Ext. 18(b). Ext. 3(m) is written in Urdu and has been translated into English by translator of this Court. Like Ext. 18(b), Ext. 3(m) also mentioned that "the Katkanedars shall have no concern with one hundred bighas of former khudkasht land, and with 12½ bighas of former kharaur land, Badh Sirsia, jalkar, fishery right and dih kadim in mauza Hajipur Kusmaut aforesaid". He also drew our attention to Ext. 18, Thika Patta executed by Raghubans Narain Singh and another to Jagdeo Narain Singh alias Jaipragas Narain Singh, dated the 5th Chait, 1288 equivalent to 20th March, 1881. By this deed the executants executed Thika patta in respect of the whole and entire four annas out of sixteen annas share in mauza Hajipur Kusmaut including all zamindari rights and appurtenances after excluding 16 bighas and 5 kathas of land situate in mauza Raghunandanpur and Salempur otherwise known as Dhabuli and 50 bighas of land situate in mauza Hajipur Kusmaut constituting old khudkasht land and 6 bighas 5 kathas of kharhaur land within the said mauza according to proportionate share, known as Badh Sirsia and Dih land in the mauza as their share on partition and jalkar of mauza aforesaid.

17. He then referred to Ext. 3(L), which being a counterpart of Ext. 18, is a kabuliati executed by Jagdip Narain Singh alias Jai Pragash Narain Singh to Raghubans Narain Singh and others, dated 5th Chait, 1288 fasli corresponding to 20th March, 1881, the relevant portion of which reads:—

"..... With all rights in the items of zamindari, on excluding 16 bighas 5 dhurs of land, situate at mauza Raghunandanpur and Salempur otherwise known as Dhapamli and 50 bighas of land situate at mauza Hajipur Kusmaut, being old khudkasht land, and 6 bighas 5 kathas of kharaur land in the said mauza in accordance with proportionate share, known as Badh Sirsia and dih land in the said mouza"

18. Learned counsel for the appellants urged that all these documents clearly indicate that the khudkasht land situated in Badh Sirsia. In my opinion, at least with reference to these documents it can be said with certainty that at any rate these documents do not indicate that the khudkasht lands situated in Badh Dudhela.

19. Learned counsel drew our attention to paragraph 26 of the judgment of the Court below where the learned Judge also observed that those bonds mentioned above were not at all helpful for coming to a decision that plot Nos.

895 to 897 were included under 200 bighas of land. Learned counsel submitted that the learned Judge, however, erred in coming to a decision that these three plots were part and parcel of 200 bighas of khudkasht lands, by taking into evidence certain inadmissible documents. In this connection he referred to Ext. 26(a) which is deposition of Srilal who gave his evidence in Second Appeal 682 of 1892. He was patwari of Mr. Thomas till the year 1287 fasli. In paragraph 3 of his deposition he stated that since the year 1276 till the year 1284 fasli, Mr. Thomas was the Thikadar of the whole sixteen annas share of the mauza. After the year 1284 Mr. Thomas was Thikadar of eight annas share. He had the Thika for the years 1285 to 1299. Four annas of Babu Raghubans Narain Singh and four annas share of Babu Jagdeo Narain Singh were in khas possession. In paragraph 9 of the deposition he stated that Babu Raghubans Narain Singh had khudkasht 12 or 13 bighas in Badh Dudhela, 12 bighas in Badh Bodi, 11 or 12 bighas in Badh Gamhi Kist and 12 or 13 bighas in Badh Tulheria. Learned Judge has placed much reliance on this exhibit in order to support the case of the plaintiff-respondents that the khudkasht lands were in Badh Dudhela, as he has observed that fortunately the plaintiffs have filed deposition of Srilal. Learned counsel contended that the deposition of Srilal under Ext. 26(a) is inadmissible in evidence, as it is hit by the provisions contained under proviso to Section 33 of the Indian Evidence Act, 1872, which clearly lays down that in order to make a deposition in a prior proceeding admissible, it must be shown that the first proceeding was between the same parties, or their representatives-in-interest. In the instant case, Srilal, by no stretch of imagination can be said to be the representative of the plaintiff-respondents or of their ancestors or their co-sharers. Admittedly he was Patwari, an employee, of Mr. Thomas.

20. Learned counsel appearing on behalf of the respondents, however, urged that Srilal may be treated as the representative of the plaintiffs' ancestors as he was employee of Mr. Thomas, who was the mortgagee of the plaintiffs' ancestors. In that view it may be said that Srilal was the representative of the ancestors of the plaintiffs.

In my opinion, this contention of learned counsel for the respondents cannot be accepted. Srilal cannot be treated as representative of the ancestors of the plaintiffs. I hold that Ext. 26(a) was inadmissible in evidence and the learned Judge erred in taking it in evidence.

21. Learned counsel for the appellants then referred to Ext. 21, which is a peti-

tion dated 8-5-1894, filed by one Har-dayal Singh, who was one of the tenants, who had filed the said petition against Jagdeo Narain Singh, ancestor of the plaintiffs, alleging that Jagdeo Narain Singh wanted to take forcible possession over his raiyati lands. In that petition he has shown his raiyati lands under three blocks in Dudhela Badh. While giving the details and boundaries of his each block of raiyati lands, he has mentioned towards south "khudkasht jot zirat of Babu Sia Prasad Singh and Babu Mod Narain Singh". The learned Judge in paragraph 29 of his judgment has taken it as an important piece of evidence, in favour of the plaintiffs in order to show that the zirat lands were in Dudhela Badh. Learned counsel on behalf of the appellants contended that this also is inadmissible in evidence under Sec. 32(3) of the Evidence Act. In order to find support, he relied on a Full Bench decision of this Court in Soney Lall Jha v. Darbdeo Narain Singh, AIR 1935 Pat 167, where their Lordships observed that the statements of boundaries in documents of title between third parties are not admissible under Section 32(3) of the Evidence Act. Such a statement cannot be said to be necessarily and prima facie against the proprietary interest of the person making it. In that view of the matter, in my opinion, the contention of learned counsel for the appellants has got to be accepted and the learned Judge committed an error in taking Ext. 21 in evidence.

22. It follows that both with regard to Ext. 26(a) and Ext. 21 the learned Additional Subordinate Judge has misdirected himself in law. One cannot help saying that if he had only cared to look into the relevant provisions of the Evidence Act and followed what was held in the Full Bench decision of this Court reported in AIR 1935 Pat 167 (supra), the error would have been avoided.

23. Further, in order to establish that the three plots of land were part of the zirat lands which were in Dudhela Badh, the learned Judge relied upon the evidence of Gauri Shankar Prasad, who was examined as P.W. 49 in Title Suit Nos. 44 and 46. He gave his age to be about 76 years in 1959, when he deposed before the Court below. He was an employee of Ajodhya Prasad of Nao Kothi since he was 15 years old. He deposed that Ajodhya Prasad, Jagdeo Narain Singh and Sheo Prasad had lands in village Kusmaut. Those lands were khudkasht lands. Mod Narain Singh, Raghubans Narain, Choudhary Ramgulam Singh and Jagnarain had given 16 annas interest in village Kusmaut and other villages in Thika to Mr. Thomas. He further stated that they had kept 200 bighas of khudkasht land of village Kusmaut in their

possession. They personally cultivated 200 bighas of land with their plough and ox. The village was given in Thika in the year 1867. It is this witness, who proved Exts. 18(a) and 18(b). He further deposed that he knew the 75 bighas of land of Dudhela Badh in dispute. Fifty-five bighas out of 75 bighas in suit were covered under 200 bighas of lands which were not given in lease. Fifty-five bighas of lands were measured under plot Nos. 895, 896 and 897.

Plot Nos. 895, 896 and 897 are khudkasht lands of the landlords. Learned counsel appearing on behalf of the appellants urged that the court below ought not to have relied on his evidence. He has drawn our attention to a portion of his deposition in the cross-examination, wherein he stated that the papers of the Estate of Ajodhya Prasad would not show that he was his manager or servant. Further, he stated that he began to study at the age of 6 years and passed middle vernacular at the age of 11 years. He gave up his studies in 1899. He had read Hindi. The papers which he had proved were written in Urdu. He was not present when the leases or sub-leases were executed. Learned counsel urged that as he did not know Urdu, he was not a competent witness to prove Ext. 18(a) and Ext. 18(b) which were admittedly written in Urdu. Further, he drew our attention to another portion of the cross-examination, where the witness stated that he could not say the khata and khasra numbers of the 200 bighas of lands which were not given in the lease. At another place in cross-examination he stated that Ajodhya Prasad had borne the expenses of his education. Therefore, in my opinion, this witness does not appear to be an independent and reliable witness. Hence, much reliance cannot be placed on his evidence.

24. Learned counsel on behalf of the respondents, however, referred to another set of documents (Exts. 2 and 3), which, according to him, clearly indicates that the three plots were part and parcel of the khudkasht land, which were Badh Dudhela. In this connection he referred to Ext. 3(t) which is a kabuliati dated 15-6-1927 executed by Hirday Narain Singh, grandfather of Ramcharitar Singh defendant No. 12) and father of Ramsagar Singh (defendant No. 11), who were members of defendants first party, in favour of Raj Rajeshwar Prasad (brother of plaintiff No. 1) and others. It may be noted that by this kabuliati, Hirday Narain had taken settlement, for a limited period, for a term of 5 years from 1335 Fasli to 1339 Fasli, 4 bighas, 14 kathas and 17 dhurs of zirat lands as per boundary given in the deed, which were portions of the khudkasht lands belonging to Choudhary Raj Rajeshwar Prasad and Babu

Lal Prasad Singh and others. The further recital in the said kabuliati is that the said land was under the possession of the proprietors and his representatives-in-interest as khudkasht land, and they were determined in survey operation as the bakasht interest of the aforesaid proprietor. It is also mentioned therein that the executants of the kabuliati shall not change the feature and the status of the aforesaid kamat lands. This kabuliati relates to the portion of land of plot No. 895. Learned counsel for the respondents then referred to Ext. 3 (a). This was also a kabuliati dated 15-6-1928 executed by Ramparsan Singh, father of Bacha Singh, defendant No. 1, a member of the defendants first party, to Choudhary Raj Rajeshwar Prasad, brother of the plaintiff.

According to this kabuliati he had taken settlement of 4 bighas 19 kathas and 17 dhurs of zirat land in village Kusmaut and in this exhibit also similar recital is made as in Ext. 3 (t). This relates to a portion of plot No. 895. It also relates to a portion of plot No. 991 which is not relevant for the disposal of this appeal. He further referred to Ext. 3(n). This was also executed by Ramparsan Singh in favour of Choudhary Raj Rajeshwar Singh on 27-7-1927. Similar recital is made in this deed also. In this kabuliati settlement was made in favour of the executant for 8 bighas 2 kathas and 18 dhurs of zirat land in the same village Hajipur Kusmaut. In this deed also similar recital has been made. It relates to a portion of plot No. 895 and other two plots 855 and 991; the latter two plots are not relevant so far this appeal is concerned. He drew our attention to Ext. 3 (o) which is also a kabuliati dated 17-7-1935 executed by Sitaram Singh, who was one of the farzidars of defendants first party as held by the Court below. Sitaram is also father of Chandradeo Singh, defendant No. 13, and Satnarain Singh, defendant No. 13(a), who are members of the defendants second party. It is for a period of 7 years in favour of Choudhary Raj Rajeshwar Prasad Singh. It is with respect to 32 bighas and 3 kathas of land situated in Hajipur Kusmaut. In this deed also similar recital is made regarding the nature of the land as kamat land. Further, an undertaking is given therein, by the executant that he shall not acquire any title to the said kamat land, and on the expiry of lease he would give up possession to the lessor, i.e., to the proprietor. It is also stated therein that the executant shall not acquire occupancy right in the land. It is also stated that the executant had executed the kabuliati by making the admission of all stipulations and by reading it and by getting it read over and explained to him, so that the same may be used

when required. This kabuliati relates to the portion of lands in plots Nos. 895, 896 and 897; and in the boundary portion towards south, it is mentioned khudkasht lands of malik.

Learned counsel for the respondents contended that these kabuliats, which have been executed by the ancestors of the defendants first party, and defendants second party, who were their farzidars, estop the defendants first party from challenging the lands in plots Nos. 895 to 897 as kamat lands. These deeds contain their own statement and are binding on defendants first party. The kabuliats, according to him, conclusively establish that the lands under these plots were the kamat lands of the plaintiffs and they were part and parcel of the 200 bighas which were zirat lands of the plaintiffs' ancestors, and the co-sharers of their ancestors.

25. On the other hand, learned counsel appearing on behalf of the appellants submitted that in those documents also it is not mentioned that the lands under the three plots were part and parcel of the 200 bighas of zirat lands mentioned in Ext. 18(a); nor they anywhere indicate that the zirat lands situated in Badh Dudhela, nor they mentioned that those zirat lands by mistake were mentioned as bakasht lands in the survey record of rights. All these kabuliats were prepared by the lessors, who got them executed by the lessees, who were not aware with meaning of kamat, zirat or khudkasht lands.

He relied on a decision of the Privy Council in Radha Krishna Thakurji v. Raghunandan Sinha, AIR 1935 PC 47. The case which their Lordships of the Privy Council were considering, also related to admission made in the kabuliati by the respondents that the lands were the private lands of the appellants. The Subordinate Judge held that the terms of the kabuliati showed that the lands were let to the respondents for the purpose of cultivation and they were the private lands of the appellants. On appeal, this High Court agreed that the lands were let for the purpose of cultivation, but their Lordships of this Court differed from the learned Judge's conclusion as to the private lands, and they allowed the appeal. Hence, aggrieved by the order of the High Court an appeal was filed to the Privy Council and their Lordships at page 48 observed:

"On the question of private lands, it is the duty of the Court, as provided in S. 120, Tenancy Act, to presume that land is not a proprietor's private land until the contrary is shown. Further the lands in suit are entered in the survey khatian completed in 1899, as 'proprietor's bakasht', and their Lordships agree with the

High Court that the 'Guide and Glossary to the Survey and Settlement Operations in this District', which were published in 1907, and the 'Final Report of the Survey and Settlement', published in 1926, make clear that the entry in the Record of Rights negatives the appellants' contention, and is entitled to the statutory presumption of its correctness. The report also states the term 'zirat' is locally applied to all land in the possession of the proprietor, irrespective of whether it is truly zirat, or private land, within the meaning of the statute. For this reason, their Lordships agree with the High Court that the admission in the kabuliati of 1914 that the lands were 'khudkasht' that cannot be accepted as a clear admission they were not only in the possession of the appellants but were also zirat, or private land"

Learned counsel further contended that these recitals are not admissible in evidence and at any rate not much value can be attached to these recitals.

26. To repel these contentions, learned counsel for the respondents referred to the kabuliati, Ext. 3(o), to show that the executant was familiar with the terms 'Kamat' as well as 'khudkasht land' and the difference between the two, because in that very deed he mentioned the kamat land in the body of the deed, and while giving the boundaries of the kamat lands towards the south he mentioned "khudkasht lands of the malik". That obviously indicates that he was familiar with the terms. Besides, in the kabuliati it is mentioned that the same was read over and explained to the executant before he executed the deed. Learned counsel referred to a decision of the Supreme Court in Harihar Prasad Singh v. Deonarain Prasad, AIR 1956 SC 305 where their Lordships were dealing with similar questions regarding the proprietors' private land as contemplated under Sec. 120(2) of the Bihar Tenancy Act, as well as with regard to the presumption of correctness of entry made under Section 103-B of the said Act. At page 308 their Lordships while dealing with the case observed that in that case some oral evidence was adduced by both the sides as to the character of the lands, but it was too vague and interested to be of much value. Therefore, their Lordships concentrated only on the documentary evidence adduced by the parties and their Lordships at page 308 in paragraph 5 observed:

"The earliest document bearing on the question is Exhibit 1, which is a mortgage deed executed by the previous owners, Firangi Rai and others, to Harbans Narain Singh on 10-4-1893 over a portion of the suit lands. Therein it is recited that the mortgagors 'mortgage, hypothecate and render liable the properties constituting the proprietary mukarari interest, with

all the zamindari rights and claims including the 'khudkasht kamat lands'."

The word 'khudkasht' means personal cultivation, and that is a neutral expression, which might include both private lands and bakasht lands, that is to say, raiyati lands, which had come into the possession of the proprietor by surrender, abandonment or otherwise. But the word 'kamat' has a definite connotation, and means private lands (Vide S. 116, Bihar Tenancy Act).

If the recital in Exhibit 1 is to be accepted as correct, the lands were on that date in the personal cultivation of the proprietor as private lands

Their Lordships in the same paragraph further observed:—

"..... These recitals are of considerable importance as they occur in deeds inter partes. The respondents are right in contending that they cannot be regarded as admissions by the mortgagees as the deeds were executed by the mortgagees; but they are certainly admissible under S. 13, Evidence Act, as assertions of title, and as it is under these documents that the first party defendants claim, their probative value as against them and as against the second party defendants who claim under them is high."

Learned counsel further submitted that in this case the plaintiff-respondents have been able to rebut the presumption which was available to the appellants under Ss. 120 (2) and 103-B of the Act and, that they have been able to discharge their onus by adducing the evidence under Ext. 3 series. In this connection be relied on the same judgment of the Supreme Court where their Lordships at page 309 in paragraph 6 observed:—

"Now, what is the evidence adduced by the defendants to rebut the inference to be drawn from them? None. They simply trust to the presumptions in their favour enacted in Ss. 120(2) and 103-B of the Act to non-suit the plaintiffs. But these are rebuttable presumptions, and they have, in our opinion, been rebutted by the evidence in the suit, which is all one way."

But, in my opinion, the facts and circumstances in the case reported in AIR 1956 SC 305 (supra) were different. From the above it is clear that there was not sufficient evidence adduced on behalf of the defendants to resist the evidence of rebuttal. Their Lordships, in that case had not laid down the general principle indicating the circumstances, under which the burden of proof shall be discharged or the statutory presumption shall be displaced. In my opinion, whether the statutory presumption attaching to an entry in the survey record of rights has been properly displaced or not, must depend on the facts of each case. In the

instant case, the earliest documents which came into existence before the survey record of rights, which were prepared in 1908, were Exts. 18, 18(a), 18(b), 3(m) and 3(L). We have already seen that from these exhibits it cannot be said with certainty that the lands under plots Nos. 895, 896 and 897 were part and parcel of the zirat lands, which were in possession of the plaintiffs' ancestors or their ancestors' co-sharers. These documents do not indicate where those private lands were situated. Their boundaries are not given. Admittedly, in the years 1867 and 1881, when these documents were executed, the lands were not surveyed. Therefore, no plot number could have been given. But, nonetheless, it was essential to indicate clearly as to where those proprietors' private lands were situated; more so, because those lands were not surveyed. When we refer to the documents Exts. 18(b), 3(m) and 3(L) there are certain indications which lead to the conclusion that the lands were situated in Sirsia Badh as mentioned earlier. Even if it is assumed that Badh Sirsia refers to Kharhor land and it does not refer to the zirat lands, in the circumstances of the uncertainty, in the instant case, there is heavy onus on the plaintiff-respondents to establish that the lands under the three plots were part and parcel of the same zirat lands, which existed in the years 1867 and 1881.

In my opinion, those documents are not helpful to the plaintiff-respondents in displacing the statutory presumption contained under Sections 103-B (3) and 120(2) of the Bihar Tenancy Act. Admittedly, it is the case of the plaintiffs that the disputed land situated in Badh Dudhela, as per evidence led in the trial Court, referred to earlier. If we refer to schedule A to the plaint, while giving description of the land under dispute, it is specifically mentioned by the plaintiffs that the lands in dispute situated in village Hajipur Kusmaut Badh Jagdishpur. This indicates that the plaintiffs were themselves not certain where those proprietors' private lands situated. Admittedly, village Kusmaut, as mentioned earlier, included several Badhs. According to the case of the plaintiffs, after the proprietors' private lands were surveyed, by mistake, they were recorded as bakasht lands in the survey record of rights, which was prepared in 1908. The plaintiffs have not given satisfactory reasons as to why they allowed the mistake to continue in the survey record of rights, and took no step to rectify those mistakes; so much so that even in the documents contained under Ext. 3 series referred to above, there is no mention regarding the mistake having crept in, in the survey record of rights. In my opinion, even the documents contained under Ext. 3

series, on which much reliance has been placed on behalf of the plaintiff-respondents, do not help them in displacing the statutory presumption. It has been held in *Sivarama Iyer v. Subramonia Iyer*, AIR 1953 Trav-Co 417 at p. 421 by Koshi, C. J. and Govinda Pillai, J.:—

"..... Relying on the decision of the Judicial Committee of the Privy Council in *Banga Chandra v. Jagat Kishore*, AIR 1916 PC 110, it had been laid down in '*Esekkimadan Nadan v. Chellamma Nadachi*'. (1937) 27 Trav LJ 44 that a recital in a deed or other instrument is in some cases evidence against the party who makes it; but it is no more evidence as against other persons than any other statement would be"

Therefore, even if those documents are admissible much evidentiary value cannot be attached to them, in the facts and circumstances of the case. The legal terms and the conditions, most favourable to the lessors, urged in the document under Ext. 3 series, clearly indicate that the documents were drafted at the instance of the lessors, who have taken too much of precaution to safeguard their rights in the lands which were subject matter of the lease in those documents. If really those lands were proprietors' private lands or kamat lands, they were amply protected under Section 116 of the Bihar Tenancy Act. It was not necessary for the lessors to have taken such precaution. That also creates grave suspicion as to whether those lands were really proprietors' private lands. It is noteworthy that even though the lands were in reality being settled with the defendants, extra precaution was taken by getting kabuliats from persons who were relations of the defendants. This shows that the lessors were afraid that if the lands were settled with the defendants who had other raiyati lands in the village acquisition of occupancy rights would be easier. This fact also indicates that the lands were really bakasht lands and not nij jote or zirat. It is well settled that statutory presumptions are displaced to cogent evidence. In Halsbury's Laws of England, Third Edition, Volume 15, at page 343, under the heading "Effect of rebuttable presumptions of law", it is mentioned:—

"..... The nature of a presumption of law is that the Court treats as established some fact of which no evidence has been given, and when rebuttable, it can have no weight capable of being put in the balance against opposing evidence which is believed. It does not follow that such a presumption may be rebutted in every case by any evidence however slight. The rebutting evidence, must be considered on its merits"

Therefore, in my opinion, the plaintiff-respondents failed to displace the statu-

tory presumption contained under Sections 103-B (3) and 120 (2) of the Act. Thus, the findings of the Court below that the lands under the three plots, namely, 895 to 897 were the proprietors' private lands and the survey entries showing these lands as bakasht were incorrect, cannot be accepted. Consequently, the other findings that the plaintiffs were entitled to recover lands under plots Nos. 895, 896 and 897; that they were entitled to mesne profits, and that the plaintiffs were entitled to recover Rs. 2,778/- from the defendants first party, being the proportionate amount of sale proceeds, which was deposited in Court during the pendency of the case under Section 145 of the Code of Criminal Procedure and which was withdrawn by the defendants first party, also cannot be sustained. These findings are, therefore, set aside and the judgment and the decree of the Court below are modified to that extent.

As regards the land under plot No. 894, it has been already mentioned earlier that the Court below held that the land under the said plot was bakasht land. The Court below considered the dispute between the plaintiffs and the defendants first party regarding the land in the said plot in paragraphs 166 to 168 of its judgment, and held that the defendants first party were not in possession of plot No. 894. They were not able to prove that they had taken oral settlement of the entire lands in the year 1932 and their story of the oral settlement was not accepted by the Court below. After due consideration the Court below held that they have not acquired any title with respect to the lands in plot No. 894. Therefore, it held that the plaintiffs were entitled to recover the land under plot No. 894. Learned counsel appearing on behalf of the appellants has not placed before us any evidence either oral or documentary, to satisfy that the said findings of the Court below were incorrect. In that view of the matter, the finding regarding plot No. 894 by the Court below is accepted, and I hold that the plaintiff-respondents are entitled to recover disputed land in plot No. 894 from the defendants first party.

27. Now I turn to the consideration of point No. (ii). Learned counsel for the appellants urged that the defendants first party are the settled raiyats of the village, and since the finding of the Court below is that they were in possession over the lands in the three plots, viz., 895 to 897 they have acquired occupancy right over those lands. In order to show that they were the settled raiyats of the village, learned counsel has drawn our attention to the evidence of Bateshwar Singh (P.W. 18) who has stated in cross-examination that Bacha Singh has got ancestral lands

In village Kusmaut. He referred to the evidence of Dwarika Singh (P.W. 21) who in his cross-examination stated that Bacha Singh has got 5 bighas of ancestral lands in village Kusmaut. He also referred to the evidence of Dund Singh (D.W. 14) who deposed that he got 7 bighas of land in village Kusmaut. He further stated that he and his co-sharers have got lands recorded in one holding which measured 60 bighas and odd. Sukhram, Gazadhar and Ramparsan had also share in the holding. Ramparsan Singh had a share in the holding. Bacha Singh is the son of Ramparsan. Each co-sharer was in separate possession of the plots. He further stated that they have got holding splitted up after the estate vested in the Government.

He has also drawn our attention to paragraph 170 of the judgment of the trial Court where it is specifically mentioned that the defendants have alleged that they are settled raiyats of the village and this factum was not disputed. Again in paragraph 172, the Court held that the defendants first party are settled raiyats of the village. Therefore, learned counsel for the appellants contended that if the plaintiff-respondents have failed to establish that the lands under plots Nos. 895 to 897 were proprietors' private land or kamat land, the defendants first party, being settled raiyats of the village, as a matter of course, would acquire occupancy right according to the provisions contained under Section 21 of the Act. Even in this Court learned counsel appearing on behalf of the plaintiff-respondents has not been able to show that the plaintiff-respondents were not settled raiyats of the village. Since, I have already held that the plaintiff-respondents have failed to establish that the lands under plots Nos. 895 to 897 were zirat lands or proprietors' private lands, in my opinion, the contention of learned counsel for the Appellants is well grounded.

Therefore, I hold that the defendants first party have acquired occupancy right over the lands in dispute in plots Nos. 895 to 897. Thus, the finding of the trial Court that the defendants first party have not acquired occupancy right over these three plots, is also set aside, and the judgment and decree of the Court below are modified to that extent.

28. Since I have already held while dealing with point No. (iii) that the plaintiff-respondents have failed to establish that the lands under plots Nos. 895 to 897 were the proprietors' private lands, and since that point has been decided in favour of the appellants, it is not necessary to decide the point No. (iv).

29. Now I turn to consider point No. (v). It may be recalled that under this

point learned counsel for the appellants contended that even if the lands under plots Nos. 894 to 897 were held to be proprietors' private land, the plaintiffs not being in possession at the time of the vesting under the Land Reforms Act, the same has vested in the State of Bihar under Section 6 of the Bihar Land Reforms Act, 1950, and he relied on a decision of the Supreme Court in Suraj Ahir v. Prithinath Singh, 1963 BLJR 1=(AIR 1963 SC 454). But, in my opinion, since I have already held that the lands under plots Nos. 895 to 897 were not the proprietors' private lands, this point also has become infructuous so far the lands under plots Nos. 895 to 897 are concerned. I have already held that the defendants first party have acquired occupancy right in the lands under dispute in these three plots. Only in case of the land under plot No. 894 I have held that the plaintiff-respondents are entitled to recover and over this land defendants first party have not acquired any right. In that view of the matter it has become necessary to consider the contention of learned counsel for the appellants under this point only with regard to the land under plot No. 894. Learned counsel on behalf of the plaintiff-respondents contended that the defendants first party had acquired possession over this land along with others, in view of the order passed in the proceeding under Section 145 of the Criminal Procedure Code. Therefore, Section 6 of the Land Reforms Act will have no application in the instant case. In order to support his contention learned counsel for the respondents relied on a decision of this Court in Kanhaiya Lal Singh v. Bilas Singh, 1967 BLJR 600, where their Lordships have held that the declaration of the possession under S. 145 of the Code of Criminal Procedure does not amount to actual possession, and actual possession must be deemed of the persons, who are found by Civil Court to have been in actual possession. Besides, in this case, notice under Section 4 (e) of the Land Reforms Act was issued to the State of Bihar, but none appeared on behalf of the State of Bihar to advance the claim of vesting under the Land Reforms Act. In that view of the matter, in my opinion, the lands under plot No. 894 have not vested in the State of Bihar under the said section of the Bihar Land Reforms Act. As held earlier, the plaintiff-respondents are entitled to recover the land under dispute in plot No. 894 from the defendants first party.

30. In the result, the judgment and decree of the trial Court are modified to the extent indicated above and the appeal is allowed in part, but in the circumstances of the case, there will be no order as to costs.

31. A. B. N. SINHA, J.: I agree.
Appeal partly allowed.

AIR 1970 PATNA 237 (V 57 C 37)
FULL BENCH

**N. L. UNTWALIA, TARKESHWAR NATH
AND K. B. N. SINGH, JJ.**

Sarjug Singh and others, Appellants v.
Basisth Singh and others, Respondents.

A. F. O. O. No. 175 of 1962 and No. 6
of 1964 and A. F. A. O. No. 248 of 1964,
D/- 10-1-1968, from decisions of 2nd
Addl. S. J. Muzaffarpur, D/-9-6-1962, 1st
Addl. S. J. Patna, D/- 10-10-1963 and
Addl. Dist. J. Darbhanga, D/-14-7-1964.

Civil P. C. (1908), Ss. 11, 47 — Res
judicata — Applicability to execution pro-
ceedings — Principles of res judicata and
constructive res judicata apply to execu-
tion proceedings — Application by judg-
ment-debtor under Sec. 47 dismissed in
default — Fresh application not barred —
AIR 1947 Pat 298 partly Overruled. Rea-
soning of Rai, J. in AIR 1950 Pat 354 Not
approved; AIR 1955 Orissa 81 & AIR 1961
Orissa 86; AIR 1964 Orissa 107 & AIR 1967
Orissa 38, Dissented from.

Though in terms the provisions of Sec-
tion 11 of the Code are not applicable to
execution proceedings, principles of res
judicata as also of constructive res judi-
cata are applicable to execution proceed-
ings under appropriate circumstances in
subsequent executions of the same decree
or at different stages of the same execution
case. AIR 1962 Pat 72 (FB), Foll.

(Para 4)

The order of dismissal of an application
under Section 47 of the Code filed by the
judgment-debtor in his default—either in
presence of the decree-holder or in his
absence—is an order which can be said to
have decided, neither expressly nor im-
pliedly, i.e. by necessary implication, any
of the points of objection to the execution,
which were raised by him in his objec-
tion or which might and ought to have
been raised. The provisions of Order 9
are not applicable to such proceedings.
There is no specific provision in the Code
to bring about dismissal of an application
under Section 47 of the Code in default
of the judgment-debtor. Obviously, it is
done in exercise of the inherent power of
the Court as the Court must necessarily
have the power to dismiss a proceeding in
default of the party. By such dismissal
alone, however, it makes no order which
decides any point of objection either ex-
pressly or by necessary implication. The
matter becomes different if some other
order in the execution case is made either
at the time of dismissing the miscellaneous
case under Section 47 of the Code in
default of the judgment-debtor or at any

time thereafter and before the filing of
the second application. AIR 1947 Pat 298
partly Overruled. Reasoning of Rai, J. in
AIR 1950 Pat 354, Not approved; AIR 1955
Orissa 81 & AIR 1961 Orissa 86, AIR 1964
Orissa 107 & AIR 1967 Orissa 38, Dissent-
ed from. (Paras 4, 5, 7, 15)

It cannot be said that merely because
the decree-holder was directed to file fresh
requisites for issue of sale proclamation,
by necessary implication the objection of
the judgment-debtor was overruled. The
Court cannot be said to have come to a
decision by passing an order that the prop-
erty in question is liable to be sold
without adjudication of the objection raised
by the judgment-debtor in the miscel-
laneous case while keeping it pending. In
such a situation, it must be held that the
order made by the executing Court will
always be subject to the ultimate decision
in the miscellaneous case. (Para 17)

Where the order directed in execution
of the decree, attachment of the sale pro-
ceeds in another execution case the order
by necessary implication decided that the
decree under execution was not invalid,
was fit to be executed and execution was
directed to proceed by attachment of a
considerable sum of money lying in deposit
in another execution case in furtherance
of the present execution. The order clearly
brings about a bar on the principle of
constructive res judicata. (Para 26)

Cases Referred: Chronological Paras

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|-------------------------------------|------------------|
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| ILR (1964) Cut 494, Ramchandra | |
| Nahaka v. Bharat Rana | 11 |
| (1964) AIR 1964 Orissa 107 (V 51) = | |
| 30 Cut LT 262, Gundicha Padhano | |
| v. Parrati Podhanuni | 11 |
| (1962) AIR 1962 Cal 272 (V 49), | |
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48 Ind Cas 45, Raja of Ramnad
v. Velusami Tevar 20
- (1891) ILR 13 All 53 = 17 Ind App
150 (PC), Radha Prasad Singh v.
Lal Sahab Rai 4
- (1882) ILR 8 Cal 51 = 8 Ind App
123 (PC), Mungul Pershad Dichit
v. Girja Kant Lahari 9, 21

B. P. Samaiyar, for Appellants; Kedar Nath Verma, for Respondent (in M. A. No. 175/62); S. C. Sinha, Ambika Kant Sinha and Kamlapati Singh, for Appellant; S. K. Sarkar and K. N. Rao, for Respondents (in No. 6/64); Ashwini Kumar Sinha, for Appellant; Lalnarayan Sinha and Ram Nandan Sahai Sinha, for Respondent (in No. 248/64).

UNTWALLA, J.:—All these three miscellaneous appeals referred to Full Bench have been heard together as the common question of law involved in them is whether dismissal of a judgment-debtor's application under Section 47 of the Code of Civil Procedure hereinafter called the Code in his default is a bar to the maintainability of an identical or a similar application by the judgment-debtor on the principles of *res judicata*.

2. By order dated 13th of April, 1967 R. K. Choudhary and G. N. Prasad, JJ., referred miscellaneous appeal 175 of 1962 to a larger Bench as in respect of the point aforesaid there was a conflict of views expressed in two Bench decisions of this Court, namely, *Ramnarain Singh v. Basudeo Singh*, AIR 1947 Pat 298 and *Bhagwati Prasad Sah v. Radha Kisun Sah*, AIR 1958 Pat 254. Since this was an appeal from an original order, obviously the reference was under Rule 3, Chapter V of the Patna High Court Rules, and only the questions of law could be referred. No question for answer by the Full Bench was, however, framed by the Division Bench. Miscellaneous Appeal 248 of 1964 which is an appeal 'from an appellate order, in view of the earlier reference to the Full Bench in miscellaneous appeal 175 of 1962 as also because of the conflict between the two Bench decisions of this Court, was also referred to a larger Bench by *Ramratna Singh and Shambhu Prasad Singh, JJ.*, on the 10th of July, 1967. Since this is a miscellaneous second appeal, manifestly the reference was under Rule 2, Chapter V of the Patna High Court Rules, and, therefore, not only the point of law but the whole case was for decision before the Full Bench. Miscel-

laneous appeal 6 of 1964 which again is an appeal from original order came up before the same Bench consisting of *Ramratna Singh and Shambhu Prasad Singh, JJ.*, for hearing, and this was also referred to the Full Bench by their Lordships' order made on the 14th September, 1967, without formulating any question of law. In this appeal as also in miscellaneous appeal 175 of 1962, we have framed and answered the question of law only as will be stated hereinafter. These two appeals eventually will have to be placed before the appropriate Division Benches for final disposal.

M. A. 175 of 1962

3. *Sarjug Singh*, one of the judgment-debtors, is the sole appellant in this case. *Basistha Narain Singh* is decree-holder respondent No. 1. The latter proceeded to execute his decree in execution case No. 9 of 1953 in the Court of the 2nd Additional Subordinate Judge, Muzaffarpur. It appears that the talika of the properties sought to be proceeded against in the execution case was altered at a subsequent stage by amendment of the execution petition. The judgment-debtor appellant filed an application on the 8th of August, 1961 under Section 47 of the Code, which was registered and numbered as miscellaneous case 20 of 1961, objecting to the execution chiefly on the ground that it was barred by limitation. The application was dismissed on the 20th of January, 1962 ('1961' is a mistake) in his default and in presence of the decree-holder respondent, by an order in the following terms—

"139: 20-1-1961 Parties files (sic) hazari. Case called out. O. P.'s lawyer turns up. A. P. does not turn up after repeated calls.

The Hazari on behalf of the A. P. discloses the name of one Ramsobhit Singh as witness for the A. P. but none responded on repeated calls. The lawyer is sent for but he is not available. The miscellaneous Case is, therefore, dismissed for default."

Shortly after the dismissal, on the same date another application under S. 47 of the Code on identical lines was filed by the appellant, which was registered as miscellaneous case No. 4 of 1962. This miscellaneous case has been dismissed by the learned Additional Subordinate Judge by his order dated the 8th of June, 1962 merely on the ground that in view of the decision of a Full Bench of this Court in *Baijnath Prasad Sah v. Ramphal Sahni*, 1962 BLJR 110 = AIR 1962 Pat 72 (FB) the second application was barred on the principle of constructive *res judicata* because of the dismissal of the first application in default of the judgment-debtor. The point as to whether the execution case was barred by the law of limitation has not been decided by the Court below. The judgment-debtor applicant has come up in appeal.

4. It is beyond debate and dispute now that though in terms the provisions of Section 11 of the Code are not applicable to execution proceedings, principles of res judicata as also of constructive res judicata are applicable to execution proceedings under appropriate circumstances in subsequent executions of the same decree or at different stages of the same execution case. The decision of the Full Bench consisting of five Judges of this Court in the case of Baijnath Prasad Sah, AIR 1962 Pat 72 (FB) is a settler on the point. The question, however, is whether the dismissal of an application under Section 47 of the Code filed by the judgment-debtor in his default — either in presence of the decree-holder or in his absence—is an order which can be said to have decided, either, expressly or impliedly, i.e., by necessary implication, any of the points of objection to the execution, which were raised by him in his objection or which might and ought to have been raised. The order dismissing the application in default, it is manifest, did not decide anything expressly. Did it decide any matter impliedly or by necessary implication? The answer, to my mind, to this question also is in the negative.

5. The analogy of dismissal of a suit for default of the plaintiff, which bars the filing of a second suit, if the dismissal has been in presence of the defendant, is not quite apposite, as has been taken in some cases. On the same analogy, it has been opined in some of them that if the dismissal of the application under Section 47 of the Code is in default not only of the judgment-debtor but also of the decree-holder then a second application by the former is not barred. It ought to be remembered, however, that dismissal of a suit for default of the plaintiff, either in absence or in presence of the defendant, does not involve any question of res judicata so as to bar the filing of a second suit by him in case the dismissal is in presence of the defendant. As early as in 1890 in the case of Radha Prasad Singh v. Lal Sahab Rai, (1891) ILR 13 All 53 (PC) Lord Watson delivering the judgment of the Privy Council had said at p. 62—

"None of the questions, either of fact or law, raised by the pleadings of the parties, was heard or determined by the Judge of the Shahabad Court in 1881; 2 (when the first suit was dismissed for default) "and his decree dismissing the suit does not constitute res judicata within the meaning of the Civil Procedure Code."

If the dismissal of the suit has been under Rule 3 of Order 9 of the Code, where neither party appeared when the suit was called on for hearing, the plaintiff under Rule 4 may (subject to the law of limitation) bring a fresh suit. But if

the dismissal is under Rule 8, where the defendant appears and the plaintiff does not appear, when the suit is called on for hearing, the plaintiff under Rule 9 is precluded from bringing a fresh suit in respect of the same cause of action. The dismissal of a suit for default in either event does not bring into operation the bar of res judicata or constructive res judicata within the meaning of Section 11 of the Code in the institution of a second suit on the same cause of action. It is difficult to appreciate, then, as to how in an execution proceeding dismissal of an objection under Section 47 of the Code in default either of the judgment-debtor alone or of his and the decree-holder's, the second application can be held to be not maintainable on the ground of the principles of constructive res judicata.

What seems to have been done by the Bench of this Court in Ramnarain Singh's Case, AIR 1947 Pat 298 is to import the principles of law engrafted in Rules 4 and 9 of Order 9 of the Code in the garb of principles of res judicata to the proceedings in execution although it is well settled that the provisions of Order 9 are not applicable to such proceedings.

6. What is meant by res judicata? In Art. 357 on pages 184-85 of the Halsbury's Laws of England, 3rd Edition, it has been stated—

"Where res judicata is pleaded by way of estoppel to an entire cause of action, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact.

..... The doctrine of res judicata is not a technical doctrine applicable only to records: it is a fundamental doctrine of all Courts that there must be an end of litigation."

7. The Supreme Court has reiterated this doctrine in Daryao v. State of U. P., AIR 1961 SC 1457 with reference to the question as to whether an application to the Supreme Court under Art. 32 of the Constitution could be barred on the principles of res judicata if a similar application made to the appropriate High Court under Art. 226 has failed. The doctrine is not, it has been said, applicable with full force if the application under Article 226 has been dismissed in limine without passing a speaking order as in that event it would not be easy to decide what factors weighed in the mind of the High Court and

"that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Art. 32" (Vide Page 1466 Column 1).

It should be pointed out here that there is no specific provision in the Code to bring about dismissal of an application under Section 47 of the Code in default of the judgment-debtor. Obviously, it is done in exercise of the inherent power of the Court as the Court must necessarily have the power to dismiss a proceeding in default of the party. By such dismissal alone, however, it makes no order which decides any point of objection either expressly or by necessary implication. The matter becomes different if some other order in the execution case is made either at the time of dismissing the miscellaneous case under Section 47 of the Code in default of the judgment-debtor or at any time thereafter and before the filing of the second application.

8. In Ramnarain Singh's case, AIR 1947 Patna 298 the facts were that the decree-holder filed his execution petition on 28-5-1943, against the sons of the original judgment-debtor, he being dead by that time. On 20-1-1944, the sons filed an objection under Section 47 of the Code claiming that the decree was incapable of execution against them. The application was dismissed for default in presence of the decree-holder on 6-5-1944, and on 11-3-1944, the decree-holder was directed to file requisites for valuation by 18-5-1944, which he did. The sons' application to set aside the order dated 8-5-1944, and for restoration of their earlier application under Section 47 was rejected on 17-7-1944. The sons filed another miscellaneous case on 22-7-1944. That was also dismissed, it appears, again for default and an application filed on 11-12-1944, for restoring that petition was also dismissed for default on 10-3-1945. Meanwhile on 21-12-1944, the application objecting to the execution, out of which the appeal before the High Court arose, was filed. The earlier two dismissals had taken place in presence of the decree-holder. Under those circumstances, *Beevor, J.*, with whom *Meredith, J.*, as he then was, agreed chiefly on the basis of the decision of this Court in *Jago Mahto v. Khirodhar Ram*, ILR 2 Pat 759 = AIR 1924 Pat 122, held that the third miscellaneous case filed by the sons was barred on the principles of *res judicata*, as the earlier two miscellaneous cases had been dismissed in presence of the decree-holder. If they had been dismissed in absence of the decree-holder, *Beevor, J.*, seems to be of the view, the dismissal would not have operated as *res judicata*. For the reasons given above, with very great respect, I say that the view thus expressed in *Ramnarain Singh's case*, AIR 1947 Pat 298 is not sound and must be overruled. If I may say so, again with respect, the decision of the High Court is right and can be well supported by the fact that after the dismissal of the first application on 6-5-1944,

when on 11-5-1944, the decree-holder was directed to file requisites for valuation by 18-5-1944, that order by necessary implication negatived the objection that the decree was inexecutable against the sons.

In view of the principle of law in *Balnath Prasad Sah's case*, AIR 1962 Pat 72 (FB) this order clearly operated as a bar to the second miscellaneous case or the third one on the principles of constructive *res judicata*. But I am definitely of the view that the order dated 6-5-1944 did not operate as *res judicata*. I am happy to note that none of the learned Advocates for the decree-holders Messrs. Kedar Nath Verma, Lalnarayan Sinha (Advocate General) and S. K. Sarkar in any of the appeals could support the view expressed in *Ramnarain Singh's case*, AIR 1947 Pat 298; rather they all conceded fairly that it was erroneous.

9. The case of *Jago Mahto*, AIR 1924 Pat 122 decided by Dawson Miller, C. J., and Kulwant Sahay, J., following the decision of the Judicial Committee of the Privy Council in *Mungul Pershad Dicht v. Girja Kant Lahari*, (1882) ILR 8 Cal 51 (PC) was quite different. In the execution case filed by the decree-holder in the year 1921, the judgment-debtor filed an objection contending that the execution was barred by limitation. On the date fixed for hearing the objection the judgment-debtor did not appear. The Court dismissed the objection for default and on the same date passed an order that the decree-holder should take further steps. On his failure to take steps on the date fixed, the execution case was dismissed in default of prosecution. The next execution case was filed some time later. The judgment-debtor filed an objection that it was barred by limitation as the previous execution case was so barred. It is to be noticed that the facts were almost identical to those of *Mungul Pershad Dicht's case*, ILR 8 Cal 51 (PC). In such a situation, it was held that after dismissal of the objection by the judgment-debtor, the order of the execution Court directing the decree-holder to take further steps indirectly decided that the previous execution case was a fit one to try and, therefore, not barred by limitation. The case, if I may say so with respect, fully supports the view I have expressed above, and was wrongly understood by *Beevor, J.*, to say that the dismissal of the earlier objection for default operated as *res judicata*.

10. The facts of the case of *Bhagwati Prasad Sah*, AIR 1950 Pat 354 were that an earlier objection by the tenant judgment-debtors that they were not liable to be evicted in view of the provisions of law contained in Sec. 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act 3 of 1947) was dis-

missed for default on the 5th February, 1949, as the facts stated clearly show, in presence of the decree-holder when he had produced a certified copy of the judgment of the High Court passed in the second appeal arising out of the title suit. The tenants filed another application on the 9th February, 1949. Rejecting the argument put forward on behalf of the decree-holder that the dismissal of the first application for default operated as a bar to the maintainability of the second application, Rai, J., said—

"The second application might be considered as one in continuation of the previous application. It was in respect of the same relief about which the executing Court had not adjudicated. Under the circumstances of the present case, there would not arise any bar of res judicata while giving relief to the tenants on the application dated 9th February, 1949."

The case of Ramnarain Singh, AIR 1947 Pat 298 does not seem to have been cited. Although respectfully agreeing with the view that dismissal of the first application in default did not bring about the bar of res judicata in the way of the second application, I find myself unable to agree with the reason thereof given by Rai, J. The second application could not be considered as one in continuation of the previous application. Had some effective order intervened between the two, that order must have operated as res judicata. Sinha, J., as he then was, rested his judgment on somewhat different grounds and said that the dismissal for default of the previous application could not bar the hearing on merits of a second objection. I respectfully agree with this view.

11. Ramnarain Singh's case, AIR 1947 Pat 298 has been consistently followed by the Orissa High Court in Simhadri Sahu v. Balaji Padhi, AIR 1955 Orissa 81, Sori Dibya v. Kanhucharan Rath, AIR 1961 Orissa 86, Gundicha Padhano v. Parvati Podhanuni, AIR 1964 Orissa 107 and Ramchandra Nahaka v. Bharat Rana, AIR 1967 Orissa 38; the case of Bhagwati Prasad Sah AIR 1950 Pat 354 has not been followed. In Simhadri Sahu's Case, AIR 1955 Orissa 81, as rightly pointed out by A. N. Grover, J., in the case of Hazura Singh v. Jewon Singh, AIR 1958 Punj 339, with reference to the facts of the case of Bhagwati Prasad Sah, AIR 1950 Pat 354, it was wrongly stated that it did not appear clearly whether the previous objection petition had been dismissed for default of both parties or in presence of the decree-holder. The Punjab High Court, if I may say so with respect has rightly followed the decision of Bhagwati Prasad Sah, AIR 1950 Pat 354 and not that of Ramnarain Singh, AIR 1947 Pat 298.

In the last mentioned Orissa case, namely, Ramchandra Nahaka's case, AIR

1967 Orissa 38, the objection of the judgment-debtor that he was an agriculturist and, consequently, his property proceeded against in the execution case was exempt from attachment and sale under Cls. (b) and (c) of Section 60 of the Code was dismissed for default on 3-11-1962. Narasimham, C. J., stated—

"When the Miscellaneous case was fixed for hearing on 3-11-1962 and the appellant (petitioner) failed to appear on that date, the obvious inference is that he had no evidence to prove that he was an agriculturist, and the order dated 3-11-1962 must be held to be an implied decision against the appellant. The principle of constructive res judicata applies to execution proceedings also."

It is no doubt true that the principle of constructive res judicata applies to execution proceedings. But I say with very great respect that the order dismissing the miscellaneous case for default cannot be held to have impliedly held that the objection had no merit. I do not agree with this view, and the similar ones expressed in other cases of the Orissa High Court.

12. Grover, J., in the case of AIR 1958 Punj 339, while following the decision of Bhagwati Prasad Sah's case, AIR 1950 Pat 354, has referred to several earlier decisions of Lahore and Punjab High Courts including the decision of Bhide, J., in Jot Ram Sher Singh v. Jiwan Ram Sheoli Mal (Sic), AIR 1932 Lah 643 (1) taking the identical views.

13. In Bishwanath Kundu v. Sm. Subala Dassi, AIR 1962 Cal 272 a Bench of Calcutta High Court has said at p. 274 col. 2—

"A dismissal for default of a particular objection which involves no decision on the merits, either expressly or impliedly, that is, by necessary implication, cannot, therefore, be held to bar a subsequent objection, either similar or different." I respectfully agree with this view.

14. The following question of law is framed and will be deemed to have been framed and referred to the Full Bench by the Division Bench:—

"Whether, on the facts and in the circumstances of this case, the objection of the judgment-debtor appellant filed on 20-1-1962, in miscellaneous case 4 of 1962 was barred on the principles of res judicata?"

15. For the reasons stated above, I would answer the question in the negative, and hold that the dismissal of miscellaneous case 20 of 1961 on 20-1-1962, in default of the appellant, although in presence of the decree-holder, did not bring about any bar on the principles of res judicata or constructive res judicata. The case will now be placed for final adjudication by the Division Bench which referred it.

M. A. 248 of 1964.

16. This is a miscellaneous second appeal by the judgment-debtor. One Gujjar Sahu instituted title suit 149 of 1951 in the Court of the Subordinate Judge of Darbhanga against Tarni Prasad Singh, defendant 1st Party, and Ramcharan Shaw, defendant 2nd party. No relief had been claimed against Ramcharan Shaw. Tarni only contested the suit. It was dismissed by the trial Court on 2-3-1954 and costs were awarded to him against the plaintiff. Plaintiff Gujjar Sahu filed a title appeal in the lower appellate Court. It was dismissed on 15-2-1956, awarding cost to Tarni. The memorandum of appeal filed in second appeal 663 of 1958 by the plaintiff stood rejected for non-compliance with certain peremptory order. On 22-12-1961 Tarni filed execution case No. 31/1 of 1961/62 for realisation of his decree for costs against the heirs of Gujjar Sahu as also against Ramcharan Shaw. Asharfi shaw, one of the sons of Ramcharan Shaw, deceased, filed miscellaneous case No. 10 of 1962 under Section 47 of the Code objecting to the execution for realisation of the decree for costs against him. Obviously, there was no decree for cost against Ramcharan Shaw. Two other sons of his filed miscellaneous case 11 of 1962. Lachman Sahu, the other son of Ramcharan Shaw, who is the sole appellant in this second appeal, filed on the 30th of June, 1962, miscellaneous case 12/3 of 1962. His miscellaneous case was dismissed for default on 14-7-1962. In presence of the decree-holder and the other two miscellaneous cases 10 and 11 were allowed in part on 16-7-1962 on merits.

Substantially the objections were disallowed. What happened thereafter on 16-7-1962 has to be noted carefully. Lachman Sahu filed another objection on identical lines under Section 47 of the Code and this was numbered as miscellaneous case 7 of 1962. In the order sheet of that date, however, after recording order No. 49 in regard to the allowing in part of the other two miscellaneous cases on contest, Order No 50 on which great reliance was placed by the learned Advocate General appearing for the decree-holder respondent was recorded thus:—

"Misc. Cases have been disposed of. In view of the orders passed in misc. cases the D. Hr. is directed to file fresh requisites for issue of S. P. by 20-7-1962." And, then, Order No. 51 was recorded on that date registering miscellaneous case 7 of 1962 on the application filed by Lachman Sahu. It is conceded on all hands, wrongly labelled under Order 21, Rule 58 of the Code, although, in law, it was one under Section 47. The decree-holder respondent contested this case, and eventually it was dismissed by the execution Court on 19-2-1963 treating this application as a second application under Section 47 of the

Code, as being not maintainable in view of the dismissal of the previous application on 14-7-1962 in default, although on merits the learned additional subordinate Judge seems to have taken a view in favour of the judgment-debtor.

All the three sets of the judgment-debtors filed three miscellaneous appeals. Miscellaneous appeals 78 and 79 of 1962 arising out of miscellaneous cases 10 and 11 of 1962 were allowed by the learned Additional District Judge on the finding that the properties attached in the execution case were not liable to be attached because they belonged to Ramcharan Shaw and consequently to his sons who were not liable under the decree for costs. Miscellaneous appeal 24 of 1963 filed by the appellant against the dismissal of his miscellaneous case 7 of 1962, however, failed on the technical ground on the basis of the Division Bench decision of this Court in ILR 25 Pat 395—(AIR 1947 Pat 298); this appeal was not decided on merits.

17. For the reasons already given, it is obvious that the dismissal of the miscellaneous appeal of the appellant by the Court of appeal below on the basis of Ramnarain Singh's case, AIR 1947 Pat 298 cannot be upheld. As already stated by me, the learned Advocate General conceded to this position. He, however, submitted that although order dated 14-7-1962 dismissing the previous miscellaneous case in default would not operate as *res judicata*, what would bar the maintainability of miscellaneous case 7 of 1962 on the principles of constructive *res judicata* is order No. 50 dated 16-7-1962. Learned counsel submitted that when the decree-holder was asked to file fresh requisites for issue of sale proclamation, that order by necessary implication should be deemed to have negatived the objection of the appellant that his properties were not liable to be attached and sold. His contention was, in the first instance, that order No. 50 was recorded in point of fact before recording order No. 51 registering miscellaneous case 7 of 1962; or, even if on the special facts of this case, it could be held that order No. 50 was recorded during the pendency of the miscellaneous case 7 of 1962, it implicitly overruled the objection taken in that miscellaneous case.

18. I am unable to accept either of the points canvassed by the learned Advocate-General on behalf of the decree-holder respondent. Firstly, on the special facts of this case, when another application was filed by the appellant on 16-7-1962 and when both the orders Nos. 50 and 51 were recorded on the same date in juxtaposition, it cannot be assumed that miscellaneous case 7 of 1962 came to be registered in point of fact after passing of the order No. 50 merely because in the order sheet it was recorded before the recording of

order No. 51. Both the things must have happened, more or less, simultaneously, and, that is the reason that the main argument which was advanced on behalf of the decree-holder was on the footing that order No. 50 was made during the pendency of miscellaneous case 7 of 1962. Secondly, on the language of that order, it is difficult to hold that merely because the decree-holder was directed to file fresh requisites for issue of sale proclamation, by necessary implication the objection of the judgment-debtor was overruled. It is further to be noted that such a direction related to the filing of fresh requisites for issue of sale proclamation not only of the property of the present appellant but also of the applicants of the other two cases—a direction which did not hold good when the two appeals arising out of those cases were allowed by the lower appellate Court.

19. Even assuming, as was largely the argument addressed to us on behalf of the parties, that order No. 50 dated 16-7-1962 by implication decided that the property of the appellant was liable to be proceeded against in execution of the decree for costs, such decision by implication must be held to be subject to the final decision in miscellaneous case 7 of 1962. During the pendency of that case, the objection taken therein cannot be held to have been overruled by an order of the kind which is engrafted in order No. 50. If, of course, the objection to the attachment or sale of the property proceeded against was filed definitely later, the order may operate as *res judicata*. But during the pendency of the objection, it would be a travesty of justice to hold that on the passing of such an order, the miscellaneous case must fail on the ground of principles of *res judicata*. Learned Advocate-General pressed this point with vehemence, but I have no hesitation in rejecting it as being untenable. No case was cited by him in support of his contention that if an order of the kind as recorded in order No. 50 is made during the pendency of a miscellaneous case under Section 47 of the Code objecting to the attachment, it must fail on the principle of constructive *res judicata* without the objection being decided. If the judgment-debtor comes later, he can be confronted with the position that he might and ought to have come earlier before the recording of the order, but I find it difficult to accept that if during the pendency of his objection case such an order is made, he would be confronted with such a position even though his objection case was neither heard nor decided by adjudicating on any question raised by him. It has been pointed out by Sahal, J., in the majority decision of the case of Baljnath Prasad Sah, AIR 1962 Pat 72 (FB) at pp. 76-77:—

"In a proceeding for execution of a money decree by attachment and sale of the judgment-debtor's immovable property, there are five important stages. Under the Patna Amendment of Rule 22 of Order XXI, the Court has to issue notice in every case to the person against whom execution is levied, requiring him to show cause why the decree should not be executed against him. Rule 23 reads:

"(1) where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should be executed, the Court shall order the decree to be executed.

(2) Where such person offers an objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.' This is the first stage. If the notice under Order XXI, Rule 22 is not served upon the judgment-debtor, that is a different matter, but, if the notice is served upon him, he must raise all his objections to the executability of the decree at that stage. If he does, the Court's decision on those objections will operate as *res judicata* in all further proceedings. If, in spite of service of notice, he fails to raise an objection which he might and ought to have raised at that stage, for instance, an objection on the ground of limitation, the Court, in passing the order for execution of the decree, must be deemed to have decided the objection against him.

Ordinarily, however, the Court does not pass an express order to the effect that the decree be executed. That order is implied in the order for issue of attachment, which is the next stage. In the present case also the order under R. 23(1) is implied in order for issue of attachment. All objections to the executability of the decree have to be raised in such cases before the order for issue of attachment. The third stage is one when the Court orders sale of the judgment-debtor's property. Rule 64 of Order XXI provides that an executing Court may order the sale of any property attached by it, provided that the property is liable to sale. As the Court has come to a decision at this stage that the property in question is liable to sale, any objection on the ground of non-saleability of the property must be raised before that stage. If an objection relating to saleability is raised, the Court's decision will be binding upon the parties. In case the judgment-debtor fails to raise any such question, the Court must be deemed to have decided it against him by passing an order for sale of the property because, unless it is liable to sale it cannot pass that order."

20. I fail to follow, however, as to how the Court can be said to have come to a decision by passing an order of the

kind recorded in order No. 50 that the property in question is liable to be sold without adjudication of the objection raised by the judgment-debtor in the miscellaneous case while keeping it pending. In such a situation, it must be held that the order made by the executing Court will always be subject to the ultimate decision in the miscellaneous case.

The learned Advocate-General referred to the decision of the Privy Council in *Raja of Ramnad v. Velusami Tevar*, AIR 1921 PC 23 in support of his point discussed above. The relevant facts of that case are that during the pendency of the execution case filed by the original decreeholders on the 9th of March, 1914, the appellant before the Privy Council had purchased the decree from the then plaintiffs and on the 20th November, 1914 made his application to be brought on the record as an assignee of the decree and to have the decree executed. This was resisted by the respondent before the Privy Council or their predecessor in title on several grounds. They put the appellant to the proof of his assignment, they alleged that the right to execute the decree was barred by limitation, and they raised questions as to the liability of certain of the properties to attachment. The matter came on for hearing before the Subordinate Judge, who delivered judgment thereon on the 13th December, 1915. The objections were overruled, but the question of limitation was not specifically decided. One of the defendants applied for a review of this decision on the ground that the execution case was barred by limitation. On the 24th August, 1916 judgment was given dismissing this petition. This review application was dismissed on the ground of limitation but the order made by the Court was of importance in that the learned Judge pointed out that the order of the 13th December, 1915 did not reserve any question of limitation for future determination.

It was in such a situation that Lord Moulton delivering the judgment of the Board said at p. 24, Col. 1—

"It is clear, therefore, not only that the issue of the execution of the decree being barred by limitation was in fact before the Court (as is shown also by the pleadings) on the occasion, but that the Judge at the time was aware of it, and that his decision included (as legally must have been the case) the rejection of this plea." His Lordship further stated—

"To that order the plea of limitation, if pleaded, would according to the respondents' case have been a complete answer and therefore, it must be taken that a decision was given against the respondents on the plea."

What this case, therefore, decides is that if the miscellaneous case in which several objections have been raised by the judg-

ment-debtor to the execution is decided against him, all the objections must be deemed to have been overruled although any of them might not have been specifically and expressly considered and decided. It is difficult to follow how any of such objections taken in the miscellaneous case can be deemed to have been decided by an order of the kind made in order No. 50 when the miscellaneous case remained pending and none of the objections was considered while making that order.

21. Mr. Aswini Kumar Sinha, learned Advocate for the appellant, strongly relied upon the decision of the Full Bench of Allahabad High Court in *Genda Lal v. Hazari Lal*, AIR 1936 All 21 (FB). I do not think that this decision is of any help to answer the point as presented on behalf of the respondent. The decision of the Privy Council in *Mungul Pershad Ditch's case*, ILR 8 Cal 51 was distinguished and Chief Justice Sulaiman stated one of the principles thus—

"Where no objection is taken, but the application for execution does not fructify, the judgment-debtor is not debarred by the principle of *res judicata* from raising the question of limitation later."

Patanjali Sastri, as he then was, delivering the judgment of Madras High Court in *Desayi Venkatranga Reddi v. Paraku Chinna Sithamma*, AIR 1941 Mad 440 differed from this view of the learned Chief Justice. He referred to the provisions of Order 21, Rule 23 of the Code and then said at p. 442—

"It will be noticed that sub-rule (1) covers not only cases where the judgment-debtor does not appear in response to the notice or does not offer any objection to execution, but also those where he appears and objects but fails to satisfy the Court that the decree should not be executed. In all such cases the Court is required to 'order' the decree to be executed. That is to say, even in cases where the judgment-debtor appears and 'offers any objection to the execution of the decree' and the Court 'considers such objection', it has to act under sub-rule (1) if it is not satisfied that the objection is valid. Where such objection is found to be tenable, the Court has to make, under sub-rule (2) 'such order as it thinks fit', that is to say, according to the nature and scope of the objection upheld. There is thus no justification for the view that an order under sub-rule (1) 'has to be automatic' and that an order under sub-rule (2) alone amounts to an 'adjudication' such as would fall within the definition of a decree, and we are unable to see any such distinction as the learned Judge supposed to exist between these sub-rules. If therefore, the Court's 'order' under sub-rule (1) that the decree should be executed is, as it must be held

to be, in cases where the judgment-debtor appears and objects but the objections are overruled, an appealable adjudication binding on the parties so long as it is unreversed, it is difficult to see why a similar order under the same provision in cases where the judgment-debtor does not choose to appear in response to the notice duly served on him, should be regarded as not having that effect. It seems to us that there can be no logical difference for this purpose between an application which results in partial satisfaction of the decree and is then allowed to be dismissed, and one which is eventually dismissed without any 'fructification'."

If I may add with respect, the view of the Full Bench of this Court in Baijnath Prasad Sah's case, AIR 1962 Pat 72 (FB) is in consonance with the view of Patanjali Sastri, J., as stated above.

22. In my considered judgment, therefore, the lower appellate Court committed an error in this case in dismissing the appellant's appeal and maintaining dismissal of his miscellaneous case 7 of 1962 as being barred by *res judicata*. Since this Court has not decided the case on merits, the case has to go back to the Court of appeal below.

23. In the result, the appeal is allowed, the judgment and order of the lower appellate Court in miscellaneous appeal 24 of 1963 are set aside and the case is remitted back to it for a fresh hearing and disposal of the appeal in the light of the observations made and points decided above; I shall make no order as to cost.

M. A. 6 of 1964

24. The relevant facts of this case are that in execution case 18 of 1961 Bhagwat Ram, the judgment-debtor appellant in this miscellaneous first appeal, filed miscellaneous case 4 of 1962 under Section 47 of the Code challenging the validity of the final decree passed in title suit 36 of 1932 on various grounds. This miscellaneous case was dismissed for default on 29-3-1963 in presence of the decree-holder. Thereafter Bhagwat Ram filed miscellaneous case 9 of 1963 under Section 151 of the Code on 16-4-1963 for restoration of miscellaneous case 4 of 1962. Subsequently on 6-8-1963 he filed miscellaneous case 15 of 1963 giving rise to this appeal challenging the validity of the final decree on almost the same grounds on which he had challenged it in miscellaneous case 4 of 1962. Later on he withdrew miscellaneous case 9 of 1963 and proceeded with miscellaneous case 15 of 1963.

25. Srimati Savitri Devi, respondent No. 1 who was executing the decree, contended in the Court below that the second miscellaneous case was not maintainable in view of the fact that the previous application to the same effect had been dismissed for default, and the order dated 29-3-1963

dismissing it for default operated as a bar on the principles of *res judicata*. Following Ramnarain Singh's case, AIR 1947 Pat 298, the Court below has held that miscellaneous case 15 of 1963 is barred by *res judicata*. Bhagwat Ram has preferred this miscellaneous first appeal.

26. For the reasons stated above, it is manifest that the view of the Court below based upon Ramnarain Singh's case, AIR 1947 Pat 298 cannot be supported. Order No. 63 recorded on 29-3-1963 reads as follows—

"Applicant files a petition for time O. P. files *hazri*. Petition for time is rejected. Case called out again and again but no response to repeated calls on behalf of the applicant. O. P's Advocate, Sri K. N. Ram is present. Let the case be dismissed for default.

Sd. Illegible,
A. S. J. I."

There is nothing further recorded in this order, which can be said to have held or impliedly decided that the objection was not tenable and the execution must proceed. But Mr. S. K. Sarkar, learned Advocate for respondent No. 1, drew our attention to order No. 90 dated 19-7-1963 which directed in execution of the decree "attachment of the sale proceeds to the extent of Rs. 22285.60 np. of Ex. Case No. 16/61" and ordered the attachment accordingly. In my opinion, order No. 90 by necessary implication decided that the decree under execution was not invalid, was fit to be executed and execution was directed to proceed by attachment of a considerable sum of money lying in deposit in another execution case (No. 16 of 1961) in furtherance of this execution for realisation of Rs. 48,107.98 np. On the principles of law discussed above, there is no escape from the position that although order No. 63 dated 29-3-1963 is no bar in the way of miscellaneous case 15 of 1963 on the principle of *res judicata*, order No. 90 dated 19-7-1963 clearly brings about such a bar on the principle of constructive *res judicata*, as the miscellaneous case was filed on 6-8-1963 after the making of the said order.

27. In answer to the point thus presented by Mr. Sarkar, Mr. S. C. Sinha, learned Advocate for the appellant, referred to order No. 106 dated 21-6-1963 and submitted that the matter of attachment was actually decided by this order which was made subsequent to the filing of miscellaneous case 15 of 1963. It seems to me, however, that this argument has been advanced under some misconception of facts. On 19-7-1963, as order No. 90 indicates, the decree-holder had filed 3 petitions. In one the prayer was for amendment of the execution petition. In the second petition the prayer was for attachment of the amount of Rs. 22,285.60 np., the sale proceeds lying in deposit in ex-

execution case 16 of 1961 which concerns the present appellant, and in the third petition the prayer was for realisation of another amount of Rs. 11,949 54 np. against five other judgment-debtors by sale and attachment of the decree in favour of those judgment-debtors passed in title suit 36 of 1932 dated 4-12-1959. The second petition for attachment of the amount of Rs. 22,285 60 np had been disposed of by order No. 90. But the third petition for attachment of the decree of judgment-debtors 1 to 7 passed in title suit 36 of 1932 was allowed by order No. 106 dated 21-8-1963 after hearing the parties. It is, therefore, obvious that this order does not relate to or affect order No. 90 by which attachment of Rs. 22,285.60 np. had already been ordered.

28. On the facts of this case, the following question of law is framed and will be deemed to have been framed and referred to the Full Bench by the Division Bench—

"Whether, on the facts and in the circumstances of this case, the objection of the judgment-debtor appellant filed on 6-8-1963 in miscellaneous case 15 of 1963 was barred on the principles of *res judicata*?"

29. For the reasons stated above, I would answer the question in the affirmative and hold that although the order of dismissal of miscellaneous case 4 of 1962 made on 29-3-1963 did not bar the maintainability of miscellaneous case 15 of 1963 on the principles of constructive *res judicata* order No. 90 dated 19-7-1963 clearly brought about such a bar. The case will now be placed for final adjudication by the Division Bench which referred it.

30. TARKESHWAR NATH, J.:— I agree.

31. K. B. N. SINGH, J.:— I agree.
Order accordingly.

AIR 1970 PATNA 246 (V 57 C 35)

FULL BENCH

S. C. MISRA, C. J., U. P. SINHA AND
S. N. P. SINGH, JJ.

Sheo Narayan Singh and others, Appellants v. Ambica Singh and others, Respondents.

A. F. A. D. No. 865 of 1965, D/-31-7-1969, from decision of Addl. Sub. J. 2nd Court, Gaya, D/- 5-7-1965.

(A) Limitation Act (1908), S. 23 — Applies to cases of continuing wrong — Obstruction to right of way causing complete ouster — Section does not apply.

Section 23 applies to a case of obstruction to a right of way unless there is complete ouster. If there is no complete ouster it is a case of continuing nuisance

as to which cause of action will be renewed *de die in diem* so long as the obstruction continues.

Where by execution of the Pind over a portion of the Chhaur the width of the Chhaur had been permanently lessened:

Held, by the raising of the Pind the defendants completely obstructed the plaintiffs from using that portion of the Chhaur over which the Pind was extended. As it was a case of complete ouster, Section 23 did not apply with regard to the extended portion of the Pind. AIR 1959 SC 798, Foll. (Para 18)

(B) Easements Act (1882), S. 29 — Right to construct Chahka in place of Kanwah.

A Kanwah is a small opening for the flow of excess water whereas by the construction of a Chahka a wide opening is made as a result of which great volume of water would pass through the Chahka. Even if it be assumed that there is a Kanwah at the place where the foundation for the Chahka has been laid, a party has no right to construct a Chahka at that place. (Para 19)

(C) Easements Act (1882), S. 15 — No averment in the written statement (ha) the defendants have been enjoying peacefully and openly without interruption the right to store water in the lands belonging to the plaintiffs and the right to drain out water through the lands of the plaintiffs — Held the defendants had not acquired any legal right to store water in the lands of the plaintiffs or to drain out excess water of the Abar through the lands of the plaintiffs. Case law discussed. (Para 20)

Cases Referred: Chronological Paras
(1959) AIR 1959 SC 798 (V 46) —
(1959) Supp (2) SCR 475, Balakrishna v. Shree D. M. Sansthan 18
(1942) AIR 1942 Pat 188 (V 29) —
22 Pat LT 1001, Kureshwar Jha v. Uma Kant Jha 11
(1940) AIR 1940 Pat 449 (V 27) —
ILR 19 Pat 208, Bibhuti Narayan Singh v. Mahadev Asram 18
(1934) AIR 1934 Pat 11 (V 21) —
148 Ind Cas 215, Radha Kishum v. Sunder Mal 20
(1933) AIR 1933 PC. 193 (V 20) —
60 Ind App 313, Hukum Chand v. Maharaj Bahadur Singh 18
(1929) AIR 1929 Mad 819 (V 18) —
1929 Mad WN 528, Ramkrishna v. Ramnath 20
(1924) AIR 1924 Cal 369 (V 11) —
69 Ind Cas 183, Amrita Nath Biswas v. Jogendra Chandra 20
(1921) AIR 1921 Bom 430 (V 8) —
ILR 45 Bom 1027, Rambhai v. Vallabhbhai 20
(1903) ILR 30 Cal 281, Madhub Dass v. Jogesh Chundar 20
(1880) 7 Ind App 240 — ILR 6 Cal 394 (PC), Maharani Rajroop Koer v. Syed Abul Hossein 18

Lal Narayan Sinha, Shreenath Singh and Shivanand Prasad Sinha, for Appellants; Kailash Roy and S. B. N. Singh, for Respondents.

S. N. P. SINGH, J.:— This second appeal by the plaintiffs arises out of a representative suit filed under O. 1, R. 8 of the Code of Civil Procedure for declarations that plot No. 110 of village Nanhubigha in the district of Gaya is a public path and the defendants have no right to extend the Pind of an Ahar in plot No. 168 of village Amarwa into plot No. 110 and raise its level to the height of the Pind in plot No. 168 by putting earth and that the defendants have no right to construct a Chahka on plot No. 110 or to change its local features and for permanent injunction restraining the defendants from constructing a Chahka or from changing the local features of plot No. 110 or from interfering with the rights of the plaintiffs in plot No. 110 in any way. The plaintiffs also prayed for a decree directing the defendants to restore plot No. 110 to its original position by removing earth and other encroachments from it. A further relief, namely, a decree for permanent injunction restraining the defendants from storing any water in plot Nos. 111, 112 and 114 of village Nanhubigha and plot Nos. 171 and 172 of village Amarwa and from draining out the excess water of Sarikha Ahar to plot Nos. 110, 24, 35, 38, 39 and 41 of village Nanhubigha was sought in the plaint. A claim for mesne profits was also made.

2. According to the plaintiffs' case, in village Amarwa there is an Ahar known as Sarikha Ahar in plot No. 170 having its Pind in plot No. 168 belonging to the defendants and it irrigates only ten aeres of their land. The outlet of this Ahar is towards north-west. The defendants in order to get the Ahar repaired and to get a Chahka constructed in plot No. 168 obtained sanction for a certain amount from the State of Bihar under Hard Manual Scheme (Scheme No. 5 of 1958) dated the 18th of June, 1958. The plaintiffs put forward the case that plot No. 110, which has been recorded in the record-of-rights as Chhaur Gairmazrua Am. is a village pathway since time immemorial and it is being used as a passage by the public of the locality including the plaintiffs. Plot Nos. 111, 112 and 114 of village Nanhubigha are the Kasht lands of plaintiff No. 1, plot Nos. 171 and 172 of village Amarwa belong to plaintiff No. 2 and plot Nos. 35 and 34 of village Nanhubigha belong respectively to plaintiffs Nos. 5 and 4.

It was alleged in the plaint that defendant No. 1 under the pretext of executing the aforesaid scheme, in collusion with other defendants, started taking earth from plot No. 111 which was protested by plaintiff No. 1. As there was apprehension of

breach of peace, plaintiff No. 1 filed a petition before the Sub-divisional Magistrate, Gaya, for starting a proceeding under Section 144 of the Code of Criminal Procedure against defendant No. 1 and others including the then Anchal Adhikari, Barachatty, who was in collusion with defendant No. 1. The Anchal Adhikari, on the other hand, sent a recommendation for starting a proceeding under Sec. 107 of the Code of Criminal Procedure against plaintiff No. 1 and his family members. The Subdivisional Magistrate of Gaya referred the petition under Section 144 of the Code of Criminal Procedure for enquiry to the Land Reforms Deputy Collector, who, with a view to help the Anchal Adhikari, Barachatty, procured a compromise petition as a result of which the proceeding under Section 144 of the Code of Criminal Procedure was dropped and a proceeding under Section 107 of the Code of Criminal Procedure was started against plaintiff No. 1 and his family members. They were ultimately bound down by a first class Magistrate, Gaya, but in appeal the 3rd Additional Sessions Judge, Gaya, set aside the order of the Magistrate.

In the appellate Court defendant No. 1 filed a petition giving an undertaking that he would not take earth from the land of plaintiff No. 1, that is, plot No. 111 and also from plot No. 110 of Nanhubigha for the repair of the Pind of the Ahar in plot No. 168 of village Amarwa. The defendants, however, in collusion with each other illegally encroached upon plot No. 110 of village Nanhubigha and made an unauthorised extension of the Pind in plot No. 110 to the extent of 80 links at the time when defendant No. 1 was doing earth work in the months of June and July 1958 and thereby encroached upon the public path and put the public in general and the plaintiffs in particular in difficulty in making use of the public passage.

According to the plaintiffs, the defendants not only encroached upon the land but also raised the level of plot No. 110 to the height of the Pind in plot No. 168 with the result that the pathway had become narrow causing inconvenience to the villagers. It was also alleged that as a result of the encroachment and raising of the level of the encroached portion the water will accumulate in plot Nos. 111, 112 and 114 of Nanhubigha and plot Nos. 171 and 172 of village Amarwa and thereby the entire paddy and wheat crops will remain submerged in water and as such the plaintiffs cannot raise any crop in these plots and they would suffer an annual loss of about Rs. 1000. According to the plaintiffs, the sanction of the State of Bihar had been made for the construction of a Chahka in plot No. 168 but the defendants illegally and without any right

wanted to construe the Chahka in plot No. 110 as shown by letter "A" in the sketch map appended to the plaint.

3. As stated in paragraph 13 of the plaint, the construction of the Chahka in plot No. 110 of Nanhubigha would cause the following injuries:

- (a) The village path in plot No. 110 would become impassable as the same would become a water flowing Nala.
- (b) Plot Nos. 34 and 36 and the other adjoining plots of village Nahubigha would become incapable of producing any crop as they would become a water flowing Nala and as a consequence irreparable damage would be caused to the owners thereof.

In paragraph 15 of the plaint it has been stated that when the defendants wanted to construct the Chahka the members of the public including the plaintiffs objected and that led to an apprehension of breach of peace. A proceeding under Section 144 of the Code of Criminal Procedure was started restraining defendant No. 1 from constructing any Chahka or doing any work in plot No. 110. That proceeding was converted into a proceeding under Section 145 of the Code of Criminal Procedure. The Magistrate ultimately converted that proceeding into a proceeding under Section 147 of the Code of Criminal Procedure and the same was pending for disposal. According to the plaintiffs, the cause of action for the suit arose in July 1958 when the defendants extended the Pind in plot No. 168 by encroaching over plot No. 110 and by raising the level of the height of plot No. 110 by putting earth and also when the construction of Chahka was done by the defendants on the 4th of May, 1969.

4. The suit was mainly contested by defendant Nos. 1 to 3, who filed a joint written statement. The defendants put forward the case that shortly after the last survey operation the Pind of the Ahar in plot No. 168 was extended on a portion of plot No. 110 to the extent of 80 links and that extended Pind was raised to a considerable height and it was further extended towards east in plot No. 111. Although the Pind has been repaired from time to time, the above construction was made 30 years back. Regarding the accumulation of water of Sarikha Ahar in plot Nos. 171, 111 and portion of plot No. 112, the defendants also alleged that the water of the Ahar is being accumulated in the aforesaid plots since more than 30 years and there used to be a "Kanwah" in the south-western corner of the extended portion of the Pind after it turned east in plot No. 111, the old 'Bhow' being still in existence in the Pind. According to the defendants, the south-eastern portion of plot No. 170 contiguous to Pind No. 168 and south-western portion of plot No. 111 contiguous

east of Pind No. 110 is the Khanta of Sarikha Ahar and as such it was necessary to put a Pind running towards east in plot No. 111 to prevent the water of the Khanta from being completely drained out and a Kanwah used to be given for discharging the excess water. The aforesaid mode of accumulation and drainage of water from Sarikha Ahar, according to the defendants, has been coming in practice for more than 30 years and it was never objected to by the landlords or the tenants of villages Amarwa and Nanhubigha.

5. Regarding the drainage of excess water, the defendants further alleged that since more than 30 years the excess water has been flowing out of the Kanwah through plot Nos. 110, 38, 39, 41, 35 etc. and ultimately going to river Falgu. According to the defendants, plot Nos. 111 and 171 have been recorded as Bhith Duba land and for the first time the plaintiffs in Asar 1367 Fasli before the inspection of Mr. K. D. Sharma began to raise Baway Dhan in plot No. 111 to create evidence. They further asserted that plot Nos. 38 and 39 are also Bhith lands and no one raised any objection whenever water used to be drained out through those plots or through plot Nos. 34 and 35 or whenever water used to accumulate in plot No. 112.

6. According to the defendants, although at the time of survey only ten acres of paddy land of village Amarwa used to be irrigated by the water of Sarikha Ahar but thereafter, for more than last 30 years, about 50 bighas of land is being irrigated by the water of the said Ahar. The defendants admitted in their written statement that plot No. 110 of village Nanhubigha is recorded as Chhaur and its width has been shortened by the extension of the Pind of the Ahar but they asserted that no inconvenience has been caused to the public in making use of plot No. 110 as a passage. The defendants alleged that the Chhaur does not extend beyond village Nanhubigha and as such it is not being used by all the members of the public. Regarding the construction of the Chahka, the defendants admitted the fact that the foundation for the construction of a Chahka has already been done in the Pind in a portion of plot No. 110 and in a portion of the Pind running towards east in plot No. 111. But they asserted that the construction of the Chahka at the above site is quite legal and in accordance with the scheme sanctioned by the Government.

7. The State of Bihar (defendant No. 7) filed a separate written statement and raised a number of technical pleas including the pleas that the notice under Section 80 of the Code of Civil Procedure was illegal and invalid and that the suit was barred by the provisions of Bihar Private Irrigation and Works Act and

under the law of limitation. The State of Bihar denied the allegation that the Circle Inspector, the Anchal Adhikari and the Land Reforms Deputy Collector were in collusion with the defendants and they supported the case of the defendants that under the scheme a Chahka was to be constructed in plot No. 110.

8. The learned Munsif, who tried the suit, framed the following issues:

- (i) Have the plaintiffs any cause of action or right to bring this suit?
- (ii) Is the suit maintainable in its present form and for the reliefs sought?
- (iii) Is the suit barred by limitation and adverse possession?
- (iv) Is the suit barred by the provisions of Bihar Private Irrigation and Works Act?
- (v) Is the notice under S. 80, Civil P. C. on defendant No. 7 valid and legal and sufficient under the law?
- (vi) Is the suit bad for defect of parties?
- (vii) Is it a fact that the extended portion of the Pind in plot No. 168 into plot No. 110 has been made by the defendants in 1958 and the foundation for the Chahka was made in 1959?
- (viii) Is it a fact that the water of the Sarikha Ahar is accumulated in plot Nos. 171, 172, 111, 112 and 114 as alleged by the defendants for more than thirty years and the extended portion of the Pind in plot Nos. 110 and 111 are coming on from that time?
- (ix) Was there any escape for discharging the excess water of this Ahar on the south-western corner of the Pind in plot Nos. 110 and 111 for the last thirty years and were the defendants discharging the water through this passage for the last thirty years or more?
- (x) To what relief, if any, the plaintiffs are entitled?

9. It appears that issue Nos. 2 and 6 were not seriously pressed. Regarding issue No. 5, the learned Munsif recorded the finding that there was no defect in the notice under Section 80 of the Code of Civil Procedure. Issue No. 4 was answered by the learned Munsif in the negative. The three main issues, namely, issue Nos. 7, 8 and 9, were considered together by the learned Munsif. Upon a consideration of the evidence adduced by the parties, both oral and documentary, the learned Munsif held that the evidence adduced on behalf of the plaintiffs was consistent and in conformity with the record-of-rights including the Fard-ab-Pasi prepared by the survey authorities. He, therefore, preferred the plaintiffs' evidence and did not place any reliance on the evidence adduced by the defendants. Accordingly he answered issue No. 7 in the affirmative and issue Nos. 8 and 9 in the negative.

The learned Munsif answered Issue No. 3 also in the negative. Regarding issue Nos. 1 and 10, the learned Munsif recorded the finding in these words:

"It will appear that the defendants have encroached upon a public Chhaur by extending the Pind of the Ahra and they have also opened opening by digging the foundation for a Chahka which has created difficulty in passage over the Chahka and caused damages to the public pathway and it has also been held that in case the Chahka be constructed the lands of the plaintiffs are going to be submerged under water which would put them to loss; as such, the plaintiffs have a valid cause of action for the suit and are entitled to a decree therein."

In the result, he decreed the suit of the plaintiffs with costs in the following terms:

"It is hereby declared that plot No. 110 of village Nanhubigha is a public path and the defendants have no right in extending the Pind into this plot and the defendants are directed to restore this plot at the place of encroachment to its original position by removing the earth over 80 links in length starting from the point where plot No. 168 meets plot No. 67 at the south-western corner, and they are also directed to fill up the foundation dug for the purpose of Chahka both at their own costs, within three months of this order, failing which, the plaintiffs would be entitled to remove them and restore the above encroachments to their original position at the costs of the defendants and through the processes of the Court. The defendants are further restrained permanently from constructing any Chahka at the place where the foundation has been damaged to submerge the lands of the plaintiffs. The reliefs which have not been specifically granted by the order would be deemed to have been refused."

10. The appeal filed by the defendants was heard by the 2nd Additional Subordinate Judge of Gaya. The learned Additional Subordinate Judge formulated the following points for determination in the appeal:

- (1) It is a fact that the extended portion of pind in plot No. 168 over 110 was made by the defendants in 1958 and the foundation for the chahka was made in 1959?
- (2) Whether it is a fact that this extension took place more than 30 years back as alleged by the defendants and that the water of Sarikha Ahar is accumulated in plot Nos. 171, 172, 111, 112?
- (3) Whether there was any escape for discharging the excess water of this Ahar on the south-west corner of the pind in plot 110 and 111 for the last 30 years as alleged by the defendants?

(4) To what relief, if any, are the appellants entitled?

He took up points (1) to (3) together and upon an appraisal of the evidence on the record recorded his findings in these words:

"I hold that the defendants have very satisfactorily proved that the extended portion of the pind over plot 110 was done more than 30 years back and the Kanwa was in existence at the south-western end of this extended portion where the Chahka is proposed to be constructed for the same period and the excess water of the Ahar used to pass along the Kanwah. I also hold that the plot 111 also formed the pet of the Ahar since the extension. In the beginning of the judgment I had made reference that on a close examination of the survey map it will appear that the original plot 168 extended over a portion to the west of plot 111 which gives an indication that water used to accumulate on the north-western corner of plot 111 as otherwise there was no meaning of giving a pind to the west of plot 111. It is clear that subsequently this pind was extended by villagers of Amarwa to which no objection was taken by the plaintiffs or any other villagers of Amarwa or Nanhubigha and the excess water or spill water of the ahar used to pass over this Kanwa."

11. In the appellate Court an argument was advanced on behalf of the plaintiffs-respondents that the defendants could not acquire any right of constructing the Chahka at the place where its foundation had been dug because that would damage the Nala and that no prescriptive right or a right of easement would be acquired in the Chhaur land even if the entire case put forward by the defendants be correct. The learned Additional Subordinate Judge after considering the decision in the case of Kueshwar Jha v. Uma Kant Jha, AIR 1942 Pat 188 took the view that in the instant case by extending the Pind over a portion of the Chhaur the width of the Chhaur was permanently lessened and to that extent there was complete dispossession and as such Art. 23 of the Limitation Act has no application. Regarding the Nala, he held that the excess water of the Ahar used to pass through the Kanwah along the Nala through this Chhaur for more than thirty years and that also amounted to permanent dispossession and could not be taken to be a continuing wrong. Accordingly he held that Art. 142 of the Limitation Act applied in the case and the plaintiffs had no remedy. The appeal was accordingly allowed with costs, the judgment and decree of the trial Court were set aside and the suit of the plaintiffs was dismissed.

12. The plaintiffs thereupon filed the present second appeal to this Court. This appeal was originally placed for bearing

before a learned single Judge who by his order dated the 28th of September, 1967, referred it to a Division Bench. On the 14th of October, 1968, the appeal was placed before a Division Bench and that Bench referred it for hearing to a Full Bench.

13. Learned counsel appearing for the appellants, while arguing the case before the Full Bench, challenged the findings of fact as recorded by the first appellate Court, although there is nothing to indicate that the correctness of those findings was challenged before the learned single Judge, who referred the case to a Division Bench, or before the Division Bench, which referred the case to a Full Bench. It was submitted that the findings of the Additional Subordinate Judge that extension of the Pind over plot No. 110 was done more than 30 years back and Kanwah was in existence at the south-western end of the extended portion for the same period are based on inadmissible evidence, namely, Exhibits A/1, A-1/1, A-1/2 and E/2. It was further contended that the judgment of the lower appellate Court does not show that the witnesses examined on behalf of the defendants have given evidence to the effect that the extension of the Pind over plot No. 110 was made more than 30 years back and the Kanwah is also in existence at the south-western end of the extended portion since that period. Thus, according to learned counsel, the findings of the learned Additional Subordinate Judge are vitiated and they are not binding on this Court in second appeal. There does not appear to be any substance in the grounds urged by learned counsel for upsetting the findings of fact recorded by the first appellate Court.

(Then after discussing evidence (Paras 14 to 16) his Lordship proceeded).

17. Now I proceed to consider the points of law which have been raised on behalf of the parties.

18. Before the learned single Judge and the Division Bench a point had been raised that in the case of public land, such as Gairmazrua Am land, the question of adverse possession does not arise. Mr. Lal Narayan Sinha appearing for the appellants did not press this point before the Full Bench. He, however, submitted that the right of way over plot No. 110 has not been affected by the extension of the Pind of the Ahar in this plot and by raising its level and as admitted by the defendants it is still being used by the members of the public. Thus, there being no complete ouster, the instant case is a case of continuing wrong and Section 23 of the Limitation Act, 1908, applies. In support of this contention he relied on the decisions in the cases of Maharani Rajroop Koer v. Sved Abdul Hossein, (1880) 7 Ind App 240 (PC), Hukum Chand v. Maharaj Bahadur Singh, AIR 1933 PC 193, Bibbuti Narayan

Singh v. Mahadev Asram, AIR 1940 Pat 449 and Balakrishna v. Shree D. M. Sansathan, AIR 1959 SC 798. The cases cited by learned counsel no doubt (support?) the proposition that Section 23 of the Limitation Act applies to a case of obstruction to a right of way unless there is complete ouster. If there is no complete ouster it is a case of continuing nuisance as to which cause of action will be renewed *de die in diem* so long as the obstruction continues. The principles of law on the question of applicability of Section 23 of the Limitation Act have been summarised by their Lordships of the Supreme Court in Balakrishna's case, AIR 1959 SC 798 referred to above, in these words:

"..... Section 23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damages resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and that may be described as the effect of the said injury. It is only in regard to acts which can be properly characterised as continuing wrongs that Section 23 can be invoked."

The material question, therefore, which arises for consideration is whether on the findings of the lower appellate Court it can be held that the instant case is not a case of complete ouster but a case of continuing nuisance. As I have already pointed out, the learned Additional Subordinate Judge has taken the view that by execution of the Pind over a portion of the Chhaur the width of the Chhaur has been permanently lessened and to that extent there is complete dispossession. The learned Munsif in paragraph 49 of his Judgment has observed as follows:

"From the evidence disclosed in this case it will appear that the pind in 110 plot has been extended up to 80 links as a result of which the road has been narrowed. This cannot be said to be a complete ouster of the public who are still using that passage, may be, with difficulty."

Learned counsel appearing for the appellants contended that the above observation of the trial Court is supported by the statements made in paragraph 23 of the written statement filed on behalf of defendant Nos. 1 to 3 wherein it has been asserted that no inconvenience has been caused to the public in making use of the public passage although the width of plot

No. 110 has been lessened due to the extension of the Pind. It is not possible to accept the contention of learned counsel. According to the plaintiffs' own case the defendants raised the level of plot No. 110 to the height of the Pind in plot No. 168 with the result that the pathway has become narrow. The defendants in their written statement have simply asserted that by the extension of the Pind in Plot No. 110 the pathway has only been lessened but not completely stopped. There is, however, no admission by the defendants that the extended portion of the Pind is still being used as a pathway. The view of the lower appellate Court, therefore, that by the extension of the Pind over a portion of the Chhaur the width of the Chhaur has been permanently lessened and to that extent there was complete dispossession cannot be said to be wrong. Thus, by the raising of the Pind in Plot No. 110 the defendants completely obstructed the plaintiffs from using that portion of the Chhaur in Plot No. 110 over which the Pind was extended. As it is a case of complete ouster, Section 23 of the Limitation Act does not apply with regard to the extended portion of the Pind in Plot No. 110.

19. The next point which falls for consideration is whether the defendants have any right to construct a Chahka on the extended portion of the Pind. According to the finding of the lower appellate Court, the Chahka is proposed to be constructed at the south-western end of the extended portion of Plot No. 110 where the Kanwah was in existence for more than 30 years and the excess water of the Ahar used to pass along this Kanwah. In the map prepared by Sri Akhouri Sidhinath, Pleader Commissioner, 'Bhows' at three places in plot No. 168 have been shown by the letters B(1), B(2) and B(3). The place where the foundation for the proposed Chahka was laid has been shown by the letter "X" a little beyond the extended portion towards south-west of plot No. 110. In the map prepared by the Pleader Commissioner there is nothing to show that a Kanwah exists at the place where the foundation for the construction of the Chahka has been laid. The Pleader Commissioner had been specifically asked to report about the Bhows and outlets and the passage for the flow of water from the Ahar. In his report under point No. 7 he has stated as follows:

"I found three Bhows and outlets in Plot No. 168 (Amarua) fitted with hume pipes for flow of water to irrigate the fields lying to the north of it."

In his evidence also the Pleader Commissioner (D.W. 3) has not said a word about the existence of the Kanwah at the proposed site of the Chahka. It is,

therefore, difficult to locate the exact place where the Kanwah had been constructed more than thirty years back as found by the lower appellate Court. Even if it be assumed that there is a Kanwah at the place where the foundation for the Chahka has been laid, the defendants have no right to construct a Chahka at that place. A Kanwah is a small opening for the flow of excess water whereas by the construction of a Chahka a wide opening will be made in the entire width of plot No. 110 as a result of which great volume of water would pass through the Chahka. According to the report of the Pleader Commissioner, the length of the foundation dug for the proposed Chahka was 22 links north to south, its breadth was 20 links east to west and its depth was 7 links. The plaintiffs have alleged in their plaint that by the construction of the Chahka the village path in plot No. 110 would become impassable and it would become a river flowing Nala. They have also asserted that plot Nos. 34 and 35 and the other adjoining plots belonging to the plaintiffs in village Nanhubigha would become incapable of producing any crop and irreparable damage would be caused.

According to the report of the Pleader Commissioner, plots Nos. 34, 35 and 41 are Dhanhar plots and plot No. 39 is a Bhith plot. Merely because a Kanwah has been in existence in the extended portion of the Pind of the Ahar in plot No. 110 for more than 30 years at its south-western end over which excess water of the Ahar passes, as found by the lower appellate Court, the defendants have no legal right to construct a Chahka at that site. By doing so the defendants would naturally cause considerable damage to the pathway in plot No. 110, which had already been lessened by the extension of the Pind of the Ahar, and to the fields of the plaintiffs, such as, plots Nos. 34, 35, 39 and 41. The plaintiffs are, therefore, entitled to a decree for permanent injunction restraining the defendants from constructing a Chahka at any place in plot No. 110 and for a direction to fill up the foundation put up for the purposes of the Chahka with their own costs.

20. Now remains to consider the question whether the defendants have acquired any legal right to store water in the lands of the plaintiffs or to drain out excess water of the Ahar through the lands of the plaintiffs. As stated earlier, in the plaint the plaintiffs have also prayed for a decree for permanent injunction restraining the defendants from keeping or storing water in any portion of plot Nos. 111, 112 and 114 of village Nanhubigha and plots Nos. 171 and 172 of village Amarwa and from draining out any excess water of the Ahar through plot

No. 110 or through plot Nos. 34, 35, 38, 39, 41 etc., of village Nanhubigha. The lower appellate Court has not given any finding on the question whether the defendants have acquired any right to store water over plots Nos. 112 and 114 of village Nanhubigha or plots Nos. 171 and 172 of village Amarwa. It has also not recorded any finding whether the defendants have any right to drain out water from the Sarikha Ahar through plot Nos. 34, 35, 38, 39, 41 etc., of village Nanhubigha. According to the finding of the lower appellate Court the defendants have been storing water in plot No. 111 since the construction of the Pind of the Ahar more than 30 years. As already stated, the lower appellate Court held that the excess water of the Ahar passes through the Kanwah in plot No. 110 for the same period. It was submitted on behalf of the appellants that there is no question of adverse possession so far as the questions of storing of water of the Ahar in plot No. 111 and other plots and draining of the excess water through plot Nos. 34, 35, 38, 39, 41 etc., are concerned. The relief claimed by the plaintiffs in that regard can only be refused if the defendants succeed in proving that they have acquired a right of easement to store water on the lands of the plaintiffs and to drain out the excess water of the Ahar in the various plots of land belonging to the plaintiffs.

Mr. Kallash Roy, learned counsel appearing for the respondents, did not dispute this proposition but he contended that the defendants have pleaded and succeeded in proving such a right. In this connection learned counsel referred to paragraph 11 of the written statement wherein it has been stated that since more than 30 years water of Sarikha Ahar used to accumulate in plot Nos. 170, 171, 111 and portion of plot No. 112 and paragraph 13 of the written statement wherein it has been stated that excess water has been flowing through plot Nos. 38, 39, 41, 35 etc., after crossing plot No. 110 for more than 30 years. In paragraphs 11 and 13 of the written statement it has not been asserted that no objection was raised by the owners of the plots in question to the storing of water in their lands and to the draining of the excess water through their lands. Thus, there is no averment in the written statement that the defendants have been enjoying peacefully and openly without interruption the right to store water in the lands belonging to the plaintiffs and the right to drain out water through the lands of the plaintiffs.

In course of his argument, Mr. Kallash Roy referred to the decisions in the following cases of Radha Kishun v. Sundar Mal, AIR 1934 Pat 11, Rambhal v. Vallabhai, AIR 1921 Bom 430, Amritanath Bis-

was v. Jogendra Chandra, AIR 1924 Cal 369. Ramkrishna v. Ramanath, AIR 1929 Mad 819 and Madhub Dass v. Jogesh Chundar. (1903) ILR 30 Cal 281 and contended on the basis of the aforesaid decisions that where there is evidence of long enjoyment of a prescriptive right in a particular way it is the habit and duty of the Court to clothe the fact with right. Thus, according to learned counsel, though it has not been specifically pleaded in the written statement that the defendants as of right have been storing water in the Ahar in the lands of the plaintiffs and draining out excess water through the lands of the plaintiffs, in view of the fact that there is evidence that the defendants are doing so for more than 30 years, the defendants should be clothed with the right to do so. It is difficult to accept this contention of learned counsel. The facts of the cases relied upon by learned counsel were quite different and as such the decisions in those cases do not help the defendants. In the instant case there is no finding of the lower appellate Court with regard to the storage of water over plots Nos. 112 and 114 of village Nanhubigha and plots Nos. 171 and 172 of Amarwa. There is also no finding regarding the drainage of water through plot Nos. 34, 35, 38, 39, 41 etc. The plaintiffs, therefore, are entitled to a decree for permanent injunction restraining the defendants from storing water of the Ahar in plot Nos. 112 and 114 of village Nanhubigha and plot Nos. 171 and 172 of village Amarwa and from draining out excess water through plot Nos. 34, 35, 38, 39, 41 etc.

Although there is the finding of the lower appellate Court that the excess water of the Ahar has been passing through the Kanwah, which is in existence at the south-western end of the extended portion of plot No. 110 since more than 30 years, the plaintiffs are entitled to a decree for permanent injunction restraining the defendants from draining out water through the entire plot No. 110 because the defendants have neither claimed nor proved that they have been draining out water through Kanwah as of right. So far as plot No. 111 is concerned, no doubt there is a finding that plot No. 111 formed the part of the Ahar since the extension but there is no finding that the defendants are using the plot as a part of the Ahar throughout the year as of right with the result that no crop is raised therein. The plaintiffs, therefore, are entitled to a decree for permanent injunction restraining the defendants from storing water of the Ahar as of right even in plot No. 111.

21. For the reasons stated above, I allow the appeal in part, set aside the judgment and decree of the lower appellate Court and decree the suit of the

plaintiffs in part. The plaintiffs will be entitled to a decree for permanent injunction restraining the defendants from constructing a Chahka at any place in plot No. 110 and for a direction to fill up the foundation put up for the purposes of the Chahka with their own costs. The plaintiffs will get a decree for permanent injunction restraining the defendants from storing water of the Ahar as of right in plot Nos. 111, 112 and 114 of village Nanhubigha and plot Nos. 171 and 172 of village Amarwa and from draining out water as of right through plot No. 110 even through Kanwah and through plot Nos. 34, 35, 38, 39, 41 etc. of village Nanhubigha. The plaintiffs' suit is dismissed with regard to the other reliefs. On the facts and circumstances of the case, I direct that the parties would bear their own costs throughout.

22. MISRA, C. J.: I agree.

23. SINHA, J.: I agree that the plaintiffs are entitled to a decree permanently enjoining the defendants from constructing the Chahka in controversy. In my opinion, the plaintiffs have not made out a case for obtaining any other relief in this suit. The parties should bear their own costs throughout.

Appeal partly allowed.

AIR 1970 PATNA 253 (V 57 C 39)

FULL BENCH

S. C. MISRA, C. J., U. N. SINHA AND
S. N. P. SINGH, JJ.

Ram Jiwan Singh and others, Petitioners v. State of Bihar and others, Respondents.

Civil Writ Jurisdiction Case No. 244 of 1967, D/- 1-8-1969,

Tenancy Laws — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (12 of 1962), S. 16(3) — Sale of lands to respondents ladies — Petitioners holding lands, adjoining lands sold, applying under Section 16(3) — Fact of petitioners' interest in adjoining lands unchallenged — Vendees neither co-sharers of lands sold, nor, rayats of adjoining lands entitled to pre-emption — Application allowed by authorities — In appeal order reversed by Board of Revenue — Held, that the order of Board was bad as the plea that the sales were benami in the names of ladies was not taken before the lower authorities and there was no finding by the Board on that plea hence though the respondents' husbands were rayats of adjoining lands sold the applications by petitioner under S. 16(3) were maintainable. (Para 5)

CN/CN/B296/70/MVJ/B

[Correctness of view expressed by Division Bench in 1969 BLJR 203 not considered. Ed.]

Cases Referred: Chronological Paras
(1969) 1969 BLJR 203=1968 Pat
LJR 279, Ram Chabilla Singh v.
Ram Sagar Singh 6-A
(1965) AIR 1965 SC 271 (V 52)=
1964-6 SCR 1, Kankarathanam-
mal v. S. Loganatha Mudaliar 4. 5
(1952) AIR 1952 Pat 61 (V 39)=
ILR 30 Pat 1197, Hazaribagh Mica
Mines Co. Ltd. v. Ashalata Kapoor 5
Messrs. Kailas Roy and Shivanandan
Roy, for Petitioners; Messrs. Balbhadra
Prasad Singh, Bindeshwari Choudhary
and Tarakant Jha, for Respondents.

U. N. SINHA, J.:— This application has been filed by three petitioners under Articles 226 and 227 of the Constitution of India, praying that an order passed by the Additional Member, Board of Revenue, Bihar, dated the 18th April, 1967 (Annexure G), in proceeding under Section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act XII of 1962) may be quashed. In order to appreciate the relevant facts, stated hereinafter, Section 16(3) of this Act is quoted below:—

"S. 16(3). (i) When any transfer of land is made after the commencement of this Act to any person other than a co-sharer or a raiyat of adjoining land, any co-sharer of the transferor or any raiyat holding land adjoining the land transferred, shall be entitled within three months of the date of registration of the document of transfer, to make an application before the Collector in the prescribed manner for the transfer of the land to him on the terms and conditions contained in the said deed;

Provided that no such application shall be entertained by the Collector unless the purchase-money together with a sum equal to ten per cent. thereof is deposited in the prescribed manner within the said period.

(ii) On such deposit being made the co-sharer or the raiyat shall be entitled to be put in possession of the land irrespective of the fact that the application under clause (i) is pending for decision;

Provided that where the application is rejected, the co-sharer or the raiyat, as the case may be, shall be evicted from the land and possession thereof shall be restored to the transferee and the transferee shall be entitled to be paid a sum equal to ten per cent. of the purchase-money out of the deposit made under clause (i).

(iii) If the application is allowed, the Collector shall by an order direct the transferee to convey the land in favour of the applicant by executing and registering a document of transfer within a

period to be specified in the order and, if he neglects or refuses to comply with the direction, the procedure prescribed in Order 21, Rule 34 of the Code of Civil Procedure, 1908 (V of 1908) shall be, so far as may be, followed."

2. The facts necessary for determination of this writ application are as follows: The petitioners had filed an application under Section 16(3) of this Act before the appropriate authority, mentioning that Srimati Urmila Devi, respondent No. 3 of this Court, had transferred 5 kathas 12 dhurs of land, described in schedule 1 of this application, by a sale deed registered on the 30th March, 1965, to three persons, namely, (1) Smt. Sarjug Kumari, wife of Jugul Potdar, (2) Smt. Nanheevan Devi, wife of Ramcharitar Potdar, and (3) Smt. Parvati Devi, wife of Ram Agar Potdar. (The three ostensible vendees have been impleaded in this Court as respondents Nos. 4, 5 and 6 and their respective husbands have been impleaded as respondents Nos. 7, 8, and 9). The petitioners claimed that the vendee properties may be transferred to them on the terms and conditions contained in the deed of sale. A copy of the registered deed was attached and it may be mentioned that the sale deed had been executed on the 25th March, 1965. A rejoinder to this application was filed by the three ladies and their husbands (Annexure B), substantially making out the following case. It was alleged in paragraph 5, quoted below, that the three husbands of the three ladies had purchased the disputed properties by a sale deed dated the 25th March, 1965, for Rs. 1500/-, from Srimati Urmila Devi.

The details of the lands sold were also mentioned. Paragraph 5 of the rejoinder runs thus:—

"That the applicants have filed this case and put their claim under Section 16(3) of the Act over the lands described below which the Opposite Party Nos. 4 to 6 have purchased by virtue of a registered sale deed dated 25-3-65 for Rs. 1500/- from Smt. Urmila Devi, village Palidih T. No. 4148 thana No. 305.

Khata	Plot	Area.
216	148	0-2-10
	145	0-2-10
	197	0-0-12"

It was alleged, further, that on the eastern boundary of plot No. 148 Jangal Potdar, Ram Charitar Potdar and one Sukhdeo Potdar had land in plot No. 459 by settlement. It was contended, therefore, that plot No. 148 could not be the subject-matter of a proceeding under Section 16(3) of the Act. So far as plot No. 145 was concerned, it was alleged, that, 'the Opposite Party' had also lands adjoining this plot and so plot No. 145 also could not be the subject-matter of this proceeding.

Similarly, it was alleged, that, 'the Opposite Party' had some land adjoining plot No. 197 also, and, therefore, this plot also could not be the subject-matter of a proceeding under this Act. It will be necessary to quote here paragraph 12 of the rejoinder, dealing with plot No. 197, for reasons to be clarified later on. That Paragraph runs thus:—

"12. That plot No. 197 is in the eastern and northern boundary of plot No. 195 Khata No. 222 which is the land of the opposite party. The name of the opposite party Jangal Potdar is recorded in the landlords' Sherista and also in the sherista of the Anchal the opposite party pays and and (sic) gets rent receipts from the State of Bihar having its jamabandi No. 2 in which land of plot No. 145 is also included."

Various allegations were made as against the applicants under Section 16(3) of the Act with respect to their claim to be raiyats of the adjoining lands. The prayer made in the rejoinder petition was to the effect that the parties filing the rejoinder may be restored to possession, after rejecting the application filed under Section 16(3) of the Act.

3. By order dated the 21st June, 1966, the Additional Collector of Monghyr allowed the application filed under Section 16(3) of the Act, directing that the disputed lands be conveyed to the applicants (Annexure C). This order was confirmed by the Commissioner of Bhagalpur Division by his order dated the 26th December, 1966 (Annexure E). Thereafter, the impugned order was passed by the Additional Member, Board of Revenue, on an application filed by the three ladies and their husbands jointly under Section 32 of the Act. The learned Additional Member has set aside the orders passed by the two authorities mentioned above.

4. The point on which this writ application can be decided is the question as to who had purchased the disputed properties — the three ladies mentioned in the sale deed or their husbands. This point had been urged before the learned Additional Member of the Board of Revenue and he has dealt with it thus:—

"Finally, it was urged on behalf of the petitioners that they did hold land on the boundary of the plots in question; and that it was wrong to assume that the land adjacent to plot 197 only was in their possession. On this point, it was submitted on behalf of the opposite parties that the original sale deed had sought to convey the land in favour of petitioners 1, 2 and 3 before the Board who were wives of petitioners 4, 5 and 6 before the Board. It was submitted that the property of the wife was, under the Hindu Law, meant for her benefit; and

that her husband's interest in his own land would not form the basis of a claim on her own part as regards interest in adjacent land. The Board's attention was drawn to AIR 1965 SC 271 and to 1965 BLJR (sic) in this connection. But whether the purchase of land by a wife was a benami transaction on the part of her husband, would entirely depend on the result of an examination of relevant facts. There has been no such examination in the present case in respect of the purchases made by petitioners 1, 2 and 3."

5. Learned counsel for the petitioners has argued that the sale deed in question states that the disputed properties had been sold to the three ladies, and even if their husbands were raiyats of the adjoining lands, the ladies must be compelled to transfer the disputed lands in favour of the petitioners, if they themselves are neither co-sharers of the transferred lands, nor are they raiyats of adjoining lands. So far as the petitioners are concerned, reference is made to paragraph 3 of the writ application where the petitioners have mentioned their interest in the adjoining lands, a fact which is said to have gone unchallenged in this Court.

Learned counsel for the petitioners has also referred to the case of Kankarathammam v. V. S. Loganatha Mudaliar, AIR 1965 SC 271, and to the case of Hazaribagh Mica Mining Co. Ltd. v. Ashalata Kapoor, AIR 1952 Pat 61, urging that when the husbands had not proved that they were, in fact, the purchasers of the disputed lands, the petitioners' application under Section 16(3) of the Act should not have failed. Learned counsel for opposite parties Nos. 4 to 9 has referred to paragraph 5 of the rejoinder, quoted above, and has argued that the husbands had purchased the disputed properties from Srimati Urmila Devi, in the name of their wives, who were really Banamdars, and, therefore, the husbands were justified in contesting the application for re-transfer as raiyats of adjoining lands. Having heard the learned counsel for the parties, I am of the opinion, that, the main contention urged on behalf of the petitioners must prevail, on the facts and circumstances of the case and the order of re-conveyance passed in favour of the petitioners had rightly been made under S. 16(3) (iii) of the Act. The ladies had not proved that they were either co-sharers of the vended lands or that they were raiyats of the adjoining lands and, therefore, the Additional Member of the Board of Revenue had erred in reversing the orders passed by the authorities subordinate to him. It will be necessary to refer to an aspect of the matter which has been mentioned by the Bench in its order dated the 16th

April, 1969, referring the case for decision by a larger Bench. It has been mentioned that according to the order of the first authority, dated the 21st June, 1966, "it was admitted by the pre-emptor that the transferee had his land on the boundary of one of the three plots transferred by the sale deed in question". I do not think that the learned Chief Justice and Wasiuddin, J., meant to say that, without any doubt the ladies had land on the boundary of the three plots in dispute. In this context, paragraph 12 of the rejoinder, quoted above, may be considered. It is obvious that by that paragraph, the husbands, or at least, one of the husbands, namely, Jangal Poddar had claimed to be raiyat of the land adjoining plot No. 197. The Additional Collector while passing his order must have had this fact in mind when he referred to the so-called admission by the pre-emptors, that, the transferee was on the boundary of one of the three plots, namely, plot No. 197, conveyed by the sale deed in question. So far as the present petitioners are concerned, the learned Commissioner had found that they were raiyats of the adjoining lands and the learned Additional Member of the Board of Revenue has not held otherwise. On the general question of a Benami transaction, raised by learned counsel for the contesting respondents, it is enough to state that the matter had not been urged before the Additional Collector and the Commissioner, and the learned Additional Member of the Board of Revenue has not decided the question, and so it is not necessary to deal with this matter at this stage. In view of the fact that this application is being allowed on the grounds stated above, it is no longer necessary to deal with the point formulated by the Division Bench, referred the case to a larger Bench.

6. In the result, the order passed by the Additional Collector, Muzaffarpur, dated the 21st June, 1966 (Annexure C) and that of the Commissioner, dated the 26th December, 1966 (Annexure E) must be taken to be valid orders and a writ of Certiorari must issue, quashing the order of the Additional Member, Board of Revenue, Bihar, dated the 18th April, 1967 (Annexure G). In the circumstances of the case, parties are directed to bear their own costs of this Court.

6-A. MISRA, C. J.: I agree to the order proposed. The reference to the Full Bench was occasioned mainly to consider the soundness of the view expressed by a Division Bench of this Court in *Ram Chhabila Singh v. Ramsagar Singh*, 1969 BLJR 203. My learned brother has thought it proper not to answer the question formulated because he has accepted the finding of fact that the pre-emptors had land all round the three vended plots,

being portions of plots Nos. 145 and 148 and plot No. 197 (whole). The petitioners, Ram Jiwan Singh and others, claimed as pre-emptors of these three plots which were sold in favour of the opposite party, Mt. Sarjug Devi, Mt. Naniha, Mt. Parwati and their husbands, Jhangal Poddar, Ramcharittar Poddar and Ram Sagar Poddar. The learned Additional Collector and the Commissioner, Bhagalpur Division, allowed the claim of the pre-emptors on the ground that they had land near the disputed plots and the purchasers did not have any such land near these plots. The learned Additional Member, Board of Revenue, however, allowed the revision application filed by the purchasers on certain technical grounds. The Division Bench decision, however, which occasioned the reference, as I gather from the Supreme Court Department, is the subject-matter of an appeal in the Supreme Court.

Accordingly, it may not be necessary to answer the question formulated at this stage. As for the nearness of the land of the purchasers to plot No. 197, the finding of the Commissioner is not that they had no land in the neighbourhood of plot No. 197 but that the pre-emptors had land which was nearer to plot No. 197, plot No. 198 belonging to the pre-emptors is contiguous to plot No. 197 and plot No. 195, which also adjoins plot No. 197, however, was in possession of the purchasers. The learned Commissioner, therefore, went upon the closer proximity to plot No. 197 of plot No. 198 than plot No. 195. In that view of the matter also, this application can be disposed of only upon the finding of proximity. The pronouncement of the Supreme Court in the appeal filed is likely to settle the question.

7. S. N. P. SINGH, J.: I agree.
Petition allowed.

'AIR 1970 PATNA' 256 (V 57 C 40)

TARKESHWAR NATH AND
K. K. DUTTA, JJ.

Administrator of District Board, Gaya,
Appellant v. Shri Deonath Sahay, Res-
pondent.

AFAD. No. 887 of 1966, D/- 6-8-1969,
against Judgment of Sub-J., Gaya, D/-
20-8-1966.

(A) Limitation Act (1908), Art. 146-A
— Suit for possession of land by District
Board — Land not part of public road or
road side — Article has no application.

(Para 4)

(B) Bihar and Orissa Local Self-Govern-
ment Act (Bengal Act 3 of 1885),
S. 138 — Rules under Rr. 93, 94 and 103
— Registered lease of land of value of

CN/DN/B297/70/RGD/A

= (AIR 1968 SC 554) their Lordships did not favour the extended meaning given in an earlier decision of that Court in the Corporation of City of Nagpur's case, (1960) 1 Lab LJ 523 = (AIR 1960 SC 675) to the expression "undertaking" which is fairly elastic. Be that as it may, there can be no denying the fact that the specific judgment in that case was not overruled. Every judgment is an authority for what it decides and not for the various observations made therein which may be in the nature of a reasoning or an obiter dicta to support the decision arrived at. Even if it be held that "undertaking" to fall within the concept of "industry" must be an enterprise analogous to business or trade, there cannot be a dispute that Fire Brigade service is such an undertaking as held by the Supreme Court. It is not necessary that the activity must be one which is likely to bring profit before it can fall in the category of an industry. Fire Brigade service is a 'service' and also an 'undertaking' within the meaning of Section 2 (i) of the Act. Section 2 (n) defines "public utility service" and means:

"(i) any railway service; or any Transport service, for the carriage of passengers or goods by air.

(ii) * * * * *

(vi) any industry specified in the First Schedule which the appropriate Government may, if satisfied that public emergency or public interest so requires, by notification in the Official Gazette, declare to be a public utility service for the purposes of this Act, for such period as may be specified in the notification;

Provided that the period so specified shall not, in the first instance, exceed six months but may, by a like notification, be extended from time to time, by any period not exceeding six months, at any one time if in the opinion of the appropriate Government public emergency or public interest requires such extension."

The First Schedule which is correlated with sub-clause (vi) of cl. (n) of Section 2 gives various industries which may be declared to be public utility services and Fire Brigade service is one of them. Legislature has treated Fire Brigade service as an industry which can be declared by the appropriate Government to be a public utility service giving rise to industrial disputes and other consequences connected therewith. The Supreme Court in the Corporation of City of Nagpur's case, (1960) 1 Lab LJ 523 = (AIR 1960 SC 675) was dealing with the Central Provinces and Berar Industrial Disputes Settlement Act, 1947. That Act gave the definition

of "industry" in somewhat different language and limited the scope of an undertaking. It included:—

"(a) any business, trade, manufacturing or mining undertaking or calling of employers,

(b) any calling, service, employment, handicraft or industrial occupation or avocation of employees, and

(c) any branch of an industry or a group of industries."

In the definition of the expression "industry" as given in the Industrial Disputes Act, 1947, there are no limitations prefixed to the word "undertaking" which can be given a wider meaning. Their Lordships deciding the Corporation of City of Nagpur's case, (1960) 1 Lab LJ 523 = (AIR 1960 SC 675) gave extended meaning to the expression "undertaking" in spite of the limitations laid therein. The subsequent decision of the Supreme Court in Madras Gymkhana Club Employees' Union's case, (1967) 2 Lab LJ 720 = (AIR 1968 SC 554) has laid down some additional tests to determine whether an activity is industry or not, but it does not mean that the decision in the Corporation of City of Nagpur's case, (1960) 1 Lab LJ 523 = (AIR 1960 SC 675) does not hold the field. In my opinion, the Industrial Tribunal went wrong and committed an error apparent in not following the judgment of the Supreme Court which is on all fours with the present case and instead relying on some observations made in Madras Gymkhana Club Employees' Union's case, (1967) 2 Lab LJ 720 = (AIR 1968 SC 554). On merits, the Tribunal has given a finding that prima facie the workmen are entitled to the concessions claimed by them but has not disposed of all the issues.

8. For the foregoing reasons, I allow the writ petition, quash the impugned award of the Industrial Tribunal and direct that it should proceed to dispose of all the other issues on merits. I assess the costs of the petitioners at Rs. 150.

Petition allowed.

AIR 1970 PUNJAB & HARYANA 289
(V 57 C 44)

FULL BENCH

MEHAR SINGH, C. J., HARBANS SINGH, D. K. MAHAJAN, GURDEV SINGH AND BAL RAJ TULI, JJ.

Sada Kaur, Appellant v. Bakhtawar Singh and others, Respondents.

Second Appeal No. 1456 of 1964. D/- 3-11-1969.

(A) Custom (Punjab) — Widow — Remarriage with husband's brother — Effect on life estate in husband's property.

There is no universal custom amongst the Jats of Punjab, by which a widow does not forfeit her life estate in her hus-

AR/AN/A15/70/CWM/P.

band's property by reason of her remarriage with her husband's brother and the same holds good with regard to Dhaliwal Jats of Muktsar Tehsil in the Ferozepur District. Case law discussed.

(Para 28)

(B) Custom (Punjab) — Proof of custom.

A custom to be treated as a general custom may not be an immemorial custom as is contemplated under the English Law, and if a particular custom is well-recognised by judicial decisions and otherwise, then the same may be taken judicial notice of by the Courts without any further proof by producing particular instances. AIR 1941 PC 21, Rel. on.

(Para 15)

(C) Custom (Punjab) — Special custom — Burden of proof.

It is for the party who pleads the special custom, not only to plead it, but also to prove the same unless such a special custom has been recognised to be in existence in such a large number of cases that even no instance may be established to discharge the burden.

(Para 20)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 1821 (V 51) =

(1964) 7 SCR 430, Mara v. Mst. Nikko 13

(1961) AIR 1961 Punj 301 (V 48) =

ILR (1961) 2 Punj 340 (FB),

Charan Singh Harnam Singh v.

Gurdial Singh Harnam Singh

3, 4, 5, 9, 10

(1960) AIR 1960 SC 1118 (V 47) =

(1960) 3 SCR 975, Jai Kaur v. Sher Singh 11

(1955) AIR 1955 SC 266 (V 42) =

1955 SCR 1191, Salig Ram v. Mt. Maya Devi 11, 24

(1941) AIR 1941 PC 21 (V 28) =

68 Ind App 1, Mst. Subhani v. Nawab 11, 15

(1924) AIR 1924 Sind 17 (V 11) =

76 Ind Cas 408, Sant Singh v. Rari Bai 4, 12, 27

(1911) 1911 Pun Re 51 = 10 Ind

Cas 885, Basanti v. Partapa 4, 27

(1910) 64 Pun Re 1910 = 113 Pun

LR 1910, Hardam Singh v. Mt. Mahan Kaur 18, 21

(1900) 115 Pun Re 1900, Mst. Indi

v. Bhanga Singh 17, 18, 21, 26, 27

(1900) 88 Pun Re 1900, Punjab

Singh v. Mst. Chandi 17, 21

(1889) 90 Pun Re 1889, Mt. Ramon

v. Baisakha Singh 21

(1888) 25 Pun Re 1888, Didar Singh

v. Mst. Dharmon 16, 17, 19, 21, 24, 25, 28

(1883) 117 Pun Re 1883, Mst. Jai

Devi v. Harnam Singh 18

G. C. Mittal with P. C. Jain, for Appellant; N. L. Dhillon with M. S. Dhillon, for Respondents.

ORDER OF REFERENCE OF DIVISION BENCH

MEHAR SINGH C. J.:— The following pedigree-table of the parties assists in appreciation of the facts of the case—

GULAB SINGH (deceased)

Dalip Singh
(deceased)

Chand Singh
Defendant 2

Sampuran Singh
(deceased)

Bakhtawar Singh
Plaintiff 1

Jit Singh
Plaintiff 2

Widow Sada
Kaur
Defendant 1

Daughters

Kartar Kaur
Defendant 3

Jas Kaur
Defendant 4

The land in dispute was inherited by his five sons on the death of Gulab Singh, the common ancestor. The suit, out of which the present second appeal arises, was instituted by the two plaintiffs on January 22, 1962. They averred that some thirty years earlier to that Dalip Singh had died issueless, leaving him surviving his widow Sada Kaur defendant 1, who, within a few months of the death of her husband, remarried, by Karewa, the real brother of her husband, Chand Singh defendant 2. They have had a number of children out of that marriage. On the death of Sampuran Singh, his two daughters (defendants 3 and 4) sold one-fifth share of their father to the remaining four branches of the common ancestor. The plaintiff averred that the land is ancestral qua them and their brother Dalip

Singh deceased, that they were governed by custom among Dhaliwal Jats in Muktsar Tehsil of Ferozepur District in regard to inheritance, widow's right to succession, and forfeiture of estate on widow's unchastity or remarriage, and that throughout they have remained in possession of the land as owners and co-sharers. They sought declaration that they were owners of two-thirds of the land, the rest one-third remaining with Chand Singh defendant 2. This they claimed on the ground that on remarriage Sada Kaur defendant 1 forfeited her right to the estate of her deceased husband Dalip Singh.

2. The trial Court found that the suit of the plaintiffs was within time, that though the parties are Dhaliwal Jats, by the custom applicable to them, Sada Kaur

defendant 1 did not forfeit her first husband's estate on remarriage to his real brother Chand Singh defendant 2, that the plaintiffs failed to prove their title by prescription, that the land is ancestral qua the plaintiffs and Dalip Singh deceased, and that Sada Kaur defendant 1 had become full owner of her share of the land in view of the provisions of the Hindu Succession Act, 1956. The learned trial Judge by his judgment and decree of June 13, 1963, thus did not grant declaration to the plaintiffs as prayed for by them, but he made a declaration that they along with Chand Singh defendant 2 are owners and in possession of four-fifths of the land in dispute. Decree was ordered to be made according to that, leaving the parties to bear their own costs. On an appeal by the plaintiffs from the decree of the trial Court, the learned Additional District Judge of Ferozepur by his judgment and decree of August 7, 1964, reversed the decree of the trial Court and decreed the claim of the plaintiffs as a whole. He pointed out that no other issue was a matter of argument before him except whether Sada Kaur defendant 1 having remarried, within a few months of the death of her first husband, his real brother Chand Singh defendant 2, forfeited the estate she inherited from her first husband or not? He answered the question in favour of the plaintiffs and against the defendants, relying very greatly upon the statement of custom in this behalf as given at page 166 of Currie's Customary Law of Ferozepur District of the Settlement of 1914. Question 47 is—What is the effect of unchastity upon the right of a widow to the estate of her deceased husband? What is the effect of her remarriage? And the answer given is—

"Answer— At last settlement Mr. Francis wrote:—

'Unchastity or remarriage deprives a widow of her right to the property.' The Muktsar Code gives a similar answer. The Sirsa Code, however, stated: 'If a sonless widow have succeeded to her husband's estate, and be proved unchaste or leave her husband's house to reside permanently with her parents elsewhere, or marry by nikah or karewa any one except a near agnate of her husband, she loses all right to her husband's estate.' Further on (page 124) it says:— 'Whenever a widow remarries, even if she marry the brother of her deceased husband, she loses her right to her deceased husband's estate, which reverts at once to his agnates (mostly Sikh, Jats, Kumhar, Khatri, Lohar, Bodla, Chishti, Wattu). If a sonless widow in possession of her husband's estate marries his brother, she is often allowed to remain in possession of her deceased husband's estate for her

life time (Bagri Jats, Musalman Jats and Rajputs).

As regards the question of unchastity, there seems to have sprung up a greater laxity. Most tribes now say that unchastity does not affect the widow's rights. The following groups however say that unchastity entails forfeiture:— Among Sikh Jats, Dhaliwals of Moga and Muktsar, Siddhus in Ferozepore, Gils and miscellaneous Jats in Moga and Sandhus and Khosas in Muktsar, and among other tribes — Bodlas, Nipals and Chishtis in Fazilka, and in Ferozepore Pathans, Arains and Moghals.

Note.— The truth on this point, I think, is that as long as the widow remains in her deceased husband's house and her unchastity is not an open scandal, no one will object.

As regards the effect of remarriage, all tribes that admit widow remarriage agree that no matter whom the widow marries, she forfeits all right to her deceased husband's estate.

Note.— Despite the rulings to the contrary that are quoted below, I am convinced that the above answer is a true exposition of the custom. The people when pressed on the point put it as follows:— the widow on re-marriage ceases to be the widow of her late husband and becomes the wife of the man she has married; she thus forfeits her right, which is really only one of maintenance from the income of the deceased's property. Instances to the contrary will generally be found to be rather of the nature of family arrangements, whereby if the widow has daughters by the previous husband, she may be allowed to retain the whole or a part of the estate till they have been married or where the new husband has already a wife and it is anticipated that the two women may quarrel.

Many of the refusals in succession cases to admit that a karewa marriage has taken place are simply due to the belief that ipso facto the widow's rights are extinguished."

The learned Author then discusses the decisions of the Chief Court and cites one hundred and two instances in support of his conclusions. Of those there are nine of Dhaliwal Jats, seven from Moga Tehsil and two from Fazilka Tehsil, appearing at pages 173, 174 and 185. Of those nine instances of Dhaliwal Jats in Ferozepur District, eight are in support of the plaintiffs and one against them. All the seven instances from Moga Tehsil are in support of the plaintiffs. Of the two instances from Fazilka Tehsil one is in their favour and one is against them, that is to say, one instance is in favour of Sada Kaur defendant 1. No instance of Dhaliwal Jats is available from Muktsar.

sar Tehsil, but the enquiries of the learned Author as digested at page 106 give an answer even with regard to Dhaliwal Jats of Muktsar Tehsil on the questions posed. It will be seen that so far as the question of remarriage is concerned, all tribes said that remarriage, no matter whom the widow remarries, causes forfeiture of all rights to her deceased husband's estate. Overwhelming instances of other Jats in Ferozepur District are also in support of the plaintiffs and against Sada Kaur defendant 1, as enumerated and listed in this book. Now, apparently Riway-i-Am, unless rebutted, is a relevant and strong piece of evidence in support of custom. No doubt, the females were not consulted at the time of preparation of the Riway-i-Am but in spite of this no substantial evidence to the contrary in the form of sufficient number of instances is available in this book which rebuts the presumption of correctness of the custom stated therein.

3. The learned Additional District Judge thus proceeded on this evidence and was of the opinion that the Full Bench decision of this Court reported as Charan Singh Harnam Singh v. Gurdial Singh Harnam Singh, AIR 1961 Punj 301 (FB), was not quite in point because it was a case from another district, that is to say, Ambala District.

4. There has been an appeal by the defendants other than the daughters of Sampuran Singh deceased against the appellate judgment and decree of the Additional District Judge of Ferozepore. It came for hearing before Tek Chand J., and the learned Judge was of opinion that Charan Singh's case, AIR 1961 Punj 301 (FB) has stated, following paragraph 32 and Exception 1 to that paragraph of Rattigan's Digest of Customary Law, 1938 Edition, that among Jats remarriage in Karewa form with the brother of the deceased husband does not cause forfeiture of a widow's life estate in the property of her first husband, the proposition therein too broadly and it is not really supported by authority. The learned Judge points out in his order of reference of September 5, 1967, that in the first nine editions of Rattigan's Digest of Customary Law, of which the first six were by the Author himself, Sir William Rattigan, between 1880 and 1921, there was no reference to any such custom in the Digest. It was for the first time introduced by Mr. K. J. Rustomji when he edited the Digest in 1925 and has continued in it ever since. The learned Judge then points out that when it was introduced in the Digest by Mr. Rustomji there was no authority in support of it but a mistaken view taken in Sant Singh v. Rari Bai, 76 Ind Cas 408—AIR 1924 Sind 17, decided on August 1, 1923, by the Judicial Commissioner of Sind. There

the learned Judicial Commissioner by mistake stated that among Sikh Jats of Punjab, instead of Sikh Jats of Jullundur, which was the case before him, a widow does not forfeit her life estate in her deceased husband's property by reason of remarriage in Karewa form with her husband's brother whether he be the sole surviving brother or there are other brothers as well of the deceased. The learned Judicial Commissioner was relying upon Basanti v. Partapa, 51 Pun Re 1911, which was a case from Ludhiana District and did not state a general custom applicable to all the districts in the Punjab. This mistake has ever since, according to the learned Judge, been repeated and unjustly attributed to Sir William Rattigan, the original Author of the Digest. The learned Judge felt that he was bound by the decision of the Full Bench in Charan Singh's case, AIR 1961 Punj 301 (FB) and so he has made reference of this case to a larger Bench, which means a Bench of five Judges, because Charan Singh's case, AIR 1961 Punj 301 (FB) was decided by a Bench of three Judges.

5. The question that has been posed by the learned Judge is, whether by universal custom among the Sikh Jats of the Punjab, a widow does not forfeit her life estate in her husband's property by reason of her remarriage in Karewa form with her husband's brother, and, if so, whether the custom admits of exceptions among different tribes of Sikh Jats and in particular among Dhaliwal Jats of Muktsar Tehsil of Ferozepore District. In Charan Singh's case, AIR 1961 Punj 301 (FB) it was not stated that there is a universal custom of this type, but from the judgment an argument in support of such a claim may be urged. That was a case which decided the dispute between the parties from Ambala District. Now, it is acknowledged that custom in Punjab is not only local but also tribal. It may vary from district to district, from tehsil to tehsil, and from Pargana to Pargana in the case of the same tribe. It may vary from tribe to tribe and, what is more, it may vary among different sections or castes of the same tribe. If my memory serves me right, except in one case, it has never been accepted that there is any such thing as a general custom prevailing in Punjab. Custom has every time to be alleged and proved as a fact. True, instances of reported cases may offer ready precedents in support of a claim in this respect, but a custom has still to be alleged and proved. In a given case proof may be readily available in the form of reported cases or as is more common in the statement of the custom in the Riway-i-Am, to which attaches a presumption of correctness and truth unless otherwise rebutted. So that it would

be a point whether the Full Bench in Charan Singh's case, AIR 1961 Punj 301 (FB) intended to lay down any broad proposition that the statement of custom therein is applicable as a general or a universal custom among Jats in the whole of Punjab. I was a party to that case but mine was a dissenting judgment. What has been brought to light by the learned Judge was never placed before us when that case was heard. Apart from this whatever may be the case of a custom on the aspect of the matter among a particular tribe of Jats in Ambala, in Ferozepore District among the tribe of the parties, according to Currie's Customary Law of Ferozepore District, 1914 Settlement, the custom with them is quite to the contrary. In these circumstances, I think it would not be proper to pose a definite question for the larger Full Bench in this case. The reason is that the vast majority of cases on custom are more disposed of upon the evidence than upon abstract statement of custom as law. As I have already said, in so far as my memory serves, there has only been one statement of general custom applicable to the whole of Punjab in a decision of the Privy Council, but only on one isolated aspect of the customary law and no other. In these circumstances, I think it more appropriate that this second appeal be placed before a Bench of five Judges for final disposal on all aspects that arise in this appeal including the consideration of the Full Bench decision in Charan Singh's case, AIR 1961 Punj 301 (FB). So the case is referred to a Bench of five Judges.

6. **BAL RAJ TULLI, J.:** I agree.

JUDGMENT OF FULL BENCH

7. **HARBANS SINGH, J.:** The facts of the case have been given in detail in the referring order and for the purpose of this appeal, it is not necessary to give them in extenso.

8. After the demise of one Gulab Singh, a Dhaliwal Jat of Muktsar Tehsil in District Ferozepur, the property was inherited by his five sons in equal shares some thirty years before 22nd of January, 1962, when the suit, out of which the present second appeal has arisen, was filed. Dalip Singh, one of the sons of Gulab Singh, died leaving him surviving only his widow Sada Kaur defendant No. 1. Within a few months of the death of her first husband, Sada Kaur remarried in Karewa form the real brother of her husband, Chand Singh defendant No. 2. The third brother Sampuran Singh died leaving two daughters, who transferred one-fifth share of their father to the surviving three brothers including Chand Singh. It appears that the possession of the entire land continued with the three brothers though in the revenue record, Sada Kaur was mentioned as the

owner of one-fifth share belonging to her first husband. The present suit was brought by the remaining two brothers, namely, Bakhtawar Singh and Jit Singh for a declaration that they were governed by custom according to which Sada Kaur on remarriage forfeited the estate inherited by her from Dalip Singh and the same devolved, on her remarriage, on the remaining three brothers, that is, two plaintiffs and Chand Singh defendant No. 2. They sought a declaration that they are the owners in possession of the two-third share. As modified by the lower appellate Court, the plaintiffs were granted a decree as prayed and this second appeal was filed by Sada Kaur, challenging this decision. The main contention on behalf of the appellant was that a remarriage by the widow with the real brother of her deceased husband does not involve a forfeiture of the estate inherited by her from the deceased husband.

9. This appeal in the first instance came up before the learned single Judge, who referred it to a Division Bench for an authoritative decision. The Bench, however, by its order dated 31st of July, 1968, felt that the question involved in the case required more authoritative consideration particularly in view of an earlier Full Bench decision in AIR 1961 Punj 301 (FB). This Regular Second Appeal was, therefore, directed to be placed before a Bench of five Judges and that is how the case is before us.

10. The question involved in the case and which was posed by the Division Bench is in the following terms:—

"Whether by universal custom among the Sikh Jats of the Punjab, a widow does not forfeit her life estate in her husband's property by reason of her remarriage in Karewa form with her husband's brother, and, if so, whether the custom admits of exceptions among different tribes of Sikh Jats and in particular among Dhaliwal Jats of Muktsar Tehsil of Ferozepur District."

Charan Singh's case, AIR 1961 Punj 301 (FB) was from Ambala District and the question referred to the Full Bench was not the same as arises in the present case, but slightly different, namely, "whether in the case of Jats governed by custom in matters of succession, a widow, by remarrying her deceased husband's brother, is entitled to collateral succession in the family?" The question argued before the Bench viz., whether by remarriage with the real brother of her first husband, she would forfeit the life interest inherited by her from her first husband was discussed and the conclusion arrived at by the Full Bench was that to the general rule that a widow on remarriage forfeits her life interest in the estate inherited by her from her first husband was subject to an exception or a special custom

prevailing among Jats that a remarriage in the Karewa form with the brother of the deceased husband does not cause such a forfeiture. In fact, this proposition was accepted by the learned counsel for both the parties and consequently the question, which is before this Bench, was not examined at any considerable length either by the Division Bench or by the Full Bench.

11. Paragraph 32 of Rattigan's Digest of Customary Law is to the following effect:—

"In the absence of custom, the remarriage of a widow causes a forfeiture of her life interest in her first husband's estate which then reverts to the nearest heir of the husband."

No exception can be taken to this statement of general custom prevailing among the Jats. Rattigan's Digest of Customary Law of Punjab has received the seal of being a book of undisputed authority by the Privy Council in *Mst. Subhani v. Nawab*, AIR 1941 PC 21 and by the Supreme Court in *Salig Ram v. Mt. Maya Devi*, AIR 1955 SC 266, and *Jai Kaur v. Sher Singh*, AIR 1960 SC 1118.

12. There are number of exceptions mentioned to this statement of general custom and we are concerned with Exception I, which is stated in the following terms:—

"Amongst certain tribes a remarriage in the Karewa form with the brother of the deceased husband does not cause a forfeiture of the widow's life estate in the property of her first husband"

Some of the cases cited in support of this statement relate to Sikh Jats of different districts in Punjab including Sirsa, Amritsar, Ferozepur and Ludhiana. In the twelfth edition of this Digest of Customary Law, the following statement is found added for the first time:—

"By custom among the Sikh Jats of the Punjab a widow does not forfeit her life-estate in her deceased husband's property by reason of her remarriage in Karewa form with her husband's brother, whether he be the sole surviving brother or there are other brothers as well of the deceased."

The case quoted in support of this general statement is 76 Ind Cas 408—AIR 1924 Sind 17.

13. It is now well-settled that agricultural custom in Punjab is not only local, but also tribal and may even differ from Tehsil to Tehsil and from tribe to tribe *Mara v. Mst. Nikko*, AIR 1964 SC 1821.

14. On behalf of the respondents, who are brothers other than the one who married the widow by Karewa marriage, it was vehemently argued that the Sind case is no authority for the recognition of such a universal exception to the general rule as stated in paragraph 32 of

Rattigan's Digest of Customary Law. It was further urged that in the District of Ferozepur and more so amongst Dhalawal Jats, this exception was not recognised and the general rule resulting in the forfeiture of the life estate by the widow on remarriage applied notwithstanding the fact that remarriage was with a brother of the deceased husband.

15. As was observed by the Privy Council in *Mst. Subhani's case*, AIR 1941 PC 21 a custom to be treated as a general custom may not be an immemorial custom as is contemplated under the English Law, and if a particular custom is well-recognised by judicial decisions and otherwise, then the same may be taken judicial notice of by the Courts without any further proof by producing particular instances. The question, therefore, before us is whether the exception mentioned in the Rattigan's Digest of Customary Law under paragraph 32 that the forfeiture does not take place in case of widow's remarriage with her husband's brother is so universally recognised all over Punjab and particularly amongst the Dhalawal Jats of Ferozepur District as to be treated as their generally recognised special custom. As instances from other districts will not be of much avail, unless the position is not clear so far as the instance from Ferozepur District are concerned it would be necessary in the first instance to examine decided cases and other instances arising out of the Ferozepur District, to which the parties belong.

16. Earliest reported case from Ferozepur District is *Didar Singh v. Mst. Dharmon*, 25 Pun Re 1888. In this case, one Gara had left two widows J and D. D remarried younger brother of Gara. In a litigation between the widow and the collaterals, it was held that this remarriage did not result in the forfeiture of the half share of the estate which had earlier been mutated in favour of D. Later J died and the question was whether D as a co-widow of J was entitled to inherit J's share as well. The Punjab Chief Court held, in view of the previous decision between the parties, that if D had been the sole widow, she would have been entitled to retain the entire estate in spite of her remarriage and consequently D should be held to be entitled to inherit the other half of the estate which was inherited by J on the demise of the latter.

17. *Punjab Singh v. Mst. Chandl*, 88 Pun Re 1900, was a case from Sirsa, but the parties were Gill Jats and had migrated from Fazilka Tehsil and they owned property in Tehsil Muktsar also, to which Tehsil the parties in the present case before us belong. The defendants relied upon the custom of non-forfeiture of the estate of the widow on remarriage with

her husband's brother and it was observed by the Bench as follows:—

"It is clear that the custom relied on by the defendants does obtain to a very considerable extent amongst Sikh Jats of Sirsa District, though it may not be universal."

Punjab Singh's case, 88 Pun Re 1900 was followed in *Mst. Indi v. Bhangra Singh*, 115 Pun Re 1900. In the first instance, this case was remanded by the Court for detailed enquiry and number of instances were brought on the record for and against the aforesaid exception. At page 450 of the report, Mr. Justice Chatterji, who delivered the judgment observed as follows:—

"The decision of the question is not free from difficulty, but on the whole I am disposed to think that the plaintiffs' claim ought not to succeed. Having regard to the customs and notions of the Jats, I am inclined to hold that there is a substantial distinction recognized by them between the marriage of a widow with her husband's brother and her marriage with a stranger. The Jat notion undoubtedly is that by marrying a member of a family a woman not only becomes a member of it but comes to be looked upon as if she were the property of the family. If her husband dies his male relations in the order of propinquity to him have a preferential claim to take her to wife. In practice in most instances she follows this rule if she contracts a second marriage at all."

In addition to *Didar Singh's case*, 25 Pun Re 1888 (supra) and *Punjab Singh's case*, 88 Pun Re 1900 (supra), reliance was also placed on *Hira Singh v. Mst. Rami*, 74 Pun Re 1893 (a case of Cohabitation, and not of remarriage, from District Amritsar) for coming to the conclusion that the custom in favour of non-forfeiture of widow's estate on remarriage with her husband's brother was established.

18. There is no reported case after *Mst. Indi's case*, 115 Pun Re 1900 (supra) from Ferozepur District recognising this exception. *Hardam Singh v. Mst. Mahan Kaur*, 64 Pun Re 1910, however, is a case from Ferozepur District. In that case, the deceased left him surviving his son and widow. On the demise of the son, widow, who had remarried a brother of her deceased husband, claimed inheritance. Her claim was negatived following the decision in *Mst. Jai Devi v. Harnam Singh*, 117 Pun Re 1883, which was a case of Jats from Hoshiarpur District and in which also the question involved was inheritance of a son. This case consequently did not deal directly with the question of forfeiture by widow of the estate of her husband.

19. Thus it is clear that so far as the reported cases are concerned, we have only three cases relating to Jats of Fe-

rozepur District and all these cases are prior to 1900. Out of these, *Didar Singh's case*, 25 Pun Re 1888 related to Dhaliwal Jats.

20. There is no reported case directly dealing with the point from Ferozepur District taking a contrary view. The learned counsel for the respondents, however, urged that the only three decided cases (the third one following the other two and only one of them relating to Dhaliwal Jats) are hardly sufficient for holding that the exception is generally recognised among the Dhaliwal Jats, so as to be taken a judicial notice of. The learned counsel rightly contended that it is for the party who pleads the special custom, not only to plead it, but also to prove the same unless such a special custom has been recognised to be in existence in such a large number of cases that even no instance may be established to discharge the burden.

21. In order to ascertain the custom prevailing in a tribe residing in any district or a sub-division of a district *Riwaj-i-am* compiled by the authorities of a district normally affords a good and reliable source. Question No. 47 of Currie's Customary Law of the Ferozepur District deals with the question of the effect of unchastity and remarriage upon the right of a widow to the estate of her deceased husband. Relevant portion of the reply dealing with the remarriage is in the following terms:—

"At last settlement Mr. Francis wrote: 'Unchastity or re-marriage deprives a widow of her right to the property'. The Muktsar Code gives a similar answer..... Further on (page 124) it says:— 'Whenever a widow re-marries, even if she marries the brother of her deceased husband, she loses her right to her deceased husband's estate, which reverts at once to his agnates (mostly Sikh Jats, Kumhar, Khatri, Lohar, Bodla, Chishti, Wattu). If a sonless widow in possession of her husband's estate marries his brother, she is often allowed to remain in possession of her deceased husband's estate for her lifetime (Bagri Jats, Musalman Jats and Rajputs)."

xx xx xx

As regards the effect of re-marriage, all tribes that admit widow re-marriage agree that no matter whom the widow marries, she forfeits all right to her deceased husband's estate."

This statement is very categorical. There is a note given by the compiler to this answer in the following terms:—

"Despite the rulings to the contrary that are quoted below, I am convinced that the above answer is a true exposition of the custom. The people when pressed on the point put it as follows:—

The widow on remarriage ceases to be the widow of her late husband and be-

comes the wife of the man she has married; she thus forfeits her right, which is really only one of maintenance from the income of the deceased's property. Instances to the contrary will generally be found to be rather of the nature of family arrangements, whereby if the widow has daughters by the previous husband, she may be allowed to retain the whole or a part of the estate till they have been married or where the new husband has already a wife and it is anticipated that the two women may quarrel."

Apart from the rulings noted above, namely, Didar Singh's case, 25 Pun Re 1888, Punjab Singh's case, 88 Pun Re 1900, Mst. Indi's case, 115 Pun Re 1900, and Hardam Singh's case, 64 Pun Re 1910 another judicial instance cited recognising the exception in case of a brother is that of Mst. Ramon v. Baisakha Singh, 90 Pun Re 1889. This case, however, is not relevant because in this case the marriage of the widow was with the first cousin and not with the real brother of the deceased and the forfeiture by the widow of a husband's estate on such a remarriage would not be an instance of recognition of the exception. Under this question, the compiler has quoted a very large number of instances, from different Tehsils and of different categories of Jats, numbering nearly 70, in which the widow forfeited the estate inherited from her husband on remarriage even with the brother.

22. On going through these instances, I find that there are some instances, which are not really instances of remarriage with the brother, but out of these 70 instances, there are about 59 instances of Jats, which do support the answer given by the compiler to this question. As against this, seven instances are given wherein remarriage with the brother did not result in the forfeiture of the widow,

23. Out of these seven instances, first instance is of Sidhu Jats of Tehsil Moga, but here the question seems to have been decided by a compromise because 42 Kanals 2 Marlas of land without the share of Shamlat were allowed to remain in the name of the widow and the rest of the land was mutated in the name of two brothers of her deceased husband including Ratna on her remarriage. The fourth instance is of Gill Jats of Tehsil Moga. Here the marriage of the widow was with the cousin of her deceased husband and the mutation entered for removal of her name was rejected on the ground of her apprehension that she might be expelled by her second husband as he already had a wife. Again instance No. 6 relates to Jat Bhuttar of Tehsil Muktsar, in which 10/11th of the estate was mutated in the names of Lal Singh and Budha Singh, brothers of the hus-

band of the widow and only 1/11 (stated 1/10 in the book) was in the name of the widow and on that also the widow had no separate possession. The last instance from Chak Jowahrewala relates to Dhillon Jat of Muktsar Tehsil, wherein the land inherited by the widow on remarriage with Sber Singh, her Dewar, was mutated in equal shares between Sher Singh, aforesaid, and his two brothers, and she was given only 40 Gbumaons for her maintenance till the marriage of her daughters and after the marriage of the aforesaid daughters, the three brothers divided these 40 Gbumaons among themselves.

24. The aforesaid instances, therefore, hardly support the contention that the remarriage did not result in the forfeiture of the estate. The remaining three are, however, instances, in which even after remarriage the widow continued in possession of the estate inherited by her from her husband. Instance at serial No. 3 relates to Dhaliwal Jats being the same as reported in 25 Pun Re 1888. Instance at serial No. 2 is of Sidhu Jats of Fazilka Tehsil and at serial No. 5 of Sandhu Jats of Muktsar Tehsil, but in this case there is also a mention that the brother, whom the widow had remarried, had already a wife. Thus it is clear that there are three reported cases and three other instances in support of this exception as against 59 instances to the contrary. It is now well-settled that the statement of custom incorporated in the Riway-i-Am of a district, even without any instance quoted in support thereof, is entitled to an initial presumption of correctness unless it is found that the Riway-i-Am was not a properly compiled document. See in this connection Salig Ram's case, AIR 1955 SC 268. So far as Riway-i-Am of Ferozepur District compiled by Mr. Currie is concerned, it was conceded that the same has not been adversely commented upon and so far as question and answer No. 47 is concerned, the same finds ample support from a large number of instances.

25. So far as Ferozepur District as a whole is concerned, it is thus obvious that the preponderance is against the exception and it appears that the general custom as incorporated in paragraph 32 of the Rattigan's Digest was followed in this District and the exception was not generally recognised. So far as Dhaliwal Jats are concerned, the only instance in favour of the exception is the judicial one as noticed above, being Didar Singh's case, 25 Pun Re 1888. As against this, at page 178 of the District Riway-i-Am, a number of instances have been given of Dhaliwal Jats, of which instances at serial numbers 31, 32, 33 and 34, all of the year 1911-12, are against the recognition of this exception. All these instances relate to

Tehsil Moga and not to Tehsil Muktsar. Here it may be assumed that the custom that is followed by the Dhaliwal Jats in Moga would not be much different from the one followed by them in Tehsil Muktsar and more so because this is the usual custom generally prevailing in the whole of the District amongst the other Jats also. So, as regards Dhaliwal Jats, we have got four clear instances, in which widow even in spite of her marriage with her deceased husband's brother forfeited the estate and we have one judicial instance of Didar Singh's case, 25 Pun Re 1888, taking a contrary view.

26. As has been noted above, Mr. Justice Chatterji, while dealing with Mst. Indi's case, 115 Pun Re 1900 expressed the view that the decision of the question was not free from difficulty and that this exception to the general custom of forfeiture by widow on remarriage with the brother of the deceased husband was not universally recognised. There is no instance after the year 1900, reported or otherwise, from Ferozepur District in which a widow on remarriage with a brother of the deceased husband was allowed to retain the property after remarriage. As has been observed in the note, reproduced above, by Mr. Currie, the cases in which a widow is allowed to keep the property with herself are more by way of family arrangement than otherwise. Furthermore, in the earlier years, the landed property was not of very great value and possibly the brothers allowed a widow to remain in possession of life interest because in any case after her death the property devolved, in equal shares, among all the surviving brothers. In fact Mr. Justice Chatterji, in Mst. Indi's case, 115 Pun Re 1900 at page 454 of the report, states as follows:—

"After all the matter is not of vital importance to the plaintiffs; their succession to the property of their deceased brother is, if their suit fails, only postponed till the death of the widow; their rights remain unaffected."

It appears that as the value of the landed property increased, the brothers, other than the one who remarried the widow, were more alert as regards their rights and asserted the same and got the property mutated equally in the names of all the brothers and did not allow the estate to remain with the widow to be enjoyed exclusively by the brother whom she had remarried.

27. It was vehemently contended that the statement that appeared in Rattigan's Digest of Customary Law in its edition of 1925 and the subsequent editions, saying that among Sikh Jats in Punjab this exception is generally recognised, was not correct, because the case of AIR 1924

Sind 17 = 76 Ind Cas 408 on which it purported to be based, was hardly an authority for such a general statement. I feel, there is force in this contention. In this case, the parties to the litigation were Bhullar Jats, who had migrated to Hyderabad Sind from Jullundur District and it was held that the parties, on migration to Sind, carried with them their personal law as to custom prevailing in the province of Punjab. The learned Judges simply relied on Mst. Indi's case, 115 Pun Re 1900 and 51 Pun Re 1911, a case from Ludhiana District, for coming to the conclusion that among the Sikh Jats remarriage of a widow with the brother of her husband did not result in forfeiture of her estate inherited by her, irrespective of the fact whether he be the sole surviving brother or there are other brothers as well of the deceased. Mst. Indi's case, 115 Pun Re 1900 has already been discussed above the Basant's case, 51 Pun Re 1911 is a case from Ludhiana District, in which it was laid down that amongst Sikh Jats in the District of Ludhiana, widow does not forfeit her life estate in her deceased husband's property by reason of her remarriage in Karewa form. None of these two cases is an authority for the general proposition that amongst Sikh Jats in the Punjab this special custom is recognised. This statement, therefore, introduced by the editor for the first time in 1925 edition of Rattigan's Digest was not borne out by the decision in Sant Singh's case, AIR 1924 Sind 17=76 Ind Cas 408 or any other case referred to in Sant Singh's case, AIR 1924 Sind 17=76 Ind Cas 408 or otherwise.

28. Be that as it may, so far as the District of Ferozepur is concerned, the number of instances in support of the general custom not recognising this exception are so overwhelmingly large that it is not possible to say that this special custom prevails in the district of Ferozepur. So far as Dhaliwal Jats are concerned, there are four instances cited in the Riway-i-am as against one reported case of Didar Singh, 25 Pun Re 1888 and consequently it cannot be held that this special custom is recognised universally amongst the Dhaliwal Jats. No specific instance was proved in the case relating to the family of Dhaliwal Jats in Muktsar Tehsil, to which the parties belong, and, therefore, the main question posed in the case has to be replied in the negative, namely, that there is no universal custom amongst the Jats of Punjab, by which a widow does not forfeit her life estate in her husband's property by reason of her remarriage with her husband's brother and the same holds good with regard to Dhaliwal Jats of Muktsar Tehsil in the Ferozepur District.

29. As this is the only point involved in the case and the entire case was referred to the Full Bench, this appeal must be dismissed and the decree of the lower appellate Court confirmed. As the point involved in this case was not free from difficulty, there would be no order as to costs in this Court, but the costs of the Courts below will be borne by the parties as directed by the lower appellate Court.

30. MEHAR SINGH, C. J.: I agree.
 31. D. K. MAHAJAN, J.: I agree.
 32. GURDEV SINGH, J.: I agree.
 33. BAL RAJ TULL, J.: I also agree.

Appeal dismissed.

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 (V 57 C 45)

D. K. MAHAJAN, J.

Bega and others, Appellants v. Shadi and others, Respondents.

Second Appeal No. 869 of 1965, D/- 21-8-1969, from decree of Addl. Dist. J., Ambala, at Karnal, D/- 27-5-1965.

Limitation Act (1963), Arts. 64-65 — Adverse possession — Mera adverse possession of proprietary land — It is not by itself adverse possession of shamlat land corresponding to proprietary land. (T. P. Act (1882), S. 8).

In order to adversely possess land — whether it be proprietary holding or shamlat — the land must actually be possessed. So far as transfer of land is concerned, the rule is firmly settled that unless the shamlat land appertaining to proprietary land is specifically transferred, it does not pass to the vendee. The vendee only gets the proprietary land. It is only when the proprietor transfers the proprietary land along with the share in the shamlat that the vendee gets the ownership of the corresponding rights in the shamlat land. Adverse possession is nothing short of involuntary transfer and unless there is a clear intention on the part of the adverse possessor to possess the shamlat land adversely there would be no reason to hold, by the mere fact that he has adversely possessed the proprietary land, that he has become the owner of the shamlat land corresponding to the proprietary holding by adverse possession. AIR 1931 Lah 648 (2), Disting. (Para 5).

Cases Referred: Chronological Paras (1931) AIR 1931 Lah 648 (2) (V 18)

= 32 Pun LR 634, Karam Dad v.

Rehmat

D. S. Tewatia with Mr. Jaswant Jain, for Appellants; P. S. Jain with V. M. Jain, for Respondents.

JUDGMENT:— This second appeal is directed against the decision of the learn-

ed Additional District Judge, Ambala, at Karnal, partly modifying the decision of the trial Court decreeing the plaintiffs' suit.

2. The plaintiffs as well as the defendants owned separate khewats of land in village Kachhana, Tehsil Kaithal, District Karnal. Besides their khewat lands they also owned shamlat land. This shamlat land was known as 'Thulla Badhahan'. During the consolidation of holdings in the village the shamlat land was partitioned and it was allotted to the khewatdars along with their separate khewat lands. The plaintiffs allege that the area of shamlat 'Thulla Badhahan' owned by the parties was 1,318 bighas 14 biswas and out of this the plaintiffs owned three-fourth share and the defendants one-fourth share and that during the consolidation the defendants have wrongly been allotted land measuring 484 bighas 12 biswas out of the shamlat land and the plaintiffs have wrongly been allotted 834 bighas 2 biswas of land. In fact the plaintiffs are entitled to 984 bighas 4 biswas of land and the defendants should have been allotted only 329 bighas 13 1/2 biswas of land. It was with regard to this excess allotment of the shamlat land to the defendants that the present suit was filed. The contention of the plaintiffs prevailed in the Courts below and accordingly the necessary decree was ultimately granted by the learned Additional District Judge.

3. It will be proper at this stage to mention the reason why the defendants were allotted more land by the consolidation authorities. In the earliest settlement the khewat land was held three-fourth and one-fourth by the ancestors of the plaintiffs and the defendants. Out of the plaintiffs' ancestors' holding, an area measuring 13 bighas 19 biswas was taken possession of by the defendants' ancestors and ultimately they perfected their title by adverse possession to this area by the year 1921. However, it is clear from the pedigree-table Exhibit P. 44 that in the year 1905-06 the shamlat was recorded as owned by the ancestors of the plaintiffs and the defendants three-fourth and one-fourth. A mutation was entered in the year 1930-31 (Exhibit D. 6), wherein it was clearly indicated that the shamlat was to be shared according to the settlement of Mr. Stowe. This Settlement was of the year 1905-06 as would appear from Exhibit P. 40. It will, therefore, appear that the measure of ownership of the shamlat in Exhibit D. 6 was three-fourth and one-fourth. Later on an attempt was made by the defendants to get this mutation entry corrected. Their case seems to be that in view of the excess in their holding by 13 bighas 19 biswas, they are entitled to the corresponding shamlat of that khewat

holding and on that basis they got the mutation Exhibit D. 7 entered in their favour and this is what really furnished the basis for the present suit, though the matter was precipitated when the consolidation of holdings took place. In the background of the above facts the present appeal has to be decided.

4. Before proceeding further I may advert to another fact, namely that this matter came up before me on the 25th of April 1967 and by my order of that date I remanded the case to the trial Court for a report as to whether 13 bighas 19 biswas of land was taken possession of by the defendant-appellants on the basis of their prior title or on the basis of adverse possession. This course was adopted in view of the rule that shamilat land, though an adjunct to the proprietary holding, has to be specifically either adversely possessed or transferred. Mere transfer of the proprietary land does not pass the shamilat corresponding to it to the transferee of the proprietary holding. If the defendant-appellants were proprietors of this land in their own right, the shamilat land corresponding to 13 bighas 19 biswas will form part of their holding. If they were not, then the question will have to be decided, whether by adversely possessing the proprietary holding alone, the shamilat corresponding to it is also adversely possessed. It was for this reason that the remand order was passed. The trial Court has, after giving the parties opportunity to produce evidence, submitted a comprehensive report. I must place my appreciation on the record of the labour and pains taken by the trial Court in writing the report. It is a very fair and clear document and no error has been pointed out by the learned counsel for the appellants in the same. The report clearly indicates, that land measuring 13 bighas 19 biswas was the ownership of the plaintiffs. They lost this ownership in a process starting in the year 1901 and ending in the year 1922. This is a clear case where they lost the land by adverse possession and this is what the trial Court has found. The only question that arises now is whether the shamilat land appurtenant to this land will go to the defendant-appellants or it will still remain the property of the plaintiffs. The plaintiffs' case is that it is still their property and the defendants' case is that they are the owners of this land as well on the basis of adverse possession.

5. On first principle it appears to me that the defendants do not become the owners of the shamilat land. In order to adversely possess land — whether it be proprietary holding or shamilat — the land must actually be possessed. There is no evidence on the record that the defendants adversely possessed the corres-

ponding part of the shamilat land. There is no evidence that they have even asserted an adverse right to this shamilat land to the knowledge of the plaintiffs. It is not disputed that so far as transfer of land is concerned, the rule is firmly settled that unless the shamilat land appertaining to it is specifically transferred, it does not pass to the vendee. The vendee only gets the proprietary land. It is only when the proprietor transfers the proprietary land along with the share in the shamilat that the vendee gets the ownership of the corresponding rights in the shamilat land. Adverse possession is nothing short of involuntary transfer and unless there is a clear intention on the part of the adverse possessor to possess the shamilat land adversely there would be no reason to hold, by the mere fact that he has adversely possessed the proprietary land, that he has become the owner of the shamilat land corresponding to the proprietary holding by adverse possession. No authority has been cited at the bar which will support the contention of Mr. Tewatia, learned counsel for the appellants.

However, Mr. Tewatia has drawn my attention to the decision of Shadi Lal, C. J. and Tapp, J., in *Karam Dad v. Rehmat*, AIR 1931 Lah 648 (2), for his contention that if any parcel of land is adversely possessed the necessary consequence is that the shamilat land appurtenant thereto also gets adversely possessed. In my opinion this decision is not an authority for the proposition for which it has been relied upon. In *Karam Dad's* case, AIR 1931 Lah 648 (2) two brothers owned land. One brother abandoned the village and went away. Later on he came back and laid claim to one parcel of the abandoned land and succeeded in getting its possession from his brother. There was another parcel of abandoned land to which no claim was laid. Later on a claim was laid to the remaining parcel of the abandoned land and that claim failed in a Court of law, the suit having failed on the plea of limitation. Having failed in that suit, the brother who abandoned that land filed another suit to claim the corresponding shamilat appurtenant to the abandoned land and it was in that situation that it was held by the learned Chief Justice and Tapp, J., that the shamilat land would form part of the abandoned land. It is no doubt true that the learned Judges have used the expression that by adversely possessing khewat land the adverse possessor would get rights to the shamilat land appurtenant to it, but this expression must be read in the light of the facts of that case. The reason for this is very simple. When the land was abandoned, it was abandoned along with the shamilat rights. That is not the case when land is adversely possessed, because

abandonment is a unilateral act, whereas adverse possession, though in one sense is a unilateral act, pre-supposes that the owner is aware of adverse possession. In the case of abandonment there is no question of the awareness on the part of the owner, because the owner has voluntarily left the land with no intention to return. Therefore, the case of abandonment will stand on a totally different footing than the case of mere adverse possession. I am therefore clearly of the view that the Bench decision has no bearing on the present controversy.

6. In view of the remand report, there is no option but to dismiss the appeal. Considering the importance of the question involved, I would leave the parties to bear their own costs throughout.

7. On an oral request by the learned counsel for the defendant-appellants, I grant leave under CL 10 of the Letters Patent.

Appeal dismissed.

AIR 1970 PUNJAB & HARYANA 300
(V 57 C 46)

MEHAR SINGH, C. J.

Kanshi Ram Mohan Lal, Petitioner v.
Smt. Bhagwan Kaur, Respondent.

Civil Revn. No. 596 of 1967, D/- 19-11-1968, from order of Rent Controller, Ferozepore, D/-10-4-1967.

Limitation Act (1963), Art. 123, Expln. — Civil P. C. (1908), O. 5, R. 20 (2) — Substituted service is as effectual as personal service — Explanation to Art. 123 is neither a substitute for O. 5, R. 20 (2) nor operates as a limitation to that sub-rule.

The two provisions of O. 5, R. 20 (2), Civil P. C. and Art. 123, Limitation Act have to be so read as to avoid any conflict. The Explanation to Art. 123, on its very words, has to be confined to that Article alone and for the purpose of limitation an ex parte decree can be set aside within thirty days from its date, but where there has been no due service, within thirty days from the knowledge of the decree. In the case of substituted service under O. 5, R. 20 it would not ordinarily be open to the party served under that rule to say that there was no due service, because O. 5, R. 20 (2) says specifically that such substituted service shall be as effectual as personal service. It is the rigour of this sub-rule which the Explanation to Art. 123 is meant to meet, but only for the purpose of enabling the person against whom an ex parte decree has been passed to make an application to have the decree set aside. Once he is permitted to make an application for setting aside a decree in spite of service under O. 5, R. 20 the merit of the matter still remains for him

to meet, that is to say is still remains for him to prove that he was not duly served. If he fails in that, then while his application shall have been made within time but he would fall on the merit of his application. So the Explanation to Art. 123 does not either abrogate in any way O. 5, R. 20 (2) or operate as a limitation of any kind of that sub-rule. (Para 3)

K. L. Sachdeva, for Petitioner; G. S. Dhillon, for Respondent.

ORDER:— An application was made by the applicant, Kanshi Ram landlord, under Section 13 of the East Punjab Urban Rent Restriction Act, 1949 (East Punjab Act 3 of 1949), for eviction of the respondent, Bhagwan Devi tenant, from the demised house. The date of the application was February 11, 1966, and the respondent was summoned for March, 3, 1966. It has been said at the bar from the side of the applicant that the respondent refused service on March 3, 1966. The Rent Controller ordered service on the respondent by affixation of the process on the outside of her house and by proclamation for April 4, 1966, but as it was not found by him sufficient, so having regard to Rule 20 of Order 5 of the Code of Civil Procedure he ordered service on the respondent by publication in a newspaper. It is said that the publication was duly made. The respondent did not appear. So an ex parte eviction order was made against her on August 30, 1966. On October 19, 1966, she made an application to the Rent Controller for setting aside the ex parte eviction order made against her.

2. The Rent Controller by his order of April 10, 1967, allowed the application of the respondent saying that although service on her had been effected by publication of the proclamation according to O. 5, R. 20 of the Code of Civil Procedure, but in view of the Explanation to Art. 123 of the Limitation Act, 1963, substituted service under O. 5, R. 20 is not to be deemed to be due service. So the Rent Controller was of the opinion that the respondent was never served and he set aside the eviction order made against her. This is a revision application by the applicant, the landlord, against that order.

3. The argument urged by the learned counsel for the applicant is that although an order of eviction is not a decree, but the Rent Controller has the power to adopt a known procedure in a matter like this and he, therefore, proceeded to consider the respondent's application for setting aside the ex parte ejectment order against her in the wake of the provisions for setting aside ex parte decrees in the Code of Civil Procedure. So he referred himself to Art. 123 of the Limitation Act, 1963, which Article provides a limitation of thirty days to set aside a decree passed ex parte or to rehear an appeal decreed

or heard *ex parte*, and the starting point of limitation given is 'the date of the decree or, where the summons or notice was not duly served, when the applicant had knowledge of the decree.' The Explanation to this Article says: 'For the purpose of this article, substituted service under Rule 20 of Order 5 of the Code of Civil Procedure, 1908, shall not be deemed to be due service.'

The Rent Controller took the Explanation into consideration and was of the opinion that there was no due service on the respondent. So he set aside the eviction order made against her. The learned counsel points out that the Explanation starts with the words: 'For the purpose of this article,' and contends that this Explanation only applies where Art. 123 of the Limitation Act, 1963, applies and not to any other case. He refers to sub-rule (2) of Rule 20 of Order 5, which says that 'Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally,' and contends that once substituted service under Rule 20 of Order 5 is made, it is as effective as service personally and non-appearance in spite of such service would justify an *ex parte* order against the party so served and it will not be open to the party to say that it was not duly served, because sub-rule (2) of Rule 20 of Order 5 says specifically that such service is equivalent to personal service on the party concerned. If the approach of the Rent Controller was accepted, sub-rule (2) of Rule 20 of Order 5 will be rendered nugatory by reason of the Explanation to Art. 123 of Limitation Act, 1963.

The two provisions have to be so read as to avoid any conflict, and it is immediately apparent that the Explanation to Art. 123, on its very words, has to be confined to that Article alone and for the purpose of limitation an *ex parte* decree can be set aside within thirty days from its date, but, where there has been no due service, within thirty days from the knowledge of the decree. In the case of substituted service under Rule 20 of Order 5 it would not ordinarily be open to the party served under that rule to say that there was no due service, because sub-rule (2) of R. 20 of O. 5 says specifically that such substituted service shall be as effectual as personal service. It is the rigour of this sub-rule which the Explanation to Article 123 is meant to meet, but only for the purpose of enabling the person against whom an *ex parte* decree has been passed to make an application to have the decree set aside.

Once he is permitted to make an application for setting aside a decree in spite of service under Rule 20 of Order 5, the

merit of the matter still remains for him to meet, that is to say it still remains for him to prove that he was not duly served. If he fails in that, then while his application shall have been made within time but he would fail on the merit of his application. So the Explanation to Art. 123 does not either abrogate in any way sub-r. (2) of Rule 20 of Order 5 or operate as a limitation of any kind of that sub-rule. The Rent Controller was, therefore, wrong in reading the Explanation to Art. 123 as something which is either a substitute for sub-rule (2) of Rule 20 of Order 5 or operates as a limitation of that sub-rule. On this approach the order of the Rent Controller cannot be maintained.

4. In consequence the order of the Rent Controller is set aside and the case is remitted back to him for the application of the respondent to have the *ex parte* eviction order set aside, tried and disposed of *on merits*. There is no order in regard to costs in this application.

5. The parties, through their counsel, are directed to appear before the Rent Controller on December 9, 1968.

Petition allowed.

AIR 1970 PUNJAB & HARYANA 301
(V 57 C 47)

MAN MOHAN SINGH GUJRAL, J.

Ram Kanwar and another, Appellants v. The State, Respondents.

Criminal Appeal No. 66 of 1968, D/- 28-11-1969, from order of S. J., Hissar, D/- 5-1-1968.

(A) Criminal P. C. (1898), S. 342 — Statement under — Court cannot pick up incriminating part of statement.

It is not open to a Court to dissect the statements of the accused made under Section 342 so as to pick only a part out of the statements which was incriminating. The admission of the accused could only be used against them if the admission were taken as a whole. 1964 (1) Cri LJ 730 (SC), Foll. (Para 8)

(B) Evidence Act (1872), S. 105 — General exceptions in Penal Code — Burden of proof — Plea of justification by accused — Conviction.

Where an accused claims the benefit of an exception the burden of proving that exception lies on him only if the prosecution case establishes that in the absence of such a plea he would be guilty. Where there is no reliable evidence to support prosecution case and the responsibility arose only out of the plea raised by accused the Court could convict him only if the plea amounted to a confession of the guilt. (Para 8)

CN/CN/B45/70/VRB/C

Cases Referred: Chronological Paras
 (1964) 1964 (1) Cri LJ 730 =
 (1963) 3 SCR 678, Narain Singh v.
 State of Punjab 8

Harparsad, for Appellants; A. S. Nehra,
 for Advocate General, Haryana, for Res-
 pondents.

JUDGMENT:— This is an appeal by Ram Sarup and his brother Ram Kumar against their conviction under S. 325/34 of the Indian Penal Code and a sentence of eighteen months' rigorous imprisonment and a fine of rupees one hundred and fifty each imposed by the Sessions Judge, Ambala, by his order dated 5th January, 1968.

2. The case of the prosecution, as emerging from the statement of Hari Chand P. W. is that Ram Sarup and Ram Kumar were the sons of his brother Shiv Ram and Vijay Singh was his cousin. On 10th February, 1967, Hari Chand left his village Rawalwas at about 11 a. m. for going to village Kali Rawan in order to return Rs. 1,000/- to his cousin Bhagwanti and when he reached Matar Sham Bridge at about noon time he found the two appellants coming there in a reri. The two appellants raised alarm that they would not spare him and when he came down the bridge he found himself surrounded by the two appellants and their companions Shiv Ram and Vijay Singh. At that time Vijay Singh was armed with a bhala and the other accused had lathis with them and finding him in that situation all the four accused gave him injuries with their weapons. Vijay Singh gave blow from the wrong side of the bhala on his leg. On receipt of the injuries Hari Chand fell down and thinking him to be dead the four accused went away.

After a short time one Jal Karan happened to come there and with his help Hari Chand reached Balsamand Bridge from where he was taken in a tempo to the hospital at Hissar. After he was medically examined his statement was recorded by Siri Ram Sub-Inspector on the basis of which a case was registered against the two appellants and Shiv Ram and Vijay Singh. While Shiv Ram and Vijay Singh were given the benefit of doubt and acquitted, the two appellants were convicted and sentenced as above.

3. At the trial the appellants gave a counterversion of the occurrence and stated that Hari Chand attacked Ram Sarup in his field whose alarm brought Ram Kumar accused also to the spot and they gave injuries to Hari Chand in self-defence. The accused, however, did not produce any evidence in defence in support of their plea.

4. The medical evidence in this case shows that Hari Chand had received as many as twenty-one injuries with blunt weapons. Excepting injury No. 7 which

was on the ankle all other injuries were simple. The injuries had been caused within about six hours from the time of the examination at 4.45 P. M. There is also the evidence of Dr. Sohan Lal to show that Ram Sarup accused had two injuries which had been caused with a blunt weapon and out of which one was grievous while the other was simple. Ram Kumar appellant was also found to be having one abrasion which was caused with a blunt weapon and had resulted in a simple injury. The appellants had been examined on 11th February, 1967, at 7.20 P. M. and the injuries on their persons were found to be twenty-four to thirty-six hours old. The above narration of the medical evidence would show that the prosecution story that Hari Chand had been injured with lathis stands corroborated from the presence of the injuries on his person. The prosecution case as to who had caused the injuries mainly rests on the testimony of Hari Chand alone.

The statement of Hari Chand shows that soon after the occurrence he had disclosed the names of the assailants to Jal Karan of village Dobi and had also mentioned these names to Mani Ram, driver of the tempo, but none of these witnesses has come forward to support Hari Chand's version. Evidence was also led that lathis had been recovered from the appellants and Shiv Ram, but as these lathis had not been found to be stained with human blood no useful purpose will be served by discussing evidence regarding the recovery of the lathis at the instance of these accused. No corroboration can, therefore, be found to the testimony of Hari Chand from the recovery of lathis from the possession of the accused.

5. The statement of Hari Chand is that he was carrying rupees one thousand to be returned to his cousin sister Bhagwanti, but Shrimati Bhagwanti has not been produced to depose whether any money was owing by him to Bhagwanti or not. Leaving that apart, the learned Sessions Judge has not accepted the evidence of Hari Chand that he was carrying money and the money had been taken from his person by the accused. The evidence of Hari Chand was also disbelieved regarding the participation of Shiv Ram and Vijay Singh accused on the ground that there was no corroboration available to the evidence of Hari Chand regarding the participation of these two accused.

6. While canvassing that the case against the accused was not proved, the learned counsel appearing for the appellants has pointed out that there was no corroboration available to the testimony of Hari Chand against the two appellants also and that the defence set up by the accused could not be used to give the finding that they had participated in the assault on Hari Chand as the entire defence

version would have to be taken into account and a portion only cannot be used to support the prosecution story against the appellants. It was also contended that no doubt the burden of proving the right of private defence was on the accused, but this situation would only arise if it is established that there was a case against the accused which they had to meet. It is stated that the evidence of Hari Chand being not worthy of credence it would not be necessary to find whether the defence set up by the accused was plausible or not.

7. It is common case of the parties that there is serious enmity between Hari Chand and the two appellants and their father. The father of the appellants, Shiv Ram, is a step-brother of Hari Chand and some two or three years earlier Shiv Ram and his two sons, who are the appellants, were challaned for having caused injuries to Hari Chand. They were, however, acquitted in that case and after that Hari Chand was implicated in a case by Shiv Ram in which he was also acquitted. It, therefore, stands fully established that the relations between the parties are very strained and this could be a motive for the accused to have assaulted Hari Chand. On the other hand, this enmity could also be the cause of Hari Chand falsely implicating at least some out of the accused.

8. As remarked earlier, the learned trial Court has found that there was some corroboration available to the evidence of Hari Chand in so far as the case against the appellants is concerned. In this respect reliance has been firstly placed on the fact that the first information report contained all the details of the occurrence and was lodged promptly. This piece of evidence was, however, available against all the accused and not only against the appellants. It was then observed by the learned Sessions Judge that Hari Chand could not have implicated innocent persons instead of real culprits. That may be so, but once it is found that some out of the accused have been falsely implicated, some material will have to be found on the record which will give an indication as to which out of the accused have actually participated in the crime before any of the accused can be held liable.

Support was then sought by the learned Sessions Judge from the fact that blood had been found on lathis Exhibits P-1 and P-2 which had been recovered from the two appellants. Again, I find that this piece of evidence is also not available against the appellants as it has not been established that the blood found on the lathis was of human origin. Support was also sought from the medical evidence which shows the presence of a large number of injuries on the person of Hari

Chand, but this circumstance is wholly insufficient to show which out of the accused had taken part in the assault. Lastly, corroboration was sought from the statement of Ram Sarup and Ram Kumar wherein it had been pleaded that they had caused injuries in the exercise of their right of private defence of person which was available on account of Hari Chand having opened the assault on them.

On behalf of the appellants it has been debated before me that the learned trial Court was in error in coming to the conclusion that the defence of the accused was untenable and then taking support from their statements, that they had assaulted Hari Chand, for finding the case proved against them. Support for this argument is sought from the following observations made in *Narain Singh v. State of Punjab*, 1964 (1) Cri LJ 730 (SC):—

"Examination under Section 342 is primarily to be directed to those matters on which evidence has been led for the prosecution, to ascertain from the accused his version or explanation, if any, of the incident which forms subject-matter of the charge and his defence. By sub-sec. (3) the answers given by the accused may "be taken into consideration" at the enquiry or the trial. If the accused person in his examination under Section 342 confesses to the commission of the offence charged against him the Court may, relying upon that confession, proceed to convict him, but if he does not confess and in explaining circumstances appearing in the evidence against him sets up his own version and seeks to explain his conduct pleading that he has committed no offence, the statement of the accused can only be taken into consideration in its entirety. It is not open to the Court to dissect the statement and to pick out a part of the statement which may be incriminative, and then to examine whether the explanation furnished by the accused for his conduct is supported by the evidence on record. If the accused admits to have done an act which would but for the explanation furnished by him be an offence, the admission cannot be used against him divorced from the explanation."

In my opinion, the above observations are fully applicable to the facts of the present case. It was not open to the learned Sessions Judge to dissect these statements of the accused so as to pick out a part out of these statements which was incriminating. The admission of the accused that they had committed an act which, but for the explanation, would be an offence could only be used against them if the admission were taken as a whole. It was also observed that where a person accused of an offence claims the benefit of an exception the burden of proving that exception no doubt lies on the accused.

but this burden is only to be undertaken by the accused if the prosecution case establishes that in the absence of such a plea he would be guilty of the offence charged. Where there is no reliable evidence in support of the prosecution case itself and where the responsibility arose only out of the plea raised by him, the Court could convict him only if the plea amounted to a confession of the guilt, but if the plea only amounted to admission of facts and raised a plea of justification the Court could not proceed to deal with the case as if the admission of facts which were not part of the prosecution case was true and the evidence did not warrant the plea of justification.

9. Viewing the facts of the present case in the light of the above observations, I find that no support could be taken against the accused from their plea that they had acted in the exercise of their right of private defence by only using their admission of the fact that they had caused injuries and leaving out of consideration the circumstances in which they alleged to have caused injuries to Hari Chand.

10. For the foregoing reasons, I hold that there is no reliable evidence in this case and it would not be safe to accept the solitary statement of Hari Chand especially when he has been found not to be a witness of truth. His evidence is not of a nature on which implicit reliance can be placed. I am, therefore, of the view that the case against the appellants has not been proved beyond reasonable doubt and accepting this appeal I set aside their conviction and sentence and acquit them. Fine, if paid, shall be refunded. The accused are on bail and their bail bonds shall stand discharged.

Appeal allowed.

AIR 1970 PUNJAB & HARYANA 304

(V 57 C 48)

FULL BENCH

MEHAR SINGH, C. J., D. K. MAHAJAN AND BALRAJ TULI, JJ.

Lachhman Singh Sunder Singh, Defendant-Appellant v. Pritam Chand Kirpa Mal and another, Plaintiffs-Respondents.

Second Appeal No. 532 of 1968, D/-22-12-1969, decided by Full Bench on order of reference made by D. K. Mahajan J., D/-5-8-1969.

(A) Punjab Pre-emption Act (1 of 1913), S. 15 (1) (b), Fourthly — Sale by co-sharer of his share in specific part of joint land — Vendees do not become co-sharers in the joint land of co-sharers — Vendees not entitled to claim right of pre-emption against subsequent transferees of other co-sharers — Right of vendees to claim

joint possession with other co-sharers on partition.

Where a co-sharer sells to the plaintiffs his one-fourth share out of a defined part of the joint land of the co-sharers but not out of the whole of their joint land, the sale is not "of a share out of joint land" within Section 15 (1) (b), Fourthly and the plaintiffs do not become co-sharers with the other co-sharers in the joint land and have, therefore, no preferential right of pre-emption in regard to the sale of a part of his share made subsequently by another co-sharer to the defendant. The plaintiffs have a fractional share in defined and specific portion of joint holding of the co-sharers but not in the total area of their joint land. 1894 Pun Re 44 & 1894 Pun Re 87 & AIR 1925 Lah 223 & AIR 1947 Lah 184 & (1935) 37 Pun LR 276 & AIR 1944 Pesh 40, Rel. on; AIR 1945 Lah 15, Disting. (Paras 8, 30, 32)

While they become joint owners or co-sharers of the land of specific portion sold, with the original co-sharer, they do not become co-sharers with them in the other or the remaining joint land of original co-sharers. (Para 14)

The plaintiffs will not succeed in obtaining a decree for joint possession with the other co-sharers of vendor as to the land other than the land sold to them.

(Para 11)

If the plaintiffs apply for partition as between themselves and the original co-sharers, they cannot ask for the division of the whole of the joint land of the original co-sharers. A co-sharer cannot so deal with joint land or property as to prejudice the rights and title of the other co-sharer or co-sharers in the same, but severance of tenancy-in-common may take place, apart from partition, by common consent. AIR 1959 Punj 215, Ref.

(Para 13)

(B) Limitation Act (1963), Arts. 64, 65 — Adverse possession — Co-sharers — Sale by Co-sharer of his share in specific part of joint land — Vendee in possession of land not sold to him — Nature of.

Where a co-sharer sells his share in a specific part of the joint land, the vendees do not become co-sharers with the other co-sharers in the joint land. If the vendees are in possession of any land not sold to them, in the specified part, they will not hold such possession adversely to the other co-sharers, but they, should they obtain possession, can adversely possess part of the joint land which is not the subject of their sale-deed and which does not come within the ambit and scope of that sale deed. AIR 1961 Punj 528 & AIR 1935 Lah 651 & AIR 1954 Punj 124 & AIR 1933 Lah 763 (1), Ref. (Para 12)

Cases Referred: Chronological Paras (1955) AIR 1965 Mad 399 (V 52) —

ILR (1965) 2 Mad 521, Karuppan v. Ponnarasu Ambalam

- (1961) AIR 1961 Punj 528 (V 48) =
ILR (1962) 1 Punj 101, Sant Ram
Nagina Ram v. Daya Ram Nagina
Ram 12
- (1959) AIR 1959 Punj 115 (V 46) =
ILR (1959) Punj 162, Nihalu v.
Chandar 13
- (1954) AIR 1954 Punj 124 (V 41),
Charan Kaur v. Hari Singh 12
- (1947) AIR 1947 Lah 184 (V 34) =
48 Pun LR 441, Sher Singh v.
Nand Lal 9
- (1945) AIR 1945 Lah 15 (V 32) =
46 Pun LR 350, Kuljas Rai v. Pala
Singh 9
- (1944) AIR 1944 Pesh 40 (V 31) =
1944 Pesh LJ 40, Mir Alam Khan
v. Abdul Hamid Khan 14
- (1935) AIR 1935 PC 169 (V 22) =
1935 All LJ 973, Ramjimal v.
Riaz-ud-din 15
- (1935) AIR 1935 Lah 651 (V 22) =
159 Ind Cas 230, Kanhaya v.
Trikhia 12
- (1935) 37 Pun LR 276, Mahla Singh
v. Harnam Singh 14
- (1933) AIR 1933 Lah 763 (1) (V 20) =
34 Pun LR 880, Mam Raj v.
Chhotu 12
- (1925) AIR 1925 Lah 223 (V 12) =
ILR 5 Lah 298, Rajindra Singh v.
Umrao Singh 9
- (1924) AIR 1924 All 305 (V 11) =
ILR 46 All 70, Ram Govind Pande
v. Panna Lal 15
- (1906) ILR 28 All 124 = 2 All LJ
612, Ali Husain Khan v. Tasadduq
Husain Khan 15
- (1894) ILR 16 All 412 = 1894 All
WN 134, Dakhni Din v. Rahim-
un-nissa 15
- (1894) 44 Pun Re 1894, Matu v.
Hirde 9, 10
- (1894) 87 Pun Re 1894 (FB), Champa
Mal v. Baisaki Mal 9
- (1890) ILR 12 All 426 = 1890 All
WN 117 (FB), Safdar Ali v. Kishun
Lal 15

M. L. Sethi, Senior Advocate with
Ichhpal Singh, for Appellant; Jagannath
Kaushal, Senior Advocate with Ashok
Bhan with C. B. Kaushik, for Respondents.

MEHAR SINGH, C. J.:— This second
appeal arises out of a pre-emption suit
by Pritam Chand and Wazir Chand, plain-
tiffs, against Lachhman Singh defendant,
and concerns land situate within the area
of village Khamano in Tehsil Samrala of
Ludhiana District.

2. There is the Jamabandi of 1960-61,
copies, Exhibits P-7 and P-8, of Khewats
Nos. 171 and 172, showing Rajinder Singh
and Harindar Singh, real brothers, in pos-
session of half share, and Ajmer Singh in
the remaining half share of rectangles 6,
12, 13 and 16, among others, in Khewat
No. 171, and of rectangles 13 and 16 in
Khewat No. 172. There is the copy of
the Jamabandi of 1952-53, Exhibit P-2, in

which those three co-sharers are shown
owners of Khewat No. 132/146, among
others, rectangles 6, 12, 13 and 16. Ap-
parently the Khewat numbers changed in
the subsequent Jamabandi, but the rec-
tangle numbers continued to be the same
and so also, it follows, the Killa numbers
in each rectangle.

3. On August 20, 1960, by registered
sale-deed, Exhibit P-1, Harindar Singh
co-sharer sold 48 Kanals and 2 Marlas of
land to the plaintiffs. The description of
the land sold by him given in this sale-
deed is that he was selling his share of
46 Kanals and 12 Marlas, out of 186 Kanals
and 8 Marlas comprising of rectangle 6,
Killas Nos. 16 and 25, and rectangle 13,
Killas Nos. 1 to 19 and 22 to 26, one-
fourth share, and again 1 Kanal and 10
Marlas, out of 7 Kanals and 10 Marlas
comprising of rectangle 13, Killa No. 20,
one-fifth share. So Harinder Singh co-
sharer sold two Killas out of rectangle 6,
and 24 Killas out of rectangle 13, in the
share as already given. With this sale-
deed is attached a copy of the Jamabandi
of 1952-53, Exhibit P. 2, which shows that
rectangles 6 and 13 are in Khewat No.
132/146. In the Jamabandi of 1960-61,
copies Exhibits P. 7 and P. 8, rectangle 6
is in Khewat No. 171, and rectangle 13 in
Khewat No. 172.

4. On February 2, 1965, another co-
sharer Ajmer Singh by registered sale-
deed, Exhibit D. 1, sold to Lachhman Singh
defendant, 103 Kanals and 8 Marlas of land
out of rectangle 16, Khewats Nos. 171 and
172 of the Jamabandi of 1960-61, copies
Exhibits P. 7 and P. 8. In that sale-deed
Ajmer Singh co-sharer referred to rec-
tangles 12, 13 and 16 and also to the
specific Killas from each rectangle of
which the total area came to 243 Kanals
and 2 Marlas, and of which he sold 103
Kanals and 8 Marlas from rectangle 16,
Killas Nos. 6, 7, 8, 13, 14, 15, 17/2, 16, 17/1,
18, 19, 23, 24 and 25. Rectangle 16 ap-
pears in Khewats Nos. 171 and 172 ac-
cording to the Jamabandi of 1960-61.
Killas Nos. 6, 7, 8, 13, 14, 15 and 17/2 are
in Khatauni No. 251 of Khewat No. 171,
and Killas Nos. 16, 17/1, 18, 19, 23, 24 and
25 are in Khatauni No. 253 of Khewat
No. 172. So that the land from rectangle
16 sold by Ajmer Singh to the defendant
came from Khewats Nos. 171 and 172. In
Khewat No. 171 also come, according to
the same Jamabandi, rectangles 6, 12 and
16, and in Khewat No. 172 come rectangles
12, 13 and 16.

5. The plaintiffs sought to pre-empt
the sale in favour of Lachhman Singh
defendant claiming a preferential right of
pre-emption as co-sharers according to
Section 15 (1) (b). Fourthly, of the Pun-
jab Pre-emption Act, 1913 (Punjab Act
1 of 1913), on the ground that by the ear-
lier sale in their favour, Exhibit P. 1, by

Harindar Singh co-sharer, they had become co-sharers of the land sold by Ajmer Singh co-sharer to the defendant, being co-sharers with him in the same Khewat.

6. It will be seen that Ajmer Singh, Harindar Singh and Rajindar Singh have been co-sharers of the land of Khewat No. 132/146 of the Jamabandi of 1952-53, equivalent to Khewats Nos. 171 and 172 of the Jamabandi of 1960-61. They were co-sharers of rectangles 6, 12, 13 and 16, apart from other land, and while Harindar Singh co-sharer sold land to the plaintiffs by an earlier sale-deed in their favour out of rectangles 6 and 13, by a subsequent sale Ajmer Singh co-sharer sold land to the defendant out of rectangle 16. So while the plaintiffs purchased the share of land earlier out of rectangles 6 and 13 and no share out of rectangle 16, by the later sale the defendant purchased the whole of the area of Killa numbers of rectangle 16 as given in the sale-deed, Exhibit D. 1, and although that sale-deed refers to rectangle 13 and was sold Killa, no part of rectangle 13 was sold by Ajmer Singh co-sharer to the defendant.

7. The suit of the plaintiffs was dismissed by the learned trial Judge on the ground that they are not co-sharers of joint land with Ajmer Singh vendor. The learned Judge pointed out that the plaintiffs have not any share in the whole of Khewats Nos. 171 and 172, and all that they have purchased from Harindar Singh co-sharer under an earlier sale has been purchase of specific share out of specific Killa numbers of specific rectangles. The learned Judge further pointed out that the plaintiffs never purchased any part of rectangle 16. In appeal the learned Judge was of the opinion that by reason of the sale in their favour under the earlier sale-deed, Exhibit P. 1, the plaintiffs have become co-sharers in Khewats Nos. 171 and 172, because one-half share of the entire holding of Khewats Nos. 171 and 172 has within it rectangles 12, 13 and 16 in the Jamabandi of 1960-61, copies Exhibits P. 7 and P. 8. The learned Judge in the first appellate Court came to the conclusion that the sale-deed, Exhibit P. 1, shows that it was not the specific Killas that were sold by Harindar Singh co-sharer to the plaintiffs but a share out of the joint Khewat. So the learned Judge was of the opinion that the plaintiffs have become co-sharers of Ajmer Singh, Harindar Singh and Rajindar Singh co-sharers and they have a preferential right to pre-empt the sale in favour of the defendant. This is the defendant's second appeal from the appellate decree.

8. The plaintiffs have one-fourth share of Harindar Singh co-sharer in Khewat No. 171, rectangle 6 and Khewat No. 172, rectangle 13, of the Jamabandi of 1960-61, copies Exhibits P. 7 and P. 8. The total

holding of the three co-sharers, namely, Ajmer Singh, Harindar Singh, and Rajindar Singh, consists of much more area and has within it rectangle 16 of Khewats Nos. 171 and 172 of the same Jamabandi. So the plaintiffs have one-fourth share of rectangles 6 and 13 of the joint land of those three co-sharers, but they have not a fractional or a proportional share in the total joint holding of those co-sharers, including rectangle 16 of Khewat Nos. 171 and 172. So the plaintiffs have a fractional share in defined and specific Killas of joint holding of those co-sharers, but not in the total area of their joint land. In Section 15 (1) (b). Fourthly, of the Act a co-sharer has a preferential right of pre-emption "where the sale is of a share out of joint land or property and is not made by all the co-sharers jointly." Here the sale to the plaintiffs was by a co-sharer, Harindar Singh, of a share out of a defined part of the joint land of the three co-sharers but not out of the whole of their joint land. The question then that has arisen in this case is, whether the plaintiffs have become co-sharers in the joint land of those three co-sharers and thus have a preferential right of pre-emption in regard to the sale made by Ajmer Singh co-sharer to Lachman Singh defendant? One more fact may be noted here before proceeding with the consideration of this question and that is that according to the Jamabandi of 1952-53, Exhibit P. 2, the Killas in rectangles 6, 12, 13 and 16 were all in Khewat No. 132, of which there was only one Khatauni number, which was 146. So Killas of all those rectangles were in one Khewat number which had only one Khatauni number and the description has commonly been given as Khewat No. 132/146. However, in the Jamabandi of 1960-61, copies Exhibits P. 7 and P. 8, under Khewat No. 171, rectangle 6 is shown in Khataunis Nos. 248 and 250, and rectangle 12 in Khatauni No. 249, and some of the Killa numbers of rectangle 16 in Khatauni No. 251, and in Khewat No. 172 Killa numbers of rectangle 13 appear under Khataunis Nos. 252, 253, 254, 258, 263 and 266 and the remaining Killa numbers of rectangle 16 appear under Khatauni No. 258. So some of the Killa numbers of rectangle 13 and some of rectangle 16 are in Khatauni No. 258 of Khewat No. 172.

9. In *Matu v. Hirde*, 44 Pun Re 1894, Plowden, S. J., observed that "the purchase by defendant of specific land cannot make him a sharer in the khata, and whatever right he may have to the land comprised in the deed if it falls to the share of his vendor, as it probably will, it cannot alter the land from being joint property of the co-sharers in the khata into separate property of the purchaser", and the same learned Judge in *Champa Mal v. Baisakhi Mal*, 87 Pun Re 1894 (FB), in which a co-sharer had sold undivided half

of his half, or one-fourth of the holding, observed that the land

"was joint undivided immovable property in which all the proprietors were co-sharers The land in dispute is a portion of the village which belonged, as an entirety, to the recorded proprietors, as co-owners with a joint title, the recorded shares merely representing the quantity of the interest of each group among them, in the whole village in unity."

A sale by a co-sharer of a specific piece or plot of land out of joint land or property does not make the purchaser or the vendee a co-sharer with other co-sharers, according to the first case, but where such a purchaser or vendee takes, on sale, a fractional share of a co-sharer in the joint land or property, then he comes to hold the land along with the other co-sharers in the fractional proportion of the whole which he has purchased, and this is the second case. The present case is neither the one nor the other. Here the plaintiffs have been purchasers of a fractional share of defined Killas of land in rectangles 6 and 13, but not a fractional share in the whole of the joint land of the three original co-sharers including rectangle 16.

It is, however, urged on the side of the plaintiffs that even in the facts of the present case the plaintiffs have become co-sharers of the joint land of the three original co-sharers in both Khewat Nos. 171 and 172, and reliance in this respect is placed by their learned counsel on *Kuljas Rai v. Pala Singh*, AIR 1945 Lah 15, in which the learned Judges held that

"when a person sues for land jointly owned by two persons, even if specific plots are sold, in law it is treated as a sale of a share of the joint property. No co-sharer has any right to sell specific plots out of the joint khata and, therefore, the value of an individual plot comprised in the joint khata is wholly immaterial in determining the point of court-fee."

It is apparent that the decision was given for purposes of court-fee under the Court-fees Act of 1870 and has nothing to do with a case like the present under Punjab Act 1 of 1913. It is evident that so far as the present matter is concerned, if *Kuljas Rai's* case, AIR 1945 Lah 15 is to be read in the manner as the learned counsel for the plaintiffs would have it, it runs contrary to the first judgment of Plowden, S. J., but *Rajindra Singh v. Umrao Singh*, ILR 5 Lah 298 = (AIR 1925 Lah 223), and *Sher Singh v. Nand Lal*, AIR 1947 Lah 184, proceed on a view exactly the same as expressed by Plowden, S. J. in the two cases already referred to. In these last-mentioned two cases the learned Judges held that the word 'co-sharers' signifies persons owning a share or shares in the whole of the pro-

perty or properties of which another share or other shares were the subject of sale. So *Kuljas Rai's* case, AIR 1945 Lah 15 does not support the contention on the side of the plaintiffs.

For *Lachhman Singh* defendant reliance is placed on cases of *Rajindra Singh*, ILR 5 Lah 298 = (AIR 1925 Lah 223) and *Sher Singh*, AIR 1947 Lah 184 that the plaintiffs have not become co-sharers in the joint land of the original three co-sharers, because they have not purchased undivided share of the whole of that joint land. It may, however, be stated that khata is equivalent to Khewat, and it is apparent from the opinion of Plowden, S. J., in the cases already referred to, that, in the matter of finding out for the exercise of a preferential right of pre-emption, the status of a party as co-sharer has to be seen in a khata or thus a Khewat.

10. The present is not a case of one or the other class of cases disposed of by the judgments of Plowden, S. J., but it is apparent that the present case, in which the plaintiffs are purchasers of a share of specified Killa numbers in specified rectangles only and not in the whole joint land of the three original co-sharers, is more near the dictum of the learned Judge in *Matu's* case, 44 Pun Re 1894 than in *Champa Mal's* case. The plaintiffs have purchased specified survey numbers in specified rectangles with this difference only from *Matu's* case, 44 Pun Re 1894, that in that case the total area of the specified land was purchased, but here a share of that has been purchased. These matters then come for consideration:

11. In the first place, it is clear that if the plaintiffs were to claim a decree for joint possession of the whole of the joint land of the three original co-sharers, they would not succeed in that, for the simple reason that they would be held to the terms and conditions of the sale in their favour, which limits their right to the share of *Harindar Singh* co-sharer to the extent of one-fourth in the Killa numbers stated of rectangles 6 and 13. So that the plaintiffs will not succeed in obtaining a decree for joint possession with the other co-sharers of *Harindar Singh* as to the land other than the Killa numbers of rectangles 6 and 13 sold to them.

12. Secondly, it is settled that possession of one co-sharer as such is not adverse to his other co-sharer or co-sharers. This is obviously qua joint land or property of such co-sharers. If the plaintiffs are in possession of any Killa numbers or any part of Killa numbers, not sold to them in rectangles 6 and 13, they will not hold such possession adversely to the other co-sharers, that is to say *Ajmer Singh* and *Rajindar Singh*, but it is not quite clear why they cannot adversely possess that part of the land of

the original co-sharers which is not the subject of their sale-deed and which does not come within the ambit and scope of that sale-deed. They have purchased Harindar Singh co-sharer's share in Killa numbers of rectangles 6 and 13 and there is apparently no reason why they should not be able to, should they succeed in this, bold possession of any part of rectangle 16 and that adversely to the other co-sharers Ajmer Singh and Rajindar Singh. The learned Judges in Sant Ram Nagina Ram v. Daya Ram Nagina Ram, AIR 1951 Punj 528, pointed out that the basis of co-sharers not being able to prescribe by mere possession of joint land against other co-sharers is that every co-sharer has a right to use the joint property to the whole extent.

On the side of the plaintiffs the argument of the learned counsel has been that in a case like the present the plaintiffs, if they go into possession of any part or whole of rectangle 16, they by the mere fact of having possession of the same will not be holding it adversely to the other co-sharers. In this respect reliance is placed on *Kanhaya v. Trika*, AIR 1933 Lah 651, but in that case the vendors sold 2 Bighas and 6 Biswas out of a joint Khata of 1800 Bighas. That was not a case of sale of specific plot or field or survey numbers, but was a case of sale of a proportionate area out of the whole. It is the same thing to sell 2 Bighas out of 100 Bighas or one-fiftieth of 100 Bighas, in either case the sale is not of a specific survey number or plot out of the joint land but of a proportionate share of the same. *Kanhaya's* case, AIR 1933 Lah 651 was of this type and, therefore, does not advance the argument on the side of the plaintiffs.

Another case that has been relied upon in this respect by the learned counsel for the plaintiffs has been *Charan Kaur v. Hari Singh*, AIR 1954 Punj 124. But in that case the learned Judge upon the evidence found that adverse possession as claimed had not been proved. In the beginning of the judgment reference is to a gift of half share of the land, but later on the learned Judge has observed that the gift was of specific properties and the donee's possession could not be adverse to the other co-sharers, the learned Judge in this respect following *Mam Raj v. Chhotu*, AIR 1933 Lah 763 (1). In the last-mentioned case what had been sold to the vendee was a share of the joint holding and not a specific part of it. So *Mam Raj's* case is not a satisfactory instance which lends support to the argument on the side of the plaintiffs. In the circumstances of the present case in the terms of the sale-deed in favour of the plaintiffs they will not be able to prescribe by possession against the other co-sharers in the Killa numbers of rectangles 6 and 13 in

which they have purchased share of Harindar Singh co-sharer, but, as has already been said, there is no reason whatsoever why they, should they obtain possession, be not able to prescribe so far as the other land of the original three co-sharers is concerned.

13. Thirdly, if the plaintiffs apply for partition as between themselves and the original three co-sharers, they cannot possibly ask for the division of the whole of the joint land of the three original co-sharers. Here again they would be confined to the terms and conditions of the sale-deed in their favour. According to that deed what they have purchased is one-fourth share of certain defined Killa numbers out of rectangles 6 and 13, and they cannot ask that that one-fourth share should be taken in partition in relation to the whole of the joint holding of the original three co-sharers, should the other two co-sharers, than the vendor of these plaintiffs, take exception to that. The reason is obvious. A co-sharer cannot so deal with joint land or property as to prejudice the rights and title of the other co-sharer or co-sharers in the same, but severance of tenancy-in-common may take place, apart from partition, by common consent. If on an application for partition by the plaintiffs, the other two co-sharers, than the plaintiffs' vendor, consent to the partition being confined to rectangles 6 and 13, one-fourth share of the Killas of which has been sold to them, then that would amount to the act of the three original co-sharers in first making a division of their joint land into two parts, one that of rectangles 6 and 13, and the other that of the rest of their joint land, and thereafter the partition of the first can take place between the plaintiffs and those co-sharers. The plaintiffs cannot compel the other co-sharers to bring in the rest of their joint land for the matter of partition though those co-sharers may compel the plaintiffs to bring in what has been sold to them in a partition of the whole of the joint holding of the original co-sharers. This obviously proceeds on the basis, as stated, that no co-sharer can do any act prejudicial to the interest of the other co-sharers in the joint land or property. The learned counsel for the plaintiffs refers to *Nihalu v. Chandar*, AIR 1959 Punj 115, to contend that the plaintiffs have the right to insist on partition that the whole of the joint holding of the three original co-sharers should be brought into consideration. In that case the learned Judges observed "that a person whose interest is not co-extensive with the common property may insist that the omitted property be included in the suit or at any rate that such properties should be included in the suit as will result in setting off to him in severalty some portion co-extensive with his in-

terest." In a case like the present there can be no two opinions that at the time of partition what should happen should be that the whole of the joint land of the three original co-sharers be partitioned and sale in favour of the plaintiffs be taken into consideration to the extent it goes. This is as much as the learned Judges held in Nihalu's case, AIR 1959 Punj 115. Apparently the plaintiffs will not be able to insist contrary to the claim of the other co-sharers to bring in property, to which their sale does not relate, for partition, because they must be held to the terms and conditions of the sale in their favour, they being purchasers not of a share of the joint land of the original three co-sharers, but only a share of a defined part of it, that is to say, Killa numbers of rectangles 6 and 13.

14. And, lastly, the plaintiffs not having purchased a share of the whole of the joint land of the original three co-sharers and having only purchased a share of defined Killa numbers of defined rectangles, that is to say rectangles 6 and 13, they obviously, in the terms of their sale-deed, do not have their rights extending beyond the land of which share has been sold to them. In other words, while they become joint owners or co-sharers of the land of rectangles 6 and 13 with the original co-sharers, they do not become co-sharers with them in the other or the remaining joint land of those three original co-sharers. In Mehla Singh v. Harnam Singh, (1935) 37 Pun LR 276, the learned Judge observed — "Mehla Singh has, it is true, purchased some specific fields in Khataunis Nos. 83 & 84 in this Khata which can be described as Hakkiat Mutfarrika. But this would not make Mehla Singh a co-sharer of the vendor in Khata No. 14. The same line of reasoning applies to Khata No. 39 where also the plaintiffs and Hira Singh are co-sharers while Mehla Singh has no fractional share in it. He owns certain Khataunis in this Khata, namely, Nos. 419 to 421 but that would not make him a co-sharer in the Khata." In Mir Alam Khan v. Abdul Hamid Khan, AIR 1944 Pesh 40, the pre-emptor had purchased three specific survey numbers out of a Khata, and the learned Judge held that that did not make him a co-sharer in the Khata. These two cases negative the claim of the present plaintiffs, and no case to the contrary has been cited at the bar. On consideration of these matters the conclusion is obvious that the plaintiffs have failed to prove that they are co-sharers in or in regard to rectangle 16 sold by Ajmer Singh co-sharer to the defendant.

15. The learned counsel for the plaintiffs has referred to Safdar Ali v. Dost Muhammad, (1890) ILR 12 All 426 (FB), Dakhni Din v. Rahim-un-Nissa, (1891) ILR 16 All 412, Ali Husain Khan v.

Tasadduq Husain Khan, (1906) ILR 28 All 124, Ram Govind Pande v. Panna Lal, AIR 1924 All 305 and Ramjimal v. Riaz-ud-din, AIR 1935 PC 169 (from Allahabad), for the proposition that a purchaser of a specific field in a village or a Mahal becomes a co-sharer in the same, but all those cases proceeded on the basis of the meaning and scope of the word 'co-sharer' either in the wajib-ul-arz of the particular place or a particular statute, which has nothing in common with the provisions of Section 15 (1) (b), Fourthly, of Punjab Act 1 of 1913. So these cases are not really relevant to the controversy in the present case. Similar is the case with regard to Karuppan v. Ponnarasu Ambalam, AIR 1965 Mad 389, as in that case what was the subject of transfer was a share of the property.

16. In consequence, the plaintiffs fail to prove that they have a preferential right of pre-emption under Section 15 (1) (b), Fourthly, of Punjab Act 1 of 1913 on the ground that they have been co-sharers with Ajmer Singh vendor in the land of rectangle 16 sold by him to the defendant and thus co-sharers with Ajmer Singh vendor in the joint land. So the appeal of the defendant is accepted and, reversing the decree of the lower appellate Court, the decree of the trial Court is restored, so that the suit of the plaintiffs remains dismissed, with costs throughout.

17. D. K. MAHAJAN J.:— I agree.

18. BAL RAJ TULI J.:— So do I.
Appeal allowed.

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(V 57 C 49)

FULL BENCH

HARBANS SINGH, H. R. SODHI AND
S. S. SANDHAWALIA JJ.

Jagat Singh and others, Plaintiffs-Appellants v. Teja Singh and others, Defendants-Respondents.

Letters Patent Appeal No. 39 of 1964, D/- 20-1-1970, decided by Full Bench on order of reference made by Mehhar Singh and H. R. Sodhi, JJ., D/-26-9-1968.

(A) Hindu Succession Act (1956), S. 14 — Alienation of widow's estate before commencement of Act — On challenge reconveyance by alienee — Sale of reconveyed property by widow after commencement of Act — As widow becomes owner of absolute estate, sale cannot be challenged. AIR 1963 Orissa 167, Dist.; AIR 1965 Mad 497 & AIR 1964 Punj 403, Ref. (Para 12)

(B) Hindu Law—Mitakshara School and Punjab Agricultural Custom — Estate of widow is not a life estate — Widow is a full owner except that her powers of alienation are limited. Mulla's Hindu Law 13th Ed. Para 176, Ref.; AIR 1916 PC 117, Rel. on. (Para 2)

CN/CN/B64/70/GGM/B

(C) Hindu Law — Mitakshara School — Widow — Alienation of property — Alienee's rights are co-extensive with that of the widow — His possession cannot be disturbed during life time of the widow or till such time as her estate comes to end by happening of certain events like remarriage and adoption. (1968) 70 Pun LR 30 & AIR 1967 SC 1786, Ref.

(Para 3)

Cases Referred: Chronological Paras

(1968) 70 Pun LR 30 = 1968 SCD

881, Kuldip Singh v. Surain Singh 3

(1967) AIR 1967 SC 1786 (V 54) =

(1967) 3 SCR 454, Mangal Singh v. Smt. Rattno 3, 9

(1965) AIR 1965 Mad 497 (V 52) =

ILR (1966) 1 Mad 326, Chinnakol-

andai Goundan v. Thanji Gounder 11

(1964) AIR 1964 Punj 403 (V 51),

Teja Singh v. Jagat Singh 11

(1963) AIR 1963 Orissa 167 (V 50)

= ILR (1963) Cut 575, Ganesh

Mahanta v. Sukria Bewa 11

(1949) AIR 1949 EP 414 (V 36),

Gokal v. Haria 8

(1933) AIR 1933 Lah 597 (2) (V 20)

= 34 Pun LR 852, Muhammad

Rafiq v. Faiz Ahmad 5

(1916) AIR 1916 PC 117 (V 3) =

43 Ind App 207, Janaki Ammal

v. Narayana Swami 2

M. L. Sethi with Ichhpal Singh, for Appellants; R. L. Aggarwal with G. S. Virk and A. L. Bahl, for Minor Respondents.

HARBANS SINGH, J.:— On the death of one Dalipa, his widow Smt. Uttam Devi inherited her husband's estate in the year 1938. On 18th of February, 1938, she gifted the entire estate to Daulat Singh and Charan Singh in equal shares. This gift was challenged on 29th of June, 1939, by reversioners by means of usual declaratory decree under Customary Law to the effect that the gift aforesaid will not affect their reversionary rights. The suit abovementioned was decreed on 17th of September, 1939. Some 20 years thereafter, that is, on 3rd of June, 1959, Daulat Singh, one of the donees, made a gift back to the widow Smt. Uttam Devi of one-half share of the property which had originally been gifted to him by her. On 6th of June, 1959, Smt. Uttam Devi sold the property so gifted to her to Hazara Singh and Teja Singh (copy exhibit D 1). On 20th of October, 1959, Smt. Uttam Devi died. On 13th of March, 1961, Jagat Singh and others claiming to be the next reversioners and heirs of Dalipa, filed a suit for possession of the entire land which formed the subject-matter of 1938 gift. The suit was resisted by the vendees qua one-half which had been sold to them by Smt. Uttam Devi in 1959. The suit was decreed by the trial Court and this decree was confirmed by the lower appellate Court, but in Regular Second Appeal No. 875 of 1963 filed by vendees, the learned

Single Judge reversed the judgment and the decree of the Courts below and held that Smt. Uttam Devi, qua the one-half of the property gifted back to her on 3rd of June, 1959, became a full owner by virtue of Section 14 of the Hindu Succession Act (hereinafter referred to as the Act) and, therefore, she could convey a good title to the vendees. Jagat Singh etc. filed this Letters Patent Appeal and the Bench consisting of Mehar Singh, C. J. and H. R. Sodhi, J. after hearing the parties referred the matter to be decided by a Full Bench in view of the important point of law involved and that is how the matter is before us.

2. There can be no manner of doubt that if Smt. Uttam Devi had not gifted the property now in dispute to Daulat Singh in the year 1938 and she was in possession thereof in her capacity as a widow of her husband Dalipa, then on the enforcement of the Hindu Succession Act by virtue of sub-section (1) of Section 14, her interest in the property would have got enlarged into an absolute estate. It is now well settled and as has been discussed at length by the learned Single Judge, the estate of a widow under the Mitakshara Hindu Law and under the Punjab Agricultural Custom, prior to the enforcement of the Act was not a life estate as it is ordinarily understood. She was a full owner except for the fact that her powers of alienation are limited. In paragraph 175 of Mulla's Hindu Law (Thirteenth Edition), widow's estate is described as follows:—

"A widow or other limited heir is not a tenant-for-life, but is owner of the property inherited by her, subject to certain restrictions on alienation, and subject to its devolving upon the next heir of the last full owner upon her death. The whole estate is for the time vested in her, and she represents it completely. As stated in a Privy Council case, Janaki Ammal v. Narayanasami, 43 Ind App 207 at p. 209= (AIR 1916 PC 117), her right is of the nature of a right of property; her position is that of owner; her powers in that character are, however, limited; but so long as she is alive no one has any vested interest in the succession."

3. Again, it is now beyond any controversy that whenever a widow makes an alienation, which is not for necessity and, therefore, not binding on the reversioners, the alienee gets all the rights which the widow enjoyed in the property and he is the owner of the property to the same extent as the widow and nobody can disturb his possession during the life-time of the widow or till such time as her estate comes to an end on the happening of any event. For example, if she remarries and the remarriage ordinarily results in termination of her estate, the alienee's interest will come to an end. Similarly, if the widow validly adopts a

son to her husband then again the estate would vest in the adopted son and the estate of the widow comes to an end and consequently also that of the alinee.

In other words, the right of the alienee in the property is co-extensive with that of the widow. After such an alienation the widow is left with no right in the property, nor can she retain possession thereof and consequently if, as in the present case, a widow makes an alienation prior to the enforcement of the Act then at the time of the commencement of the Act she is not in possession of any property nor any interest therein and consequently there is no question of any limited right being enlarged into absolute ownership under the provision of Sec. 14 of the Act on the enforcement of the Act.

See in this respect the decision of the Supreme Court in *Kuldip Singh v. Surain Singh*, (1968) 70 Pun LR 30 (SC), following the earlier decision in *Mangal Singh v. Smt. Rattno*, AIR 1967 SC 1786.

4. The question for determination in this case, however, is as to what is the effect of a reconveyance of the aforesaid alienation to the widow sometime after the enforcement of the Act.

5. We would first consider the result of such a reconveyance if it took place before the Act came into force and before a decree for usual declaration was obtained by the reversioners challenging the alienation made by the widow. This point came up for consideration in *Muhammad Rafiq v. Faiz Ahmad*, AIR 1933 Lah 597 (2) before a Bench consisting of Jai Lal and Agha Haidar, JJ. In that case the sale was by a proprietor in favour of his son-in-law. Reversioners filed a suit for the usual declaration that the sale would not affect their reversionary rights. The suit was decreed. Subsequent to the decree, the son-in-law mutated back the property in favour of the original proprietor. Some three years thereafter the original proprietor, made a gift of that very property in favour of his daughter. The reversioners filed another suit challenging the gift. The Courts below held that the parties were Awams of Shahpur District amongst whom there was an unrestricted power of alienation of ancestral property. The suit was consequently dismissed. In the second appeal before the High Court it was stressed that the decree passed by the Courts below had the effect of nullifying the earlier declaratory decree obtained by the reversioners which had become final. Jai Lal J., speaking for the Bench observed as follows:—

"But it is clear that the decrees of the Courts below have not led to that effect. On the other hand, the parties having cancelled the previous sale and placed themselves in the same position in which

they were before it was effected, the decree in favour of the reversioners practically became useless. No law has been quoted to show that it was not open to the parties by mutual agreement to cancel the sale under the circumstances and obviously there is no law to that effect."

The second appeal was consequently dismissed. This was no doubt a case of alienation by a male proprietor, but the claim of the reversioners in the earlier declaratory suit was based on the allegation that the male proprietor had a restricted right of alienation and that he could alienate only for necessity. In other words, any alienation made but for legal necessity was not binding on the reversioners. The right of a widow, as already stated, is exactly the same in this respect as that of a male proprietor who has only restricted power of alienation.

6. Apart from other things, when an alienee from a widow or other alienor with restricted power comes to know, either because he is threatened with litigation or a suit is actually filed or otherwise, of the defect or the lacuna in the title of his alienor, there is nothing either in the Hindu Law or the Customary Law or any other law which stands in his way of reconveying the property back to the alienor and thus restoring the position of the property as it existed prior to the alienation which is being challenged. After all, the relief that is claimed by a reversioner in the usual declaratory suit is that a declaration may be granted to the effect that the impugned alienation would not affect the reversionary rights. In other words, the alienation should be treated as non-existent so far as the body of the reversioners are concerned. Paragraph 202 of Mulla's Hindu Law describes the reversioners and their rights in the following terms:—

"A reversionary heir, although having those contingent interests which can be differentiated little, if at all, from a spes successionis, is recognised by Courts of law as having a right to demand that the estate be kept free from danger during its enjoyment by the widow or other limited heir. He may, therefore, sue to restrain a widow or other limited heir from committing waste or injuring the property. The reason why such a suit by a reversionary heir is allowed is that the suit is by him in a representative character and on behalf of all the reversioners, so that the corpus of the estate may pass unimpaired to those entitled to the reversion. For the same reason he may bring a suit for a declaration that an alienation effected by her is not binding on the reversion."

So that it is clear that all that the reversioners are interested in is that 'corpus' of the estate may pass unimpaired.

ed to those entitled to the reversion. Now, when the alienances from a widow are limited owners and on reconveyance the property comes back to the alienor, the result is that the corpus is given back to the widow or the limited heir and thus what the reversioners desire to achieve by obtaining a declaratory decree actually takes place. In principle, therefore, there is nothing to prohibit the parties to effect alienation by mutual consent or to agree to annul the original conveyance.

7. The learned counsel for the appellants could cite no authority taking a contrary view and in a way did concede that if in the present case the reconveyance had taken place before the enforcement of the Act, then on the date the Act came into force, she would certainly be deemed to be in possession of that property with the result that Section 14 will become applicable.

8. The second point that may be considered in this connection is the effect of the declaratory decree obtained by the reversioners, that is, if the reconveyance is made after the decree had been obtained by the reversioner, would that make any difference? It is now well settled and in fact the nature of the decree that can be obtained by the reversioners makes it quite clear that such a decree does not create any vested right in the presumptive reversioner or reversioners. The only right that they get is that if and when the succession opens and someone or some of the body of reversioners happen to be the next reversioners at the time, then they can ignore the alienation which has been challenged and in respect of which the decree has been obtained by anyone or more of the reversioners. The decree obtained enures for the benefit of the entire body of the reversioners and the actual benefit goes to the next heir at the time the succession opens irrespective of the fact whether he was one of the plaintiffs in the declaratory decree or not. See in this respect the observations of Achhru Ram J. in *Gokal v. Haria*, AIR 1949 EP. 414, which are to the following effect—

"It is well settled that till succession opens no reversioner can claim any right to or interest in the property in the possession of the limited owner. Till succession opens out, the reversionary interest is merely in the nature of spes successions and it cannot be postulated with regard to any particular person whether at the time the estate falls into possession he would be entitled to the property. When the presumptive reversioner brings a suit for a declaration that an alienation by a limited owner should not affect his reversionary rights at the time of the succession opening out and the suit is decreed the only effect of

the decree is to declare the alienation to be invalid except for the life of the alienor. The declaratory decree does not pass any title to the presumptive reversioner and does not create any right in him in the property alienated. The title still remains in the alienee."

Thus the declaratory decree can, in no way, prevent the alienee, who is the owner and in possession of the property during the period that the interest of the party subsists, to agree with the alienor widow to annul the original alienation and reconvey the property back to her, the original owner.

9. All that remains to consider is the effect of reconveyance by the alienee after the enforcement of the Hindu Succession Act and the application of Section 14 to the estate or the interest that is conveyed back to the widow. The argument of the learned counsel for the appellants was that when the original gift is made by the widow to the alienee nothing is left with the widow. About this there can be no doubt. His further contention was that what is conveyed to the alienee is the limited right which was possessed by the widow which interest was defeasible on the death of the widow or her remarriage or adoption of an heir etc., and consequently the interest conveyed to the alienee was of a limited nature, and that when the alienee reconveys to the widow, he cannot convey a title better than he himself has got. With these propositions also, there can be no quarrel. However, the learned counsel goes on to argue that what was actually conveyed to the original alienee is an interest which is a limited one and that the Hindu Succession Act would in no way have benefited the alienee and consequently when that alienee reconveys that interest to the widow, she would be in no better position than the alienee and Section 14 would not be applicable. Stress is laid on the fact that it should not make any difference as to whether the reconveyance is made by the original alienee in favour of a male or a female. It was urged that supposing he had reconveyed the property or the interest that he possessed in the property to a third person, then such a third person could not claim to have the benefit of Section 14 irrespective of the fact whether he was a male or a female. There are two things which this argument has not taken note of. First, that in this case it is not conveyed in favour of a third person. It is a reconveyance to the person from whom the property was originally taken and, therefore, it amounts to cancellation of the original document. No doubt this cancellation takes place not retrospectively from the date of the original alienation but from the date that the reconveyance is made. However, on

the date on which the reconveyance is actually effected, the result of such a reconveyance is the annulment of the original alienation. In other words, on 3rd of June, 1959, in the present case when Daulat Singh made a gift back to the widow of the property originally gifted to him by her, the widow became owner in possession of whatever interest she originally had on the 18th February, 1938, the date on which she had made a gift to Daulat Singh. The second point that is being pressed by the learned counsel is the clear effect of sub-section (1) of Section 14. The wording of this section is—

“Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.”

All that this section requires is that (a) if a female is possessed of some property and (b) whether this property is acquired before or after the commencement of this Act, she will hold the property as an absolute owner and not as a limited owner. The words ‘possessed by’ as interpreted by their Lordships of the Supreme Court in Mangal Singh’s case, AIR 1967 SC 1786 (supra) are equivalent to having a title to the property or being the owner of the property. When, as in the present case the property is reconveyed to the widow, she does acquire a title to the property in view of the fact that the property has been conveyed to her and the right that she acquires by such a conveyance is a limited right which was possessed by the alienee and which had originally been conveyed to that alienee by the widow herself.

However, as she has come to possess this limited right after the enforcement of the Act, sub-section (1) of Section 14 will become applicable to her and this right will get enlarged into an absolute estate. On the other hand, if the original alienation had been made by a male having only a limited right, he would have been able to convey to the alienee also a limited interest in the same manner if the alienation had been by a widow. If the alienee reconveys the interest originally conveyed to him back to the male limited owner, then such a man would not be able to take the benefit of the provisions of sub-section (1) of Section 14 and he will remain only a limited owner of the property conveyed back to him. Thus it makes all the difference whether the person to whom the property is reconveyed, resulting in the annulment of the original alienation, is a male or a female. Otherwise too, this so-called anomaly is of daily occurrence; for example, a male proprietor who is holding ancestral property and is governed by custom would have a limited right to alienate the pro-

perty for legal necessity only and if he alienates the property without such legal necessity, the reversioners can challenge the alienation. However, on the death of such a limited owner, if he is survived by, say, one son and one daughter, then under the Act both of them will be entitled to equal share in the estate. The son would not have unrestricted right of alienation in the share of the estate that is inherited by him because the rules of custom by which he is governed relating to alienation have not been abrogated by virtue of Section 4 of the Act. Under that section only those rules of Hindu laws and customs have been abrogated which run counter to the provisions made in the Act itself. As the Hindu Succession Act does not deal with the right of alienation of a Hindu male, the restrictions imposed on him by the customary law or under the general Hindu law continue to remain in force. However, so far as the daughter is concerned, she will have an absolute estate by the operation of sub-section (1) of Section 14 of the Act and inasmuch as the property of which she becomes the owner by virtue of inheritance, whether such an inheritance opens before or after the commencement of the Act, she takes as an absolute owner and not as a limited owner. Alienation by her, therefore, cannot be controlled by the reversioners and the alienee from her would get an absolute title.

10. Similarly, if the estate of a limited male owner is inherited by his widow, then she would have an absolute right of alienation which was not enjoyed by her husband from whom she had inherited the property. Thus it is clear that it makes all the difference whether the person to whom the property is reconveyed by the original alienee is a male or a female.

11. Another point taken by the learned counsel was that inasmuch as the reconveyance in favour of the widow was by means of a document, being a document of gift, the alienee had merely a limited right in the property. Consequently sub-section (2) of Section 14 of the Act would become applicable and not sub-section (1) because the title is by a document and it conveys only a limited estate. The mere fact that the property comes to be ‘possessed by’ a female Hindu under a deed of gift, by itself would not take the case out of sub-section (1) of Section 14. This matter is made clear by the Explanation added to sub-section (1) of Section 14, the relative part of which is as follows:—

“In this sub-section ‘property’ includes both movable and immovable property acquired by a female Hindu by inheritance or device, or at a partition.”

* * * or by gift from any person, whether a relative or not, before, at or after her marriage, or in any other manner whatsoever.

Sub-section (2) becomes applicable only where the deed of gift or other instrument by which a female acquires property itself lays down a restriction on the estate that is to be enjoyed by the female. Relevant part of sub-section (2) is as follows:—

"Nothing contained in sub-section (1) shall apply to any property acquired by way of gift * * * or any other instrument or under a decree or order of a Civil Court or under an award where the terms of the gift * * * or other instrument or the decree, * * * prescribe a restricted estate in such property."

It is nobody's case that the gift deed, by which the property was conveyed by Daulat Singh in the widow on the 3rd June, 1959, itself prescribes any restricted estate. Daulat Singh, in the deed, makes it absolutely clear that what he intends to transfer is all the bundle of rights that he possessed in the property. This bundle of rights could be nothing more or less than the bundle of rights that were conveyed to him by the widow in the year 1938. Thus the gift deed by which the widow came to acquire a right or title in the property does not, in any manner, prescribe a restricted estate in such property. Sub-section (2) is, therefore, altogether inapplicable. *Ganesh Mahanta v. Sukria Bewa*, AIR 1963 Orissa 167, was relied upon on behalf of the appellants. In this case, the property was reconveyed to the widow after a declaratory decree had been obtained by the reversioners and in the last paragraph of the judgment it was observed as follows:—

"* * * defendant 2 acquired only the widow's estate by the gift in his favour. His retransfer on 13th February 1957 by Ex. B, * * * would transmit to Lata the same title which defendant 2 himself had. * * * the declaration made in O. S. 138 of 1946-47, that her gift in favour of defendant 2 was not binding on the reversioners after her death, does not make any difference in the legal position. Even if such a suit had not been filed, the interest of the alienor or the donee in the property would be that of a limited owner. Section 14(1) does not purport to enlarge the right, title or interest of the alienor with regard to the transfers effected prior to the commencement of the Act."

With respect there can be no quarrel with any of the propositions laid down above. The learned Judge, however, then proceeded as follows:—

"By Ex. B Lata would again get the widow's estate. The position would be made clear by an illustration. Supposing defendant 2 had effected a transfer not in favour of Lata but in favour of another male who is in law always entitled to hold the property as a full owner. Would the transferee in such a case acquire a limited right or a full ownership? The obvious answer is that he would acquire only a limited right as the donee cannot transmit any title higher than what he himself had. The position does not become in any way different merely because defendant 2 retransferred the property in favour of a female. Though the transfer is subsequent to the Act, Lata acquired only a limited right and did not acquire full ownership on account of the limited nature of the interest of the transferor."

Obviously the learned Judge omitted to take note of the fact that it makes all the difference where the retransfer is in favour of the original transferor resulting in the cancellation of annulment of the original alienation and transfer in favour of a stranger. This distinction was noticed in *Chinnakolandal Goundan v. Thanji Gounder*, AIR 1965 Mad 497. At page 500, after reproducing the above observations of Misra J., in the Orissa case, *Ramamurti J.*, observed as follows:—

"With respect, I am unable to agree with this view, as the entire reasoning is based upon the view that there is no difference between a reconveyance in favour of the widow herself and alienation in favour of the stranger. In my opinion, there is all the difference between a case of annulment of a conveyance by consent of both the parties and a case of a subsequent alienation by the alienor in favour of a stranger. In the former case the effect of the alienation is completely wiped out and the original position is restored. This distinction has not been noticed in the decision of the Orissa High Court."

In addition, another point that has not been noticed in the judgment of the Orissa High Court is the distinction between the right possessed by a female and that by a male and the effect of Section 14(1) on the right acquired by the female which happened to be of a limited nature.

12. In the Madras case it was held that there is nothing in law prohibiting retransfer by an alienor from the alienor who suffers from a legal disability. At page 501 it was observed as follows:—

"I am, therefore, clearly of the opinion that there is nothing in law to prevent an alienation being completely nullified as if it never took effect provided the alienor and the alienor agree to such a course. * * * It cannot be disputed that when the re-

reversioner files the suit, it is open to the alienee to submit to a decree. After such a declaratory decree is passed, there is nothing in Hindu Law which compels or obliges the alienee to retain and keep the property himself and hand it over to the reversioner. It is certainly open to him to respect the decree and convey back the property to the widow even before her death. It is obvious that what the alienee can do after the termination of the suit can equally be done during its pendency. Surely the alienee is not a trustee for the reversioner to keep the property in trust and deliver the property on the death of the widow."

In the Madras case reconveyance took place during the pendency of the suit and it was held that in view of the re-transfer, the suit would stand dismissed. It was further held that in such a situation, Section 14 would apply and enlarge the estate reconveyed to the widow into an absolute owner, even though the title or the right to possession accrued only after the Act came into force. The learned Judge went on to observe as follows:—

"The crucial fact is that the right accrued to a Hindu female."
The decision of the learned Single Judge reported in Teja Singh v. Jagat Singh, AIR 1964 Punj 403, was noticed and approved by learned Judge.

12-A. In view of the above discussion, I am definitely of the view that there is nothing in law which prevented the reconveyance of the property in dispute by Daulat Singh to the widow on 3rd of June 1959 vide gift deed, Exhibit D. 2, and by this reconveyance the widow became the owner of the property to the same extent as she originally was before the deed of gift, and sub-section (1) of Section 14 became applicable and her interest, limited as it was before the date of the gift, got enlarged into an absolute estate which she was entitled to dispose of as she liked. There is, consequently no force in the appeal and the same is dismissed. In the peculiar circumstances of the case, there is no order as to costs.

13. H. R. SODHI, J.: I agree.

14. S. S. SANDHAWALLA, J.: I agree.
Appeal dismissed.

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(V 57 C 50)

BAL RAJ TULI, J.

Fateh Singh Chughra, Petitioner v. State of Punjab and others, Respondents.
Civil Writ No. 1440 of 1969, D/- 31-7-1969.

(A) Constitution of India, Arts. 226, 300 and 311 — Civil servant officiating in post for fixed period — Reversion to substantive post before expiry of term — Has no

right to maintain writ petition against Government unless his fundamental right or right under Art. 311 is affected — Claim based on contract — High Court does not enforce contractual rights — Remedy by way of suit against Government is open.

A civil servant who has been appointed to officiate in certain post in another department of the State Government for a fixed period on higher salary but who has been reverted to his substantive post in the original department before the expiry of the stipulated period on administrative grounds has no right to maintain a writ petition to compel the Government to retain him in that post unless it affects his legal or fundamental rights or his right under Art. 311 of the Constitution.

(Para 12)

Since the petitioner based his claim to hold the post entirely under a contractual right the petitioner was not entitled to any relief under Art. 226 of the Constitution as the High Court does not enforce contractual rights in such petitions. The petitioner can seek his remedy by way of suit for specific performance of the contract or for damages against the Government. 1969 Lab IC 721 (Cal) & AIR 1953 SC 250 & AIR 1968 SC 292, Rel. on.

(Paras 4, 11)

(B) Constitution of India, Arts. 309 and 310 — Position of Government servant is more one of status than of contract and his terms of service are governed by statute or statutory rules — Punjab Civil Services Rules, Vol. 1, R. 317 — Government has power to transfer a Government servant from one post to another and to retransfer him to the post on which he held a lien. AIR 1967 SC 1889, Foll.

(Para 5)

(C) Constitution of India, Art. 311 — Removal from service — Government servant officiating in one State department — Reversion to his original substantive post in another department — Does not amount to removal from service.

Article 311 of the Constitution speaks of removal from the service of the State Government or the Government of India and not from any post held by the Government servant in any department. The reversion of a Government servant holding an officiating post in one department to his substantive post in another department does not, therefore, amount to his removal from service within the meaning of Art. 311 of the Constitution. AIR 1958 SC 36, Dist.

(Para 6)

(D) Constitution of India, Art. 311 — Reduction in rank — What is — Government servant holding officiating post on higher salary for fixed period reverted to his original substantive post according to service rules before expiry of period — Does not amount to reduction in rank — Reduction in emoluments necessarily involved is not a penal consequence.

The reduction in rank takes place only if the Government servant has the right to hold the higher post from which he is reverted to a lower post. If he has no right to hold the higher post there will be no reduction in rank in case he is reverted to his substantive post from his officiating post, even before the expiry of the fixed period for which he was appointed to officiate. The reason is that such a Government servant has no right to hold the officiating post for all times to come and under the service rules applicable to him, he is always liable to be reverted to his substantive post in accordance with those rules. (Para 8)

The reversion from a higher post to a lower post necessarily involves reduction in emoluments and that alone cannot be termed as a penal consequence. 1967 Serv LR 240 (Punj) & AIR 1957 SC 886 & AIR 1962 SC 794 & AIR 1958 All 741 (FB) & AIR 1966 Andh Pra 116 & C. W. No. 1430 of 1967, D/- 20-2-1969 (Punj), Rel. on; 1967 Serv LR 96 (Punj), Dist. (Para 10)

Cases Referred: Chronological Paras

- (1969) 1969 Lab IC 721 = 73 Cal WN 939, Pallikalloth Shyama Prasad v. Chief Commr, Andaman & Nicobar Islands 4
- (1969) C. W. No. 1430 of 1967, D/- 20-2-1969 (Punj), Gurbux Singh Dorka v. State of Punjab 8
- (1968) AIR 1968 SC 292 (V 55) = 1968 Serv LR 119 = 1968 Lab IC 232, Dr. Bool Chand v. Chancellor Kurukshetra University 11
- (1967) AIR 1967 SC 1889 (V 54) = (1968) 1 SCR 185, Roshanlal Tandon v. Union of India 5
- (1967) 1967 Serv LR 96 (Punj), Gurdit Singh Aulakh v. State of Punjab 9
- (1967) 1967 Serv LR 240 (Punj), Bbagwan Dass v. Punjab State 8
- (1966) AIR 1966 Andh Pra 116 (V 53) = ILR (1966) Andh Pra 590, Collector of Central Excise Hyderabad v. N. Venkata Rao 8
- (1962) AIR 1962 SC 794 (V 49) = 1962 Supp (1) SCR 92, State of Bombay v. F. A. Abraham 8
- (1958) AIR 1958 SC 36 (V 45) = 1958 SCR 823, Parsbotam Lal Dhillon v. Union of India 8
- (1958) AIR 1958 All 741 (V 45) = ILR (1958) 2 All 55 (FB), Jai Shankar Hajela v. State of Uttar Pradesh 8
- (1957) AIR 1957 SC 886 (V 44) = 1958 SCR 509, Hartwell Prescott Singh v. Uttar Pradesh Govt. 8
- (1953) AIR 1953 SC 250 (V 40) = 1953 SCR 655, Satish Chandra v. Union of India 4
- H. S. Wasu with B. S. Wasu and L. S. Wasu, for Petitioner; M. R. Sharma,

Deputy Advocate General (Pb) (for Nos. 1 & 2) and M. R. Agihotri (for No. 3), for Respondents.

ORDER:— Fateh Singh Chugha petitioner was working as a permanent Superintendent in the Punjab Civil Secretariat when in 1963, due to the phenomenal development of the activities of the Industries Department, he was appointed to the post of Assistant Director (Administration) by an order of the Governor of Punjab for a period of six months. The petitioner took charge of this post with effect from January 1, 1964. The period of six months was later on, with the approval of the Punjab Public Service Commission, extended to four years ending on January 1, 1968. The petitioner has alleged that he was selected for the post of Assistant Director (Administration) in the Industries Department because of the fact that it was felt that a person from outside should be appointed who should be above departmental pressure, intrigues and faction, at the same time having special knack of setting the things in order and who should also be well conversant with the official procedure and "know-how." Applications for the post were invited from the Superintendents of the Punjab Civil Secretariat and the petitioner was then selected.

2. During the period from 1964 to 1966, the petitioner earned very good remarks in the Industries Department some of which are as under:—

1. Since his taking over as Assistant Director, a great improvement has come about in the administration Wing of the Directorate of Industries,

2. That he is also discharging duties of a Vigilance Officer, has conducted a number of enquiries which resulted in adequate punishment to those found guilty.

3. He has, in fact, proved an asset to this Department and there is a hope of bringing the administration Wing to a stable keel if he is allowed to continue his efforts with zeal and fervour he has already exhibited.

4. It is, therefore, in the interest of the Department as well as in public interest that services of Shri Fateh Singh Chugha be continued to be availed of in this Department for few years more.

These remarks were conveyed to the Public Service Commission in February, 1966 when a reference was made to it for the appointment of the petitioner to the said post. His suitability for the said post was approved by the Public Service Commission on May 30, 1966. He was not permanently appointed to this post but his appointment was extended for a further period of four years with effect from

January 2, 1968, by the order of the Governor of Punjab, a copy of which is Annexure 'A' to the writ petition. This order is dated November 13, 1967 and reads as under:—

"The Governor of Punjab is pleased to accord sanction to the continued appointment of Shri Fateh Singh Chugha as Assistant Director (Administration) in the Directorate of Industries, Punjab, in terms of Note (I) below Rule (9) of the Punjab Industries Service (State Service Class II) Rules, 1966, for a further period of four years with effect from the 2nd January, 1968, in the grade of Rs. 350-25-500/30-650, plus a special pay of Rs. 50 p. m."

A copy of this order was forwarded to the Secretary, Punjab Public Service Commission for information and it was mentioned in the endorsement that "the suitability of Shri Fateh Singh Chugha for the post of Assistant Director (Admn.) stands approved by Punjab Public Service Commission vide their letter No. TRA.22/63/21927, dated 30-5-1966." In pursuance of this order of the Governor, the petitioner continued to work on the post of Assistant Director (Administration) till an order was passed on June 13, 1969, reverting him to his substantive post of Superintendent in the Punjab Civil Secretariat and appointing respondent 3, Shri I. S. Tewari, in his place. It is alleged that this order was not served on the petitioner but Shri Tewari took over charge on June 16, 1969, on which day the petitioner was on casual leave. He applied for two days' more leave by telegram on June 17, 1969 and filed the writ petition in this Court on June 16, 1969 along with an application for staying the operation of the order reverting him to his parent substantive post in the Secretariat. The stay matter came up before Narula, J. when notice was given for June 24, 1969, and status quo was ordered to be maintained meanwhile. The said application was heard by Narula, J. on June 24, 1969, in the presence of the Deputy Advocate General appearing for respondents 1 and 2, and Shri M. R. Agnihotri, Advocate for respondent 3. Affidavits were filed by respondents 2 and 3 to the effect that respondent 3 had already taken charge of the post on June 16, 1969. The learned Judge, however, after hearing the parties, ordered that the petitioner should not be reverted from the post to which he was appointed by the order of Governor of Punjab (copy Annexure 'A' to the writ petition) till the hearing of the writ petition by the Motion Bench as the order of reversion had not been communicated to him before that date, that is June 24, 1969. The writ petition was ordered to be fixed for Motion hearing on July 14, 1969. It came up for hearing before the Motion Bench on July 16, 1969 when it was ad-

mitted and was ordered to be heard as No. 1 on July 22, 1969.

3. Separate written statements to the writ petition have been filed by all the respondents. It has been admitted by respondent 1 in its return that the petitioner had done good work and he was, therefore, given extension for a further period of four years with effect from January 2, 1968 but it is emphasised that there was no contract between him and the Government and that he "was transferred from the post of Superintendent in the Secretariat to the post of Assistant Director (Admn.) in the Directorate of Industries in a temporary capacity and his lien had been kept in the Secretariat. On the post of Assistant Director (Admn.) he had to deal with the establishment matters. The purpose of sending an outsider to the Industries Department was that the officer should handle the establishment cases free from departmental intrigues and factions. Too long a stay on the administrative seat is not a healthy thing and, therefore, Government took a decision on the administrative grounds that Shri Fateh Singh Chugha should be reverted to the Punjab Civil Secretariat and Shri I. S. Tewari, formerly P. A. to the Advocate General, Punjab, was appointed in his place."

It is also averred that the reversion of the petitioner to his substantive post of Superintendent in the Punjab Civil Secretariat from the post of Assistant Director (Admn.) which he was holding on officiating basis, did not entail any penal consequences. The orders passed by the Government were just and proper and there was no obligation on the part of the Government to retain the petitioner as Assistant Director (Admn.) for any particular period. He could be reverted on administrative grounds at any time. The Government is said to have passed the impugned order with full knowledge of all the circumstances of the case. No injustice has been done to the petitioner by his reversion to the post against which he is holding his lien and no provision of the Constitution has been violated.

4. The petitioner had challenged the order of his reversion on various grounds, the first of which is that the petitioner's appointment to the post being for a specified period to end on January 1, 1972 in terms of the order of the Governor (Annexure 'A' to the writ petition) it was not within the competence of the Government to terminate the same before the expiry of the contractual period. The plea of the petitioner is that the Governor had extended the period of his appointment by another four years with effect from January 2, 1969 and accepting that order the petitioner had continued in the post of

Assistant Director (Administration) in the Industries Department and thus a contract came about between the Government and himself. Under that contract the Government had no right to send him back before the expiry of the stipulated period of four years. The reply to this plea is that for the enforcement of a right flowing from a contract the remedy by way of writ petition under Art. 226 of the Constitution is not available and the petitioner can file a suit for damages or specific performance of the contract against the Government. Reliance has been placed on a judgment of Sinha, J. of the Calcutta High Court, in *Pallikoth Syama Prasad v. Chief Commr. Andaman & Nicobar Islands*, 1969 Lab IC 721 (Cal). The learned Judge relied upon the decision of the Supreme Court, in *Satish Chandra v. Union of India*, AIR 1953 SC 250 and observed:—

"Whether or not the petitioner's service on deputation was liable to be terminated before the expiry of the stipulated period relates at best to a contractual power. So if there was breach of such a contract the petitioner might have other remedies either in specific performance of contract or of damages. For, it is well settled that no writ will lie to compel performance or enforcement of the contract."

I am respectfully in agreement with the view expressed by the learned Judge and hold that the petitioner has no right to maintain this writ petition to compel the Government to retain him in the post of Assistant Director (Administration) in the Industries Department in accordance with the order of the Governor dated November 13, 1967, a copy of which is Annexure 'A' to the writ petition. The petitioner can seek his remedy by way of a suit for specific performance of the contract or for damages against the Government.

5. The matter can, however, be dealt with from another point of view. Their Lordships of the Supreme Court have held in *Roshan Lal Tandon v. Union of India*, AIR 1967 SC 1889 with regard to the position of a Government servant as under:

"It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolu-

ment of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee. It is true that Art. 311 imposes constitutional restrictions upon the power of removal granted to the President and the Governor under Art. 310. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest. In the language of jurisprudence status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned." Even if the order of the Governor dated November 13, 1967 amounts to a contract between the Government and the petitioner remains subject to the Punjab Civil Services Rules. It is to be noted that the petitioner had been transferred from the Punjab Civil Secretariat to the Industries Department under the power contained in Note (1) below Rule (9) of the Punjab Industries Service (State Service Class II) Rules, 1966, which authorises the Government to fill any vacancy in the Industries Department by transfer or deputation from Civil Service of the Punjab Government or other State Governments or of the Government of India. The Government has also the power to transfer a Government servant from one post to another under Rule 3.17 of the Punjab Civil Services Rules, Volume I, and to re-transfer him to the post on which he holds a lien. The petitioner is admittedly subject to these rules and it cannot, therefore, be said that the Government had no power to revert the petitioner to his substantive post before the expiry of the period of four years stipulated in the order, copy of which is Annexure 'A' to the writ petition.

6. The learned counsel for the petitioner then argued that the reversion of the petitioner from the post of Assistant Director (Administration) to his substantive post in the Punjab Civil Secretariat amounts to his removal from service by way of punishment as it entails penal consequences, for the petitioner would lose the benefit of higher pay and higher status of the post. The petitioner was getting Rs. 50 as special pay in addition to the pay of his grade as Superintendent while holding the post of Assistant Director (Administration) of which he would be deprived on his reversion for the period upto January 1, 1972. In my

opinion, the argument is not sound. The petitioner has not been removed from service of the Punjab Government but has only been reverted to his substantive post from which he was transferred. Art. 311 of the Constitution speaks of removal from the service of the State Government or the Government of India and not from any post held by the Government servant in any department. The reversion in the case of the petitioner does not, therefore, amount to his removal from service within the meaning of Art. 311 of the Constitution.

7. As regards penal consequences by way of loss of higher emoluments, they are bound to occur when a Government servant is reverted from a higher officiating post to his substantive post. But the loss of emoluments can be considered being by way of punishment only if the reversion amounts to reduction in rank. The question now to be determined is whether the reversion of the petitioner in the instant case amounts to reduction in rank within the meaning of Art. 311 of the Constitution.

8. The learned counsel for the petitioner has strongly relied upon the judgment of their Lordships of the Supreme Court in *Parshotam Lal Dhingra v. Union of India*, AIR 1958 SC 36, wherein S. R. Das, C. J., observed as under:—

"Again where a person is appointed to a temporary post for a fixed term of say five years, his service cannot, in the absence of a contract or a service rule permitting its premature termination be terminated before the expiry of that period unless he has been guilty of some misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken under the rules read with Art. 311 (2)."

This observation does not apply to the instant case as it is not a case of removal from service before the expiry of the fixed period but only reversion to the original substantive post and even according to the exception made by the learned Chief Justice it is permissible if there is a service rule permitting the same. I have already referred to Rule 3.17 whereunder the Government has the right to transfer any Government servant from one post to the other. The reduction in rank takes place only if the Government servant has the right to hold the higher post from which he is reverted to a lower post. If he has no right to hold the higher post there will be no reduction in rank in case he is reverted to his substantive post from his officiating post, even before the expiry of the fixed period for which he was appointed to officiate. The reason is that such a Government servant has no right to hold the officiating post for all times to come and under the service rules applicable to him, he is always liable to be

reverted to his substantive post in accordance with those rules. In the instant case, the petitioner was holding the post of Assistant Director (Administration) in the Industries Department on an officiating basis by transfer from the Punjab Civil Secretariat and had no right to hold that post for ever. At best under the order of the Governor dated November 13, 1967 he could have held it only upto January 1, 1972. That does not mean that the petitioner has the right to hold that post so that his reversion from that post to his substantive post amounts to reduction in rank. It was held by P. D. Sharma, J., in *Bhagwan Dass v. Punjab State*, 1967 Serv LR 240 (Punjab), as under:

"The case of reversion of a deputationist to the parent Department did not attract the provisions of Art. 311 of the Constitution of India because he cannot claim the post he held in the Department where he had gone on deputation as of right. The petitioner's lien on the post which he held in his parent Department remained intact during the period he was on deputation to the Rehabilitation Department. On his reversion he was entitled to get his due place in his parent Department. The order of his reversion thus cannot be assailed on any valid ground."

Their Lordships of the Supreme Court held in *Hartwell Prescott Singh v. Uttar Pradesh Govt.*, AIR 1957 SC 886, that "a reversion from a temporary post held by a person does not per se amount to reduction in rank because the temporary post held by him is not his substantive rank." Again, it was held by their Lordships of the Supreme Court, in the State of Bombay v. F. A. Abraham, AIR 1962 SC 794 that—

"a person officiating in a post has no right to hold it for all times. He may have been given the officiating post because the permanent incumbent was not available, having gone on leave or being away for some other reasons. When the permanent incumbent comes back, the person officiating is naturally reverted to his original post. This is no reduction in rank for it was the very term on which he had been given the officiating post."

A Full Bench of the Allahabad High Court in *Jai Shanker Hajela v. State of Uttar Pradesh*, AIR 1958 All 741 (FB), held that

"reversion from a temporary or officiating higher grade to the substantive post in the lower grade is not 'reduction in rank' within the meaning of Art. 311 even though the reversion is ordered on account of unsatisfactory work or conduct of the civil servant, provided it is ordered by the State in exercise of its power of reverting him under the contract, express or implied, or under the rules of service."

A Division Bench of the Andhra Pradesh High Court, in *Collector of Central Excise*

Hyderabad v. N. Venkata Rao, AIR 1966 Andh Pra 116, held as under:—

"A civil servant officiating on higher post until further orders cannot be said to be holding a substantive post in that higher office. The office he holds is of a transitory character and he does not acquire any right thereto. The appointing Officer is under no duty to assign reasons of his reversion to his substantive post. If the reversion does not partake the character of a punishment, then the provisions of Art. 311 (2) are not attracted and therefore, the procedure indicated therein need not be followed.

The consequences that flow from the reversion cannot be described as penal. The concept of penal consequences has no place in a case of reversion of an officer officiating on a temporary basis and that is appropriate only when the reversion is by way of punishment. It cannot be argued that whatever might be the reason or the cause of the reversion, it should be regarded as a punishment, since it affects certain rights of the officer. The real test for determination whether the reduction in such cases is not by way of punishment is to find out if the order for reduction also visits the servant with any penal consequences and if that order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his further chances of promotion, then that circumstance would indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty."

Following these judgments I had held in *Gurbux Singh Dorka v. State of Punjab*, C. W. No. 1430 of 1967, decided on 20-2-1969 (Punjab), that—

"the reversion of the petitioner to his parent department by order dated 12th May, 1966 was in order and did not attract the provisions of Art. 311 of the Constitution. This order neither reduced the petitioner from a higher rank to a lower rank nor did it entail any penal consequences by way of punishment. The reversion to the parent department could be made under the service rules applicable to the petitioner of which the petitioner was aware when he got the appointment in the Civil Defence/Home Guards Department in 1958."

In that case *Gurbux Singh* petitioner was serving in the Co-operative Department of the Punjab Government when on August 5, 1958 he applied, through proper channel, for the post of a clerk in the office of Director, Civil Defence, Punjab Chandigarh, for which post he was select-

ed and which he joined on November 22, 1958. While in the Civil Defence Department, he got rapid promotions and reached the post of Accountant. On September 20, 1965 he was serving as Head Assistant in the Department of Civil Defence/Home Guards when he received a letter informing him that he was being relieved of his duties as Head Assistant with effect from September 21, 1965 and he should report for absorption to the Registrar, Co-operative Societies. The letter reverting him to his parent department did not give any reasons for his reversion nor did it cast any stigma on him. On those facts I had held that it did not amount to reduction in rank within the meaning of Art. 311 of the Constitution and did not entail any penal consequences.

9. The learned counsel for the petitioner has relied upon a Division Bench judgment of this Court (*Mehar Singh, C. J. and D. K. Mahajan, J.*) in *Gurdit Singh Aulakh v. State of Punjab*, 1967 Serv LR 96 (Punjab), in which it was held:

"Even if the appellant is treated as a temporary Government servant holding the civil post of the member of the Tribunal, which itself is a temporary Tribunal in the sense in which it has already been explained, there is no contract or rules under which the services of the appellant could be terminated before the expiry of the term of the Tribunal itself whether for want of work or by dissolution. The only power of removal in sub-section (5) of Section 12 of the Act has not been exercised. Now, assuming for a moment that sub-section (5) of S. 12 of the Act is no longer in existence and applicable to the case, then the position is this, that there is neither any contract nor any rule under which the services of the appellant could be terminated by the respondent except at the time of the expiry of the life of the Tribunal itself." In that case *Shri Gurdit Singh Aulakh* had been appointed a member of the Sikh Gurdwara Tribunal constituted under Section 12 of the Sikh Gurdwaras Act, 1925 on March 28, 1962. The notification merely said that he was appointed a member of the Tribunal and nothing was said with regard to the nature of his tenure. On September 10, 1965 he was removed from the membership of the Tribunal. He filed a writ petition in this Court praying that the order of his removal should be quashed and a writ in the nature of mandamus be issued directing the respondent to treat him as continuing in his post as a member of the Tribunal. This writ petition was dismissed by *Narula, J.* against which order *Shri Gurdit Singh Aulakh* filed a Letters Patent Appeal. The learned Judges hearing the Letters Patent Appeal came to the conclusion that the removal could be made only in terms of

AIR 1970 RAJASTHAN 129 (V. 57 C 30)

B. P. BERI, J.

Dharma Ram, Petitioner v. Ram Karan and The State, Respondents.

Criminal Revn. No. 36 of 1969, D/- 10-3-1969 against Judgment of S. J., Jodhpur, D/-27-11-1968.

(A) Criminal P. C. (1898), Ss. 528 (1-C) 526-A — Application for transfer of case under S. 528 (1-C) — Is not confined to the stage of inquiry or trial only. AIR 1936 Mad 163, Dissented from.

No limitation is contained in the wordings of Section 528 (1-C) to suggest that it is only at the stage of inquiry or trial that an application for transfer is tenable. In Section 526-A, however, the words 'inquiry' and 'trial' find place, which the legislature has advisedly not used in Section 528 (1-C), and there is no reason, therefore, of importing restrictions which the legislature never intended to impose. AIR 1936 Mad 163, Dissented from; 1957 Cri LJ 139 (Mad), Foll. (Para 7)

(B) Criminal P. C. (1898), S. 528 — Application — In prosecution under S. 354, I. P. C. by Police, application for transfer of case under S. 528 (1-C) can be made by husband of outraged woman, who is directly interested in the outcome of the case.

Section 528 does not circumscribe its operation at the instance of any particular party. The transfer of a case from one Court to another usually affects the parties who are directly interested in the outcome of the dispute. Under Section 526 any person interested has been permitted to move transfer applications. Such a language is not contained in Section 528; but on the doctrine of the natural course of human conduct it will be permissible to construe Section 528 to be available for seeking justice in matters of transfer by parties who are directly interested in the upshot of a controversy. (Para 8)

A husband of a wife, who was the victim of an indecent assault, is certainly an interested person and he has every locus standi to move for transfer under Section 528 (1-C), notwithstanding the fact that the case had been intiated by the police. (Para 8)

(C) Criminal P. C. (1898), S. 528 — Application for transfer of case — Transfer, when can be ordered.

Spirit of vindictiveness on the part of the complainant cannot be permitted to operate as a lever to effectuate transfers, more so, when it is likely to cause inconvenience to an accused who has already been facing many stages of litigation. (Para 10)

(D) Probation of Offenders Act (1953), Ss. 3, 6 — Offence under — Question of applicability of Probation of Offenders Act

(1958) — Each case will be regulated by circumstances of each case — Penal Code (1860), S. 354. (Para 9)

Cases Referred: Chronological Paras

- (1968) AIR 1968 Mys 119 (V 55) =
1968 Cri LJ 638, Shivasharan Reddy v. State of Mysore 4
(1967) 1967 Raj LW 101, Krishnanand v. Harbans Singh 4
(1965) AIR 1965 SC 444 (V 52) =
1965 (1) Cri LJ 360, Rattan Lal v. State of Punjab 6
(1963) 1963 Raj LW 288 = ILR
(1963) 13 Raj 650, Kamji v. The State 4
(1962) AIR 1962 All 288 (V 49) =
(1962) 1 Cri LJ 703, Jag Bhushan v. State 4
(1959) AIR 1959 Mad 261 (V 46) =
1959 Cri LJ 731, Ahmed Moideen v. Inspector 'D' Division 3
(1957) 1957 Cri LJ 139 (Mad), In re, Kanniyam 4, 6
(1955) AIR 1955 Assam 116 (V 42) =
1955 Cri LJ 923, N. C. Bose v. P. D. Gupta 4
(1943) AIR 1943 Nag 236 (V 30) =
44 Cri LJ 643, Abdus Subhan v. Gajanan Patrikar 4
(1936) AIR 1936 Mad 163 (V 23) =
37 Cri LJ 223, Murugappa Thevan v. Emperor 3, 6

N. U. Khan, for Petitioner; Ranamal, Advocate, for Non-Petitioner No. 1; G. M. Mehta Dy. G. A., for the State.

ORDER:— This is a criminal revision application directed against the order of the Sessions Judge, Jodhpur, dated the 27th November, 1968, whereby he ordered the transfer of a case from the Court of the Munsiff-Magistrate, Bilara, to the Court of the Munsiff-Magistrate, Jodhpur District.

2. The criminal case, out of which the present revision-application arises, has had a chequered career. The case was initiated at the instance of the police on the 18th November, 1965, before the Munsiff-Magistrate, Bilara. The allegations were that the accused Dharma caught hold of the breasts of Mst. Gomati in a field where this woman was working at about noon on the 15th September, 1965. The learned Munsiff-Magistrate Bilara convicted the accused under Section 354, I. P. C. but gave him the benefit of the provisions of the Probation of Offenders Act by merely admonishing him. The husband of Mst. Gomati preferred an appeal in the Court of the learned Sessions Judge, Jodhpur. After treating the appeal as a revision application under Section 11 of the Probation of Offenders Act the learned Sessions Judge set aside the judgment of the Munsiff Magistrate and directed him to comply with the provisions of S. 6 of the said Act.

When the case was sent back to the Munsiff-Magistrate, Bilara, the learned Magistrate on the 8th June, 1967 recorded the statement of the defence witness Pancharam about the age of the accused and came to the conclusion that he was above 21 years of age but as he had no previous conviction and the District Probation Officer had also not made any adverse comments against the accused, he gave him the benefit of Sec. 3 of the probation of Offenders Act and merely admonished him. This order was again assailed by the husband of Mst. Gomati, and the learned Additional Sessions Judge No. 2, Jodhpur, in his order dated the 14th June, 1968, held that the order of the learned Munsiff-Magistrate Bilara was not a full-fledged judgment as envisaged by the Code of Criminal Procedure and, therefore, he set aside that order and asked the learned Munsiff-Magistrate Bilara to hear the parties and write a judgment afresh. Mst. Gomati's husband continued to be dissatisfied and he preferred a transfer application in the Court of the learned Sessions Judge, Jodhpur, asking for the transfer of the case under Section 354, I. P. C. pending before the Munsiff-Magistrate Bilara to some other Court on the ground that the learned Magistrate had already expressed his opinion on the circumstances of the case. This application for transfer was accepted and this is how the case was then transferred to the Munsiff-Magistrate, Jodhpur District, for being heard.

3. The learned counsel appearing for the applicant has raised certain interesting questions on behalf of the accused applicant. His first submission is that it is only when a case is pending for an inquiry or trial that a transfer can be ordered under Section 528, Criminal P. C. All that remained to be done in this case was to write a judgment as required by Section 367, Criminal P. C. and it was no stage for transferring the case. He placed his reliance on *Murugappa Thevan v. Emperor*, AIR 1936 Mad 163. His second submission is that even if a transfer at this stage is permissible under Section 528, Criminal P. C., the original case having been initiated by the police, the husband of the victim Mst. Gomati had no locus standi to present a transfer application. In support of his submission, he relied on *Ahmed Moideen v. Inspector, 'D' Division*, AIR 1959 Mad 261. Lastly, he argued that there was no justification for the learned Sessions Judge to hold that the ends of justice require the transference of this case because prima facie it is going to cause undue inconvenience to the accused as he will have to engage another counsel if the case is heard at Jodhpur.

4. Mr. Ramanal appearing for the husband of Mst. Gomati argued that under Section 528 (1-C) the stage of a transfer

application is not confined to the stage of inquiry or trial. He placed reliance on *In re, Kanniyar*, 1957 Cri LJ 139 (Mad) and *Abdus Subhan v. Gajanan Patrikar*, AIR 1943 Nag 236. Meeting the argument of locus standi, the learned counsel argued that any person interested can move a Court for transfer of a case regardless of the fact that the original case may have been initiated by the police. He placed reliance on *N. C. Bose v. P. D. Gupta*, AIR 1955 Assam 116; *Jag. Bhusan v. State*, AIR 1962 All 288 and *Shivasharan Reddy v. State*, AIR 1968 Mys 119. Combating the third point, the learned counsel argued that it is the apprehension of the applicant which must be taken into account and the learned Munsiff-Magistrate having twice given the benefit of the Probation of Offenders Act to the accused, he was not likely to change his mind and this did give birth to a reasonable apprehension in the mind of his client. He further submitted that Section 354, I. P. C. was not one of those sections wherein the benefit of the Probation of Offenders Act ought to be given and he placed reliance on two decisions of this Court in *Kamji v. The State*, 1963 Raj LW 288 and *Krishnanand v. Harbans Singh*, 1967 Raj LW 101.

5. The learned Deputy Government Advocate who participated in the discussion submitted that in the present case the opinion of conviction having been twice expressed, the only small territory on which the dispute seems to have concentrated is the question of sentence and more on the ground whether the benefit of the Probation of Offenders Act should or should not be given to the accused. His contention is that this is not a fit case in which transfer ought to have been ordered on that small ground and if the learned Magistrate again gave the benefit of the provisions of that Act and if any party felt aggrieved by it it was always open to that party if it had any legal remedy to seek it.

6. Mr. Khan for the applicant rejoined by submitting that even the Supreme Court in *Rattan Lal v. State of Punjab*, AIR 1965 SC 444 thought of the provisions of the Probation of Offenders Act in a case under Sections 354 and 451, I. P. C.

7. The first question is whether a transfer at this stage is permissible under Section 528 (1-C), Criminal P. C. This sub-section reads:

"Any Sessions Judge, on an application made to him in this behalf, may, if he is of opinion that it is expedient for the ends of justice, order that any particular case be transferred from one Criminal Court to another Criminal Court in the same Sessions division."

No limitation is contained in the wordings of the section to suggest that it is only at the stage of inquiry or trial that an ap-

plication for transfer is tenable. It is correct that AIR 1936 Mad 163 supports the learned counsel for the applicant but the same High Court in 1957 Cri LJ 139 (Mad) has not taken notice of the earlier decision of its own Court. In Sec. 526-A, however, the words 'inquiry' and 'trial' find place, which the legislature has advisedly not used in Section 528 (1-C), and I am not in favour, therefore, of importing restrictions which the legislature never intended to impose. I respectfully dissent with the view taken in Murugappa's case, AIR 1936 Mad 163 (supra) and follow the one which is contained in 1957 Cri LJ 139 (Mad) (supra). It is not necessary to decide the exact stage of the case before me although some argument is also possible in that direction.

8. So far as the question of locus standi is concerned, Section 528 does not circumscribe its operation at the instance of any particular party. The transfer of a case from one Court to another usually affects the parties who are directly interested in the outcome of the dispute. Under Section 526 of the Code of Criminal Procedure, any person interested has been permitted to move transfer applications. Such a language is not contained in Section 528; but on the doctrine of the natural course of human conduct it will be permissible to construe Section 528 to be available for seeking justice in matters of transfer by parties who are directly interested in the upshot of a controversy. Mst. Gomati was the victim of an indecent assault. The husband of Mst. Gomati was certainly an interested person and he had every locus standi to move for transfer under Section 528 (1-C). The cases cited by learned counsel relate to Section 526 and need not be discussed.

9. The third point is with regard to the question of the existence or otherwise of reasonable apprehension in the mind of the applicant. It is apparent from the various steps taken by the husband of Mst. Gomati that he is not satisfied only with the conviction of the accused which has in fact been recorded twice but he is interested in enhanced punishment and he is motivated on that account to take the trouble of litigating at several stages. It is neither proper nor necessary for me to decide whether Section 354 should or should not attract the applicability of the Probation of Offenders Act because each case will be regulated by its own circumstances. I have no doubt, in my mind, that the learned Munsiff-Magistrate will not feel hampered by his previous decisions and can still apply his mind judicially to this question.

10. The question of sentence is regulated by a number of circumstances and no hard and fast rule can be laid down. But the spirit of vindictiveness on the part of the complainant cannot be permitted to

operate as, a lever to effectuate transfers. More so, when it is likely to cause inconvenience to an accused who has already been facing so many stages of this litigation. I do not think that this is a fit case in which the husband of Mst. Gomati can be said to have reasonable apprehensions at the hands of the Munsiff-Magistrate, Bilara. The learned Magistrate will now apply his mind afresh instead of writing a 'post-script judgment' and decide the case after hearing the parties.

11. Since the case has taken such a long time, Mr. Ranamal is anxious that a date be fixed. I think the request is reasonable and it must be allowed. The case is fixed for the 16th April, 1968, which is a mutually agreed date. Mr. N. U. Khan is notified of the date and he undertakes to inform his client. Accordingly this revision application is allowed.

Revision allowed.

AIR 1970 RAJASTHAN 131 (V 57 C 31)

C. B. BHARGAVA, J.

Praduman Kumar, Petitioner v. Girdhari Singh and others, Non-petitioners.

Civil Revn. No. 554 of 1968, D/- 13-3-1969, against order of Addl. Civil J., Jaipur City, D/- 16-7-1968.

(A) Civil P. C. (1908), O. 14, R. 2 — Issues of pure law — Decision of case or part thereof, possible on determination of such issues — Court must decide them first — Observations in AIR 1963 Raj 100, Dissented from.

In a case where issues are purely of law which do not require any investigation into facts and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it is incumbent upon the Court to determine the issues of law first. If the determination of the issues of law is postponed to be determined along with the issues of fact it will mean unnecessary inconvenience and expense to the parties and waste of time and labour of the Court as well. In many cases if issues of law such as on a point of limitation, res judicata, jurisdiction or the suit being barred on the face of it by any law, arise and the Court having regard to the facts and circumstances of the case, is of opinion, that the case or any part thereof will be disposed of on such issues, the Court has no option having regard to the provisions of O. 14, R. 2, but to determine those issues first. If on the other hand the Court is of opinion that the issue of law cannot be determined without investigation into facts or the point of law raised is not clear or that the case or any part of it cannot be disposed of, the Court may decline to determine the issues of law first. Therefore, the Court should address itself to these vital

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points and then decide whether the issues of law should be decided first or they should be decided along with the issues of fact. Observations in AIR 1963 Raj 100, Dissented from; AIR 1957 Raj 112 & 1951-2 RLW 119 & AIR 1960 Raj 204, Foll.

(Para 4)

(B) Civil P. C. (1908), Preamble — Judicial precedents — Citing of conflicting decisions of High Court before Subordinate Court — Subordinate Court must follow decision of Division Bench in preference to that of single Judge.

Whenever conflicting judgments of the High Court are produced before Subordinate Courts it is their duty to follow the judgments of the Division Bench in preference to the judgment of a Single Judge unless the correctness of the former has been doubted by the Supreme Court. The reason is that even a Single Judge of the High Court is bound to follow the decision of the Division Bench and in case he feels that the judgment of the Division Bench requires reconsideration, he has to refer the matter to a larger Bench. Therefore, the subordinate Courts cannot give preference to a judgment of Single Judge over the decision of a Division Bench.

(Para 6)

Cases Referred: Chronological Paras
(1963) AIR 1963 Raj 100 (V 50) =
1963 Raj LW 101, Chhinga Ram
v. Nihal Singh 2, 3, 4, 5
(1960) AIR 1960 Raj 208 (V 47),
Premier Automobiles Ltd, Bom-
bay v. Laxmi Motors Co., Jodhpur 3
(1957) AIR 1957 Raj 112 (V 44) =
1957 Raj LW 323, Prithvi Raj v.
Munnalal 2, 3, 4
(1951) 1951-2 Raj LW 119, Gulab-
chand v. Kishan Lal 3
(1936) AIR 1936 Pat 250 (V 23) =
17 Pat LT 253, Janki Das v.
Kalu Ram 3

N. M. Kasliwal, for Petitioner; R. S. Purohit, for Non-petitioner.

ORDER:— This is a defendant's revision application against an order of the Additional Civil Judge, Jaipur City whereby he decided to dispose of Issues Nos. 4, 7, 8 and 10 along with other issues framed in the case after the evidence had been recorded.

2. It appears that plaintiff Girdhari-singh instituted the present suit on 29th August, 1967, for specific performance of contract of sale of a house, in the alternative, damages to the extent of Rs. 2500 and for cancellation of the sale deed executed in favour of non-petitioner No. 2 on the basis of an agreement of sale entered into between him and the petitioner on 5-10-1963. The petitioner denied the plaint allegations as also the agreement set up by the plaintiff. The learned Additional Civil Judge framed eleven issues in the suit and ordered that arguments will be heard on issues Nos. 4, 5, 7, 8 and 10 which

in his opinion were preliminary issues. However, on the date on which arguments were to be heard, the learned Judge changed his opinion because the decision of this Court in Chhinga Ram v. Nihal Singh, 1963 Raj LW 101 = (AIR 1963 Raj 100) was brought to his notice. On behalf of the petitioner another decision of this Court in Prithvi Raj v. Munnalal, AIR 1957 Raj 112, was shown to the learned Judge, but he preferred to follow the decision relied upon by the plaintiff for the reason that it was a later decision. Accordingly, he passed the order against which the present revision application has been preferred.

3. It is contended on behalf of the petitioner that once the learned Additional Civil Judge had decided to determine the aforesaid issues as preliminary issues, he ought not to have reconsidered his previous order. It is also contended that the learned Additional Civil Judge ought to have followed the Division Bench decision in preference to the decision of a Single Judge even though it happened to be later in time. Learned counsel has invited my attention to O. 14, R. 2 of the Code of Civil Procedure which according to the learned counsel is of mandatory nature and lays down that in a case where the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it will postpone the settlement of issues of fact until after the issues of law have been determined. Reliance is placed on AIR 1957 Raj 112, Gulabchand v. Kishanlal, (1951) 2 Raj LW 119 and Premier Automobiles Ltd. Bombay v. Laxmi Motors Co., Jodhpur, AIR 1960 Raj 208. The learned Additional Civil Judge has relied upon Chhinga Ram's case, 1963 Raj LW 101 = (AIR 1963 Raj 100) in which following observations were made by the learned Judge:

"This Court has pointed out on numerous occasions that, in appealable cases, the trial Court and the Court of first appeal must decide the case on all the issues, and that principle must, as a rule, be followed even though some of the issues arising in the case may be of law and may go to the very root of it, the reason being that there is always a possibility of the decision of the Courts below on the preliminary issues being reversed when the matter comes up to this Court, and then the appeal before it cannot be finally disposed of and the case has to be remanded because some issue or issues relating to fact have not been tried and decided by the Courts below. This short circuiting of procedure, more often than not, leads to considerable delay which is entirely avoidable and subjects the parties to unnecessary expense and harassment and is strongly to be deprecated."

These observations were made in a case which was instituted by the plaintiff for

recovery of money on the basis of an agreement which according to the defendant was a mortgage deed and being unregistered was inadmissible in evidence. The trial Court amongst others framed the following two issues:

1. Whether Ex. 1 was admissible in evidence.

2. Was the plaintiff's suit not maintainable on the footing of Ex. 1 and not supported by consideration, and determined these issues as preliminary issues. The trial Court as well as the first appellate Court came to the conclusion that Ex. 1 was inadmissible in evidence and that it did not contain any personal covenant to pay and thus dismissed the plaintiff's suit without deciding the other issue relating to consideration because the defendant had raised the plea that he had not received consideration for the document Ex. 1. In second appeal the learned Judge did not agree with the conclusion arrived at by the lower Courts and held that the document was a simple mortgage wherein there was an express promise to pay and, therefore, the plaintiff was not debarred in law for filing a suit for simple money claim based on personal covenant to pay. As the issue about consideration for the document had not been decided by the lower Court the case had to be sent back to the trial Court and it is in these circumstances that the above observations were made. The other earlier decisions of this Court to which reference has been made by the learned counsel for the petitioner were not brought to the notice of the learned Judge and if I may say so with great respect, the observations quoted above run counter to the decisions given in those cases.

In Prithvi Raj's case, AIR 1957 Raj 112 while discussing the scope of Order 14, Rule 2, the learned Chief Justice observed that:

"Order 14, Rule 2 provides for disposal of certain issues as preliminary issues. But there are two conditions which, in our opinion, must be fulfilled before it can be applied. The first condition is that the issue must be an issue of law, i.e., it should not be an issue either of fact or mixed fact and law, but an issue of law pure and simple. The second condition is that the Court should be of opinion that the case or any part thereof may be disposed of on that issue. This does not, in our opinion, mean that the issue is of such a nature that its decision may result in the disposal of the suit. What O. 14, R. 2 requires, in our opinion, is that the Court should look at the issue of law, & if it is of opinion that *prima facie* the decision will go one way, namely, that the case or part of the case would come to an end, it should proceed to decide the issue as a preliminary issue."

In Gulabchand's case, 1951-2 Raj LW 119 it was held that:

"The use of the word 'shall' in the above Rule shows that it is obligatory for the court to try the issues of law first if it is of opinion that the case or any part thereof may be disposed of on those issues only. It is, therefore, necessary for the trial Court to determine whether a case or part thereof can be disposed of only on the issue of law and unless it thinks that it cannot be so disposed of, it should not refuse to adopt this procedure simply to avoid piecemeal decision. This view finds support in AIR 1936 Pat 250. This Rule has been provided by law in order that the party at whose instance the issue of law is framed may not be put to unnecessary harassment and be compelled to produce evidence and wait till the completion of the whole trial, only to find later on that it was all unnecessary."

4. The observations made by the learned Judge in Chhinga Ram's case, 1963 Raj LW 101=(AIR 1963 Raj 100) should, in my opinion, be read in the context of that case. But if the learned Judge meant to lay down the above quoted principle for general application then I may say with the greatest respect, that the observations are too wide and are directly in conflict with the Division Bench decision of this Court in Prithvi Raj's case, AIR 1957 Raj 112 and would have the effect of rendering the provisions of Order 14, R. 2 absolutely nugatory. The language of Order 14, R. 2 is quite clear and in a case where issues are purely of law which do not require any investigation into facts and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it is incumbent upon the court to determine the issues of law first. If this course is not adopted by the courts and the determination of the issues of law is postponed to be determined along with the issues of fact it will mean unnecessary inconvenience and expense to the parties and waste of time and labour of the court as well. In many cases if issues of law such as on a point of limitation, *res judicata*, jurisdiction or the suit being barred on the face of it by any law, arise and the court having regard to the facts and circumstances of the case, is of opinion, that the case or any part thereof will be disposed of on such issues, the court has no option having regard to the provisions of Order 14, R. 2, but to determine those issues first. If on the other hand the court is of opinion that the issue of law cannot be determined without investigation into facts or the point of law raised is not clear or that the case or any part of it cannot be disposed of, the court may decline to determine the issues of law first. Therefore, the court should address itself to these vital points

and then decide whether the issues of law should be decided first or they should be decided along with the issues of fact.

5. In the present case the learned Additional Civil Judge did not apply his mind to the above questions whether the aforesaid issues were issues purely of law and whether the whole or any part of the case could be disposed of on the determination of those issues. He simply decided the matter on the basis of the decision in Chhinga Ram's case, 1963 Raj LW 101—(AIR 1963 Raj 100).

6. It may however, be pointed out for the guidance of the subordinate courts that whenever conflicting judgments of this Court are produced before them, it is their duty to follow the judgments of the Division Bench in preference to the judgment of a single Judge unless the correctness of the former has been doubted by the Supreme Court. The reason is that even a Single Judge of this Court is bound to follow the decision of the Division Bench and in case he feels that the judgment of the Division Bench requires reconsideration, he has to refer the matter to a larger Bench. Therefore the subordinate courts cannot give preference to a judgment of Single Judge over the decision of a Division Bench. The learned Additional Civil Judge in this case was quite in error when he preferred to follow the judgment of the Single Judge and disregarded the decision of the Division Bench of this Court merely on the ground that it was a later decision.

7. In this view of the matter the order passed by the learned Additional Civil Judge cannot be said to be correct. But the question is whether any interference is called for in the circumstances of the case. Having heard learned counsel for the parties, I am of the view that in the facts and circumstances of the case, no interference is called for.

8. The revision application is accordingly rejected. But in the circumstances of the case I make no order as to costs.

Revision dismissed.

AIR 1970 RAJASTHAN 134 (V 57 C 32)
L. N. CHHANGANI AND KAN SINGH, JJ.

Umrao Singh Dhabariya, Petitioner v. Yashwant Singh Nahar and others, Respondents.

Election Petn. No. 15 of 1967, D/25-4-1969.

(A) Civil P. C. (1909), O. 14, R. 5 — Additional issues on material brought out during evidence.

Party cannot rely upon the materials brought during evidence for framing additional issues. Issues are framed on the

controversies envisaged in the pleadings and on the materials available at the time of framing of the issues. New materials subsequently brought on record except when they may be in the nature of more elucidation of a controversy already implicit in the pleadings do not justify the framing of additional issues. (Para 11)

(B) High Court Rules and Orders — Rajasthan High Court Rules, R. 59—Reference of case to larger Bench after determination of some issues by Single Judge — Word 'case' to mean whole case.

Rule 59 of the High Court Rules for Rajasthan contemplates a reference to a larger Bench to decide a case or any question or questions of law formulated by a Bench. The word 'case' may be used in a narrow sense to imply the whole case or in a wider sense to connote a part of the case or to any state of facts requiring judicial determination. If the wider view is adopted, the decision on issue by the single Judge before the reference to a larger Bench remains a case finally decided and requires no reopening and the larger Bench need only decide the controversy remaining alive at the time of the reference. If, on the other hand, a narrower view is adopted, then evidently the Bench has to apply its mind to all the controversies, arising in the case including those earlier decided. (Para 19)

The Court felt inclined to adopt the narrow view of the word 'case' in the Rule and to hold that the larger Bench should decide the case as a whole including the controversy already decided by the single Judge. (Para 19)

(C) Constitution of India, Arts. 102 (1) (a), 191 (1) (a) — Pramukh of Zilla Parishad drawing honorarium under Rajasthan Panchayat Samitis Zilla Parishad Act does not hold office of profit under State—(Panchayats — Rajasthan Panchayat Samitis and Zilla Parishads Act (37 of 1959), Sec. 45) — (Words and Phrases — "Office of profit").

A person who was the Pramukh of Zilla Parishad under the Rajasthan Panchayat Samitis and Zilla Parishads Act, 1959, at the time he filed his nomination paper and also at the date of the election and was also drawing an honorarium of Rs. 300 per mensem in addition to travelling allowance, was not holding office of profit under the State under Art. 102 (1) (a) of the Constitution and is not disqualified from being a member of the Legislative Assembly under Art. 191 (1) (a). AIR 1958 SC 52 and AIR 1964 SC 254, Applied; AIR 1968 Raj 249 and AIR 1968 Punj and Har 450 (FB) and AIR 1968 Bom 370, Rel. on. (Para 25)

A few important features relating to the Zila Parishad and the Zila Pramukh under the Act indicated. (Para 25)

Per Kan Singh J.: When the funds are vested in the Zila Parishad, they cease to be part of the consolidated fund of the State after the grant and, therefore, it can-

not be predicated that the Pramukh is paid either out of Government funds or the Government exercises any control over a Pramukh personally. (Para 172)

(D) Representation of the People Act (1951), S. 83 — Election petition — Petitioner cannot put forward a case during argument, which he did not take in his petition — It is not proper to take respondent by surprise — (Civil P. C. (1908), O. 6, R. 2). (Para 81)

(E) Representation of the People Act (1951), S. 123 — Corrupt practice involving bribery — Action of Minister on eve of election.

Per Kan Singh, J.: The law requires that a corrupt practice involving bribery must be fully established. The evidence must show clearly that the promise or gift directly or indirectly was made to an elector to vote or refrain from voting at an election.

The position of a Minister is difficult. It is obvious that he cannot cease to function when his election is due. He must of necessity attend to the grievances, otherwise he must fail. He must improve the image of his administration before the public. If every one of his official acts done bona fide is to be construed against him and an ulterior motive is spelt out of them, the administration must necessarily come to a standstill.

Election is something which must be conducted fairly. To arrange to spend money on the eve of elections in different constituencies, although for general public good, is when all is said and done an evil practice, even if it may not be corrupt practice. The dividing line between an evil practice and a corrupt practice is a very thin one. AIR 1968 SC 1191 and AIR 1968 SC 1083, Rel. on. (Para 173)

Casse Referred: Chronological Paras (1968) AIR 1968 SC 1033 (V 55) =

(1968) 3 SCR 111, Mrs. Om Prabha Jain v. Abnash Chand 173

(1968) AIR 1968 SC 1191 (V 55) =

(1968) 3 SCR 102, Ghasi Ram v. Dal Singh 81, 173

(1968) AIR 1968 Bom 370 (V 55) = ILR (1968) Bom 1212, Motisingh v. Bhaiyyalal 24

(1968) AIR 1968 Punj and Har 450 (V 55) = ILR (1967) 2 Punj 852 (FB), Umrao Singh v. Darbara Singh 24

(1968) AIR 1968 Raj 249 (V 55) =

ILR (1967) 17 Raj 995, Ramlal v. Vishveshwar Nath 23, 24, 170, 172

(1964) AIR 1964 SC 254 (V 51) =

(1964) 4 SCR 311, Guru-Gobinda Basu v. Sankari Prasad Ghosal 22, 170

(1958) AIR 1958 SC 52 (V 45) =

1958 SCR 387, Abdul Shakur v. Rikhab Chand 21

Bajranglal and Vinodi Lal, for Petitioner; Mahaveer Chand Bhandari, Madan Raj Bhandari and P. K. Bhansali (for No. 1)

and Raj Narain, Addl. Govt. Advocate (for Nos. 3, 4 and 5), for Respondents.

CHHANGANI J.: This is an election petition under Sections 80 and 81 of the Representation of the People Act, 1951 (hereinafter to be referred to as the Act) by Shri Umrao Singh Dhabariya, a defeated candidate, calling in question the election of Shri Yashwant Singh Nahar respondent No. 1 to the Rajasthan Legislative Assembly from the Banera Constituency (No. 144) in the last general elections held in February, 1967, claiming prayers to —

- (i) declare the election of the respondent No. 1 to the a Rajasthan Legislative Assembly from Banera Constituency (No. 144) void, and
- (ii) further to declare the petitioner duly elected from the aforesaid Banera constituency (No. 144) to the Rajasthan Legislative Assembly.

There were three contesting candidates in the Banera constituency:

- (i) The petitioner Shri Umrao Singh Dhabariya who was a sitting member of the Rajasthan Legislative Assembly contested the election as a Socialist Party candidate.
- (ii) The respondent No. 1 Shri Yashwant Singh Nahar who was the Zila Pramukh of the Bhilwara Zila Parishad was the candidate of the Congress party which was the ruling party in power headed by Shri Mohan Lal Sukhadia the Chief Minister.
- (iii) The respondent No. 2 Shri Dwarka Prasad contested as a Praja Socialist Party candidate.

The first and the last date for filing nomination papers were 13th January and 18th January, 1967, respectively. Polling took place on 18th February, 1967. According to ballot paper account, 33,520 ballot papers were issued to the voters and 44 ballot papers were received by post. Thus, 33,564 ballots were polled. Counting was done on 22nd February, 1967. The total votes found and counted came to 32,555 including the 44 ballot papers received by post. The rest of the ballot papers were found missing. The respondent Shri Yashwant Singh Nahar polled 16,287 votes, the petitioner Shri Umrao Singh Dhabariya 12,399 and Shri Dwarka Prasad 2,388 votes. 1,483 ballot papers were rejected as invalid. The respondent No. 1 having secured the maximum of votes was declared elected on 22-2-1967.

2. On 7-4-67 the last date of limitation the petitioner filed an election petition challenging the election on various grounds:-

- (1) In the first instance, it was stated that the respondent No. 1 was, on the date of election as well as nomination, disqualified to be chosen a member of the Legislative Assembly under Article 191 (1) (a) of the Constitution of India as he held the office of the Pramukh of Zila Parishad,

Bhilwara, since early 1965 till the date of the presentation of the petition. It was further stated that as a Pramukh the respondent No. 1 had been drawing a monthly honorarium in addition to the travelling and daily allowances payable to him.

(2) The petitioner also averred that the respondent and his agents and workers with his consent and knowledge committed the corrupt practices of bribery and undue influence and of obtaining or procuring the assistance of certain categories of persons in the service of the Government.

(3) Reliance was also placed on the discrepancy relating to the ballot papers polled and the ballot papers counted and it was contended that the ballot papers were tampered with and the sanctity of the ballot boxes having been lost the aforesaid election cannot be maintained. The petitioner impleaded the other two contesting candidates as also Shri Shri Narain Das Mehta who was Collector and District Magistrate, Bhilwara, during the election period, the Sub Divisional Magistrate, Gulabpura — Returning Officer for 144 Banera Assembly Constituency and Shri Shiv Narain Tiwari Vikas Adhikari, Banera District Bhilwara, as there were allegations that the respondent No. 1 procured their assistance for the furtherance of the prospects of his election.

3. The election petition and the schedules were verified in a general manner on the basis of personal knowledge and information received and reasonably believed to be correct. The petitioner also filed an affidavit as required by the proviso to Section 83 (1) of the Act but in the affidavit it was not mentioned what allegations were being verified on personal knowledge and what allegations were based on information received and believed to be correct.

4. When the case came up before a learned Single Judge of this Court on 5-5-1967 Shri Kistoor Mal Singhvi appeared for the respondent No. 1 and took time for filing written statement. The other respondents did not appear and it was directed that the case would proceed ex parte against them. Subsequently, however, on 29-5-1967, Shri Raj Narain appeared for the respondents Nos. 3, 4 and 5 and wanted time for filing written statements on behalf of the respondents Nos. 3, 4 and 5. He was permitted to join and the case was fixed for the written statement on 19-6-1967. The respondent No. 1 filed his written statement on 6-6-1967. The respondents Nos. 4 and 5 submitted their written statements on 19-6-1967. The respondent No. 3 filed his written statement on 21-9-1967.

5. The respondent No. 1 in the written statement as also by means of separate applications submitted objections relating to the non-compliance of Section 81(1) and complaining of lack of full and sufficient

particulars of the corrupt practices. Objection was also taken on the ground of the defective nature of the affidavit. The objections relating to these were considered on 27-7-1967, and having regard to the order of the Court passed on that date the petitioner filed an amended election petition with amended schedules on 10-9-1967. The petitions and the schedules were again verified in the same manner as the original petitions and the original schedules. A fresh affidavit was filed in support of the allegations of corrupt practices in the amended petition and the amended schedule. In para 2 of the affidavit it was stated: "That the statements made in paragraph 4 (B), (D), (F), (G), (H), (J) and (L) of the said petition about the commission of corrupt practices of bribery, undue influence, obtaining and procuring assistance from the persons in service of Government and hiring of vehicles and the particulars given in paragraphs 4 (B), (D), (F), (G), (H), (J) and (L) of the said petition and in paragraphs 1, 2, 3 and 4 of the Schedule I and paragraphs 1, 2 (i), (ii), (iii) and (iv) of the Schedule IV annexed thereto are true to my information received from my workers". The petitioner was directed to disclose the names of the workers from whom he received the above information. In compliance with this direction the petitioner filed an affidavit which was sworn on 2-10-1967, in which he gave names of his workers from whom he received information with regard to the contents of the various paragraphs.

6. The respondents filed amended replies to the election petition. They denied the various allegations made against them.

7. On the pleadings of the parties the following issues were framed:—

1. Whether respondent No. 1 being Pramukh of the Zila Parishad, Bhilwara, at the time of election held the office of profit under the State and was consequently, disqualified to be elected as a Member of the Legislative Assembly under Article 191 (1) (a) of the Constitution?

2. Whether on 17-2-1967 at 11 p.m. the respondent No. 1 offered to Rama and Nagzi, Panchas of Raigar Community 50 paise each for 300 voters of the Raigar community and paid the amount to them on the same date in the Election Office at Banera in order to induce 300 voters of the Raigar community to vote for him and thus committed a corrupt practice of bribery as defined in Section 123 (1) of the Representation of the People Act?

3. Whether Shri Utsav Lal Laddha, a worker of the respondent No. 1, with the consent and knowledge of the respondent No. 1, offered and paid Rs. 2,000 on 17-2-1967 in village Raila to Sarva Shri Nathu son of Narainji, Bhairon son of Kajorji, Chunna son of Lalooji, Panchas of Khateek community of village Raila, for digging a well for drinking water in the locality of Raila inhabited by the Khateeks, in order

to induce Khateek voters to vote for respondent No. 1 and thus committed the offence of bribery as defined in Section 123 (1) of the Act?

4. Whether Ram Raiji Kabra of Gulabpura, a worker of respondent No. 1, with the consent and knowledge of the respondent No. 1, paid Rs. 10 each to nearly 150 Muslim voters of village Sujnabad, Tehsil Hurdia in the night of 17-2-1967 at Ram Raiji Kabra's shop to induce the voters to vote for the respondent No. 1 and thus committed the offence of corrupt practice of bribery?

5. Whether the respondent No. 1 paid Rs. 200 to Shri Ladoo Singh of village Bhatera, Tahsil Banera, in the fourth week of January, 1967, with the object that Shri Ladoo Singh may induce the voters of village Bhatera to refrain from voting in the election. If so, did the respondent No. 1 commit the corrupt practice of bribery?

6. Whether the relief works as referred to in the orders of the Collector, Bhilwara, dated 7-1-1967, 30-1-1967 and 5/7-2-1967 were actually sanctioned by the respondent No. 1 in an irregular manner in order to brighten his prospects for the aforesaid election and to induce the voters to vote for him and if so, did he commit the offence of undue influence as defined in Section 123 (2) of the Act?

7. Whether the respondent No. 1 specially attended the meeting of the Panchayat Samiti, Banera, dated 16-1-1967, wherein certain relief and development works as mentioned in Annexure No. 4 were sanctioned, and subsequently toured the villages mentioned in Annexure No. 4 and propagated that the voters of the village in which the relief works were sanctioned, should vote for him as he got those works sanctioned. If so, did he commit the corrupt practice of undue influence?

8. Whether the respondent No. 1, his workers and agents, with the consent and knowledge of respondent No. 1 obtained, procured and abetted the assistance of Government servants Sarva Shri Naraindas Mehta (Collector and District Magistrate Bhilwara), Shiv Narain Tiwari (Vikas Adhikari, Panchayat Samiti, Banera), Komal Chand (Accountant, Panchayat Samiti, Banera) and Shri Moti Shanker (Overseer) for furtherance of the prospects of the respondent No. 1 in the said elections. If so, did he commit corrupt practice as defined in section 123 (7) of the Act?

9. Whether Shri Mohan Lal Sukhadia was the Agent of the respondent No. 1 and whether he, as his agent with his consent and knowledge, committed the various acts referred to in para 4 (f) and exercised undue influence over the voters to enhance the prospects of the respondent No. 1?

10. Whether the respondent No. 1 offered a contribution of Rs. 100/- to muslim voters including Jamaiji s/o Ahmadji, Qadari s/o Ibrahimji, Hassanji s/o Rahim-

buxji, Silawats Hassan Khan Pathan and Haiderji Kayamkhani, residents of village Banera, and if so, did he commit an offence of corrupt practice of bribery?

11. Whether the ballot boxes of the Banera constituency were tampered with as per allegations in para 4 (k). If so, what will be its effect?

12. Whether the respondent No. 1 through Shri Mohanlal Sukhadia, Chief Minister of the State, utilised the entire State machinery including the State Officers employed in connection with election duties to brighten the prospects of respondent No. 1 and if so, what will be its effect on the election?

The petitioner examined himself and produced 20 more witnesses. He also got produced and exhibited 106 documents. The respondent No. 1 examined himself and produced 17 witnesses more and got exhibited 32 documents. The respondent Nos. 3 and 5 examined themselves and produced some witnesses. It may be mentioned that the witnesses of the respondents nos. 3 to 5 had been also included in the list of the witnesses of the respondent No. 1.

8. After the close of the evidence and during the course of arguments, the petitioner submitted a few applications which may be noticed. On 17-4-1968 he submitted an application for framing additional issues regarding allegations in paras 4 (e), 4 (f), 4 (h) and 4 (i) of the election petition. The respondent No. 1 submitted written reply opposing the application. The petitioner then submitted a supplementary application on 6-5-1968 in which he suggested draft issues. On 19-4-1968 the petitioner submitted an application for appointment of a Commissioner to inquire and report into the matter of stone slabs lying in the Raigar Community Temple of Banera. He further produced an affidavit on 6-5-1967 with three photos in support of his application. On 24-7-1968 the petitioner submitted application for re-call of certain witnesses for further cross examination with the help of photographs.

9. Till so far, the case was being tried by me. On 28-8-1968 I did not feel inclined to decide the case sitting in a single Bench. The case was put up before the Hon'ble the Acting Chief Justice who on 6-9-68 directed that the case be heard in future by a Division Bench composed of Hon'ble Mr. Justice Jagat Narayan and myself. The parties agreed before the Acting Chief Justice that the evidence and other proceedings so far on record shall remain as it is and shall form part of the record before the Division Bench. The case was heard by the Division Bench so composed for some days and eventually on 12-3-1969 Hon'ble Jagat Narayan J. declined to take part in the trial of the election petition. The case was put up before the Hon'ble the Chief Justice who directed the case to be heard by a Division Bench consisting of

Hon'ble Mr. Justice Kan Singh and myself. This is how, the case has come up before the present Division Bench.

10. We have heard the arguments of the counsel for the parties on the applications and the merits of the case. I consider it proper to take up the application relating to framing of additional issues first. In this petition the petitioner having stated in para 2 that the issues regarding the aforesaid paragraphs or parts thereof were not framed as there was no material on record then to show that the respondent No. 1 held himself out as a prospective candidate at any date prior to the dates relating to the subject matters of the contents of the aforesaid paragraphs or parts thereof as the case may be, "submitted that" from the statements of the petitioner Shri Umrao Singh Dhahariya (AW/1) and other witnesses the date of the respondent No. 1 holding himself out as prospective candidate for the election dispute can be fixed in the month of September or in any case earlier than the dates of the subject matter of the aforesaid paragraphs and consequently, the issues should be framed. Subsequently he filed a supplementary application suggesting the issues to be framed.

11. We have considered the application of the petitioner and the replies on behalf of the respondents. I may at once observe that it is hardly open to the petitioner to rely upon the materials brought during evidence for framing additional issues. Issues are framed on the controversies envisaged in the pleadings and on the materials available at the time of framing of the issues. New materials subsequently brought on record except when they may be in the nature of mere elucidation of a controversy already implicit in the pleadings do not justify the framing of additional issues. In the petition the petitioner has not come forward with a case of the subsequent materials having any (sic) elucidated the already existing controversy and consequently, the petition merits no consideration and deserves summary rejection. Even so, having regard to the emphatic arguments I propose to examine the questions as to the need of framing issues in a greater detail.

12-15 (His Lordship after examining the questions held that there was no need to frame an additional issue and rejected the application for the framing of additional issue. His Lordship then proceeded.)

16. I consider that the other two applications need not be considered separately as application relating to appointment of Commissioner is related to issue No. 2 and the application relating to re-call of certain witnesses is connected with issue No. 8. These applications shall be considered while discussing the related issues.

17. We now proceed to record our findings on the various issues framed in the case.

ISSUE No. 1:

18. The petitioner's case relating to this issue is contained in para 4 (a) which reads as follows:—

"The respondent No. 1 was on the date of his election as well as nomination disqualified to be chosen a Member of the Legislative Assembly under Article 191 (1) (a) of the Constitution of India as he holds the office of the Pramukh, Zila Parishad, Bhilwara, since early 1965 till the date of the presentation of this petition. As a Pramukh, the respondent No. 1 has been drawing a monthly honorarium of Rs. 300 in addition to the travelling and daily allowance as payable to him as such Pramukh."

The respondent No. 1's reply is as follows:

"That in respect of what is urged in para 4(a) it is not denied that the answering respondent was holding the office of a Zila Pramukh Bhilwara but the office of Zila Pramukh is an elected office. The election is held by an electoral college consisting of the members of Parliamentary Legislative Assembly of the district and member of Panchayat Samitis including the elected surpanchas of the various Panchayats situated in the entire area of the district Bhilwara. These Surpanchas and members are elected on adult franchise of the electors in the each Panchayat circle of all the villages situated within the District. Thus office of Zila Pramukh is neither appointed nor is removable by the Government of the State of Rajasthan and allowance which is payable to the holder of the office is paid out of consolidated fund of the Zila Parishad itself which is a body corporate possessing a perpetual existence and can sue and be sued in its own capacity and this is the juristic entity.

Consequently the respondent No. 1 does not hold any office of profit as enjoined and required by the Article 191 of the constitution of India and is not disqualified to be chosen for the said office. The plea advanced is futile and deserves to be rejected."

Arguments on issue No. 1 were heard by me on 24-10-67 and issue No. 1 was decided against the petitioner.

19. A controversy was raised after the reference of the case to the Division Bench that the arguments on issue No. 1 should be heard afresh by the Bench and a fresh decision should be recorded. The petitioner's counsel contended that the election petition stands referred to the Bench for disposal and that it has to be disposed of by the judgment of the Bench. Judgment, according to him, should include decisions of all issues and that it will not be proper that the judgment in part should be by the Bench and in part by the Single Judge. It was also submitted that Rule 59 merely contemplates the constitution of a larger Bench inter alia to decide a case

ordinarily triable by a smaller Bench and does not envisage transfer of a case to the large Bench to be taken up from a particular stage and therefore, there can be no question of a decision on an issue remaining final and conclusive before the large Bench. The respondent No. 1's answer is that the case has been referred to the Division Bench for being heard from the stage at which it was and that the decisions taken before the reference do not stand affected. He submitted that the decisions taken at one stage must remain conclusive and binding at all stages. Rule 59 of the High Court Rules for Rajasthan contemplates a reference to a larger Bench to decide a case or any question or questions of law formulated by a Bench. The word 'case' may be used in a narrow sense to imply the whole case (the election dispute case) or in a wider sense to connote a part of the case or to any state of facts requiring juridical determination. If the wider view is adopted, the decision on issue No. 1 remains a case finally decided and requires no re-opening and the Bench need only decide the controversy remaining alive at the time of the reference. If, on the other hand, a narrower view is adopted, then evidently the Bench has to apply its mind to all the controversies, arising in the case including those earlier decided. I have felt inclined to adopt the narrow view of the word "case" in the Rule and to hold that this Bench should decide the case as a whole including the controversy already decided by me; even if there be any doubt as to the right of the petitioner to claim a fresh hearing and a decision on the issue No. 1 on a proper view of the word "case". I think, there is still nothing to prevent this Bench concerned with the disposal of the whole case to reconsider and decide afresh issue No. 1.

20. Proceeding to consider issue No. 1 on merits, I may at once observe that the petitioner was Pramukh at the time of the filing of the nomination paper as also at the date of the election. It is also not in controversy that he was drawing a honorarium of Rs. 300 per month in addition to travelling and daily allowances. Clearly, he was (not?) holding office of profit under the Rajasthan State. In relation to this controversy, the arguments of the petitioner's counsel may be summarised.

In the first instance, he emphasised the principle underlying disqualification and contended that the object of introducing disqualification is to prevent conflict between the duties of the member of the Legislature as such and private interests. He pointed out that indebtedness of a member to Government is incompatible with his independence as a representative of the people, and that the Legislature felt the need to limit the control or influence of the executive Government over the

House by means of undue proportion of office and holders being members of the House. Having regard to this object, it was contended that the provisions relating to disqualification should be liberally interpreted so as to achieve the object of Legislature. He then read before me various provisions of the Rajasthan Panchayat Samitis and Zila Parishads Act relating to the constitution of the Zila Parishad; the election of the Zila Pramukh and the provisions relating to the control of the Government and inter alia made out the following points:—

(1) Zila Parishads have been constituted to exercise functions of the Government which in their absence would have been exercised by the Government.

(2) That although the Zila Pramukh is elected by an electoral college under Section 45 of the Rajasthan Panchayat Samiti and Zila Parishads Act, 1959, the Government under certain circumstance may have some hand in the constitution of the electoral college. It was pointed out.

(i) that under some circumstances under which Government role may have some significance there is a probability of some persons other than Pradhan, namely, Up-Pradhan or any other person to be elected by the Panchayat Samiti to be the member of the electoral college.

(ii) Similarly, in some cases some of the members of the electoral college, namely, the co-opted members may be nominated by the Government.

(3) That the Government have considerable financial control over the funds of the Zila Parishad.

(4) That the Government have power to recruit and lay down conditions of service of the staff of the Zila Parishad and other Panchayat institutions.

(5) That the Zila Parishad has no independent source of income which is derived from grants of the Government and donations and contributions from the Panchayat Samitis or from the public.

(6) That the Zila Pramukh is paid honorarium out of the funds of the Zila Parishad which are derived from grants of the Government and thus he is paid out of public revenue.

(7) That the Government have the power to extend the period of the Zila Parishad and thus of the Zila Pramukh and in this manner the Government can be said to have the power of temporarily nominating the Zila Pramukh for the period to be extended.

(8) That the Government have power to supersede or dissolve the Zila Parishad and thus to bring about an end of the tenure of the Zila Pramukh. This power is similar to the power of the Government to dismiss or remove a Government servant.

(9) That the Government have power to exercise power of review over the decisions of the Panchayat Samitis and to issue appropriate directions in some cases and

that the Government have the power to arbitrate in some disputes between Panchayat Samitis, Municipal Boards and Zila Parishads.

On the basis of these points it has been strongly contended that the status of the Zila Parishad has been reduced to that of a State Department and consequently, the Zila Pramukh should be considered to hold office under the State.

21. As the Supreme Court and the High Courts had occasion to consider the true scope and the implications of the expression 'under the State' it will be proper at the outset to notice these cases. The first case to be referred is *Abdul Shakur v. Rikhab Chand*, AIR 1958 SC 52. In that case the Supreme Court pointing out the distinction between the holders of office of profit under some other authority subject to the control of the Government, observed—

"No doubt the Committee of the Durgah Endowment is to be appointed by the Government of India but it is a body corporate with perpetual succession acting within the four corners of the Act. Merely because the Committee or the members of the Committee are removable by the Government of India or the Committee can make bye-laws prescribing the duties and powers of its employees cannot in our opinion convert the servants of the committees into holders of office of profit under the Government of India. The appellant is neither appointed by the Government of India nor is removable by the Government of India. The power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment from out of Government revenues are important factors in determining whether that person is holding an office of profit under the Government though payment from a source other than Government revenue is not always decisive factor."

It was further observed,

"A comparison of the different articles of the Constitution 58 (2), 66(4), 102 (1) and 191 (1)(a) dealing with membership of the State Legislatures unlike the case of the President and Vice-President of the Union the disqualification arises on account of holding an office of profit under the Government of India or the Government of the States but not if such officer is under a local or any other authority under the control of these Governments. As we have said the power of appointment and dismissal by the Government or control exercised by the Government is an important consideration which determines in favour of the person holding an office of profit under the Government, but the fact that he is not paid from out of the State revenue is by itself a neutral factor."

22. In *Guru Gobinda Baru v. Sankarl Prasad Ghosal*, AIR 1964 SC 254 the Supreme Court had another occasion to

consider the true scope and meaning of the expression "under the Government of India Act or Government of any State". From this judgment, it appears that the factors that ought to be taken into consideration in determining the question whether a person holds office of profit under the Government are these —

1. Whether Government makes the appointment to the office.

2. Whether Government has the right to remove or dismiss the holder of office;

3. Whether Government pays the remuneration;

4. What are the functions which the holder of the office performs and does he perform them for Government; and

5. Does Government exercise any control over the performance of those functions.

It was, however, emphasised that the decisive test is the test of the appointment and that all the factors need not co-exist and that each need not show subordination to the Government. It was further observed that the source from which the remuneration is paid is not from public revenue is a neutral factor not decisive of the question. It was also remarked whether stress should be laid on one fact or the other should depend on the facts of each case.

23. In *Rajmal v. Vishveshwar Nath*, AIR 1968 Raj 249 Hon'ble Jagat Narayan J. reviewed the various provisions of the Rajasthan Panchayat Samiti and Zila Parishads and the Supreme Court cases and reached a conclusion that "the office of the Pramukh of the Zila Parishad is not an office under the State Government within the meaning of Article 102 (1)(a) of the Constitution. A Pramukh no doubt holds an office under the Zila Parishad which is a local authority subject to the control of the State Government. He is disqualified for the office of the President of the Union under Article 58 (2) of the Constitution. But he is not disqualified for being chosen as a member of the Parliament or the Legislative Assembly of the State."

24. A Full Bench of the Punjab High Court in *S. Umrao Singh v. Darbara Singh*, AIR 1963 Punj and Har 450 (FB) had an occasion to consider whether the Chairman of the Panchayat Samiti holds an office under the State Government. On a consideration of the provisions of the Punjab Panchayat Samitis and Zila Parishads Act 1961 which are similar to the provisions of the Rajasthan Panchayat Samitis and Zila Parishad Act, the Full Bench held that "the Chairman of the Panchayat Samiti does not hold an office under the State Government, for the Panchayat Samiti is a local authority being a corporate body having perpetual succession and common seal and it cannot be termed either as a department of the Government or a body belonging exclusively to Government." In the Punjab case AIR 1963 Punj and Har 450 (FB) Mahajan J., who delivered the judgment of the

Court, referred to the decision in this case of AIR 1968 Raj 249 as also to the decision of the Bombay High Court in *Motisingh v. Bhaiyyalal*, AIR 1968 Bom 370. Both these decisions were in respect of the Chairman of the Zila Parishad (that is Zila Pramukh). The learned Judge after comparing the provisions of the Rajasthan Panchayat Samitis and Zila Parishad Act, 1959 and the Maharashtra Zila Parishads and Panchayat Samitis Act, 1961 observed that "the provisions of the Rajasthan and Bombay Acts are, more or less, analogous to the provisions of the Punjab Act. All that can be said for the petitioner is that the provisions in the Punjab Act, so far as Government control is concerned, are somewhat stricter. But, in our opinion, that does not make any difference so far as the question, which we have to decide, is concerned. We entirely agree with the reasoning of the Rajasthan and the Bombay High Courts, and, in our opinion the Chairman of a Panchayat Samiti does not hold an office under the State of Punjab."

25. Approaching the case in the light of the principles enunciated in the above case, I consider it necessary to indicate a few important features relating to the Zila Parishad and the Zila Pramukh under the Act:—

(1) The Zila Parishad and other Panchayat institutions have been created to give impetus to the political process of ensuring effective popular participation in the Government policy and activity at the village, tehsil and district levels and these Panchayat institutions discharge functions which would normally be discharged by the servants of the State in the absence of such institutions.

(2) That the Zila Parishad is a body corporate having perpetual succession and a common seal with powers to acquire, hold and dispose of the property, to enter into contracts and to sue or to be sued in its corporate name.

(3) That by the statute the Government have been given control over the staff of the Panchayat institutions, financial control and administrative control, but this control has been given to strike a balance between the political process described above and the Government process of efficient administration. That on account of this control the Zila Parishad cannot be said to have been reduced to a mere State Department and that the Zila Pramukh holds office under the State.

(4) That the Government have no direct hand in the appointment or removal of the Zila Pramukh; whatever indirect control the Government may have under the Statute cannot warrant an inference that the Zila Pramukh should necessarily feel indebted to the Government.

(5) That the Zila Pramukh no doubt receives honorarium from the Parishad's funds to which the Government grants

might be made but this factor is not at all decisive and cannot lend support to a contention that the Zila Pramukh holds office under the Government.

(6) That the Government can no doubt extend the term of the Zila Parishad and thus the term of the Pramukh but this extension of the term of the general body cannot be equated to the appointment of Zila Pramukh for the extended period. The Zila Pramukh has to be, in the first instance an elected person and the extension of period by the State in the exercise of statutory powers is not at all a significant factor in determining whether the office of Zila Pramukh is under the State Government.

(7) That the Government have power to supersede and dissolve the Zila Parishad but evidently the dissolution of the entire body is not the same thing as removal or dismissal of a member from the body. It is not possible to treat an indirect termination of the tenure of the Zila Pramukh in this manner as equivalent to dismissal or removal of a Government servant.

Having regard to the principles of the cases noticed above and the above features, I have no hesitation in holding that the office of the Zila Pramukh is not an office under the State. Issue No. 1 is decided against the petitioner.

26-80. [His Lordship discussed the evidence on issues 2 to 8 and held against the petitioner. In the course of discussing issue No. 9, His Lordship proceeded:]

81. The counsel for the petitioner tried to make some points from circumstances appearing on the records in an attempt to secure a finding on this issue in his favour. Mr. Ram Prasad Laddha (NAW/3) when cross-examined by the petitioner stated:

"I had not laid down the foundation stone laying ceremony of the Spinning Mill at Gulabpura, but before such ceremony was performed by Shri Sukhadia, I, of course, had attended some ceremony in connection with the Mill on an earlier occasion. That was a sort of 'Mangal Kamna' ceremony. On that occasion a 'Havan' was performed, but no foundation stone was laid. The earlier ceremony was performed at the very site where subsequently foundation stone was laid by Shri Mohan Lal Sukhadia. I do not remember the date when I performed the ceremony." [The witness was reminded that that ceremony was performed on 26th January, 1967. Even thereafter, the witness did not give any affirmative answer.] It was pointed out that on the occasion of the foundation stone laying ceremony several Sarpachas had been invited. It was also suggested that there was a circular by the Prime Minister to all the Chief Ministers prohibiting them to participate in State functions where Government finances are involved.

Shri Mohan Lal Sukhadia was questioned on this point and he stated, "As far as I remember the Prime Minister of India issued a circular to the various Chief Ministers on the eve of the 1967 elections advising them not to refer to election matters in State functions." The circular has not been brought on record and it cannot be said whether the circular was as suggested by the counsel for the petitioner or was of the nature indicated in the statements of Shri Mohan Lal Sukhadia. It was submitted that the two ceremonies in a very short period in disregard of the Prime Minister's circular cannot but have been arranged with an eye on the election prospects of the congress party and that situations were created to avail of the opportunities to contact voters. This it was argued, was evidently an unhealthy and an evil practice. Continuing further, the counsel submitted that Shri Ram Prasad Laddha stated that Shri Mohan Lal Sukhadia immediately after the function was over left for Udaipur. It was suggested that this wrong statement was made by him to suggest that Shri Mohan Lal Sukhadia could have no occasion to contact the Directors after the meeting and to make any suggestions to them in connection with the election and thus to rebut the petitioner's evidence. It was pointed out that his statement is belied by the statement of Shri Narain Das Mehta (NAW/3, 4, 5/7) who stated that after the meeting a tea party was arranged in Gandhi Vidyalaya. Shri Hamendra Singh (NAW/8) also refers to tea party and adds that at the meeting Shri Mohan Lal Sukhadia asked him to support the congress and the respondent No. 1. Some photographs have also been brought on record to prove the presence of Shri Hamendra Singh in the tea party. This statement of Shri Ram Prasad Laddha about the departure of Shri Mohan Lal Sukhadia, it was submitted, has been made only with some kind of consciousness of the reference to the election matters by him. It was further stated that having regard to the statement of Shri Hamendra Singh it appears more probable that Shri Mohan Lal Sukhadia must have referred to the election matters in his speech and that there was an attempt of an indirect bargain to secure votes. Reliance was placed in this connection upon the observations of the Supreme Court in *Ghasiram v. Dal Singh*, AIR 1968 SC 1191. I regret, I cannot accept the petitioner's submission. Proceeding to give reasons, I must state that in the first instance the petitioner did not come forward with a case as now sought to be established. He did not refer to the earlier ceremony by Shri Ram Prasad Laddha in connection with the Spinning Mill. He did not make any reference to the circular of the Prime Minister. The respondent had no notice of the case now sought to be developed and it will be hardly proper to take the respondent No. 1 by surprise.

Secondly, the circular has not been brought on record and it is not possible to have any correct idea of the contents of the circular. The statement of Shri Ram Prasad Laddha is capable of being construed as to imply that Shri Mohan Lal Sukhadia immediately left the scene of the occurrence for Udaipur but it does not necessarily mean a denial of the fact that Shri Mohan Lal Sukhadia and Shri Ram Prasad Laddha had tea at some other place. He was not specifically questioned on that point. The inaccuracy in the statement might have also been on account of lapse of memory but it is not possible to characterise the statement as a deliberate falsehood so as to justify any inference against the respondent No. 1. I do not think that the petitioner had succeeded in establishing the evil practice much less the corrupt practice. The issue is, therefore, decided against the petitioner.

82-162. (His Lordship held against the petitioner on the rest of the issues and proceeded.)

163. The trial of the election petition having been completed, it is now unnecessary to decide whether the respondents Nos. 3, to 5 are not necessary parties.

164. All the issues having been decided against the petitioner, the petition cannot succeed and I would dismiss it with costs to respondent No. 1. The other respondents will bear their own costs.

165. KAN SINGH, J.: I have had the advantage of going through the judgment prepared by my learned brother and I concur in the result reached by him that the election petition should be dismissed. However, in deference to the protracted arguments of learned counsel lasting over two weeks I will like to make a few observations of my own.

166-167. The main grounds of challenge against the election of the respondent No. 1, Shri Nahar, as a member of the Rajasthan Legislative Assembly can be broadly put under three heads.

1. That, Shri Nahar being a Pramukh was a holder of an office of profit under the Government and was consequently, disqualified under Article 191 (1) (a) of the Constitution from seeking election to the State Assembly.

2. That, Shri Nahar had committed various corrupt practices such as,

(i) giving or offering bribe to various persons for the obtaining of votes,

(ii) be or his agents exercising undue influence on the Government servants for obtaining or procuring their assistance for the election campaign and generally the utilisation of the State machinery at the behest of certain Ministers to brighten the prospects of Shri Nahar for his election.

(iii) Shri Nahar himself abusing his position as a Pramukh and obtaining funds during the election campaign for the famine relief works.

3. That the ballot papers were tampered with and the sanctity of the ballot boxes was thereby affected so as to call for the setting aside of the election.

168. The first point was subject matter of issue No. 1 set out by my learned brother in the earlier part of his judgment. It was contended by the learned counsel for the respondent No. 1 that this issue having been decided by my learned brother before the election petition came to be placed before the present Bench, it is not open to us to reconsider this issue. My learned brother has come to the conclusion that there was nothing to prevent this Bench from reconsidering issue No. 1. However, I do not wish to express any opinion on this point but even apart from it, I have considered the matter assuming for the sake of argument that it was open to this Bench to reconsider the issue.

169. Article 191 which is the counterpart of Article 102 of the Constitution in relation to State Assembly *inter alia* enacts that a person shall be disqualified for being chosen as a member of the Assembly if he holds any office of profit under the Government of India or the Government of any State other than an office declared by Parliament by law not to disqualify its holder. The issue that was framed contains the words — "Office of profit under the State". The sophisticated controversy regarding the difference between the term "State" and the term "Government" need not detain me because Shri Bajranglal learned counsel for the petitioner, has himself submitted that they are the same. For obvious reasons, it is unnecessary to enter into this subtlety of distinction.

170. The same question had arisen before a learned single Judge of this Court in another election petition AIR 1968 Raj 249 and Jagat Narayan J. who decided the case, on consideration of the relevant provisions of the Rajasthan Panchayat Samitis and Zila Parishad Act, 1959 had come to the conclusion that a Pramukh though a holder of the office of profit does not hold the office under the Government within the meaning of Article 191 of the Constitution. The learned Judge had also referred to a number of cases including a decision of their Lordships of the Supreme Court in *Guru Gobinda v. Shankari Prasad* AIR 1964 SC 254. My learned brother has gone into the matter and has come to the same conclusion as Jagat Narayan J. He has already copiously quoted from the relevant decisions of the Supreme Court. I do not think, I can shed any extra light on the problem or give any new dimension to the reasoning that has prevailed with Jagat Narayan J. or with my learned brother. The five interlocking principles laid down by their Lordships and which should guide the consideration of the question are—

1) Whether Government makes the appointment to the office;

2) Whether the Government has the right to remove or dismiss the holder of office;

3) Whether the Government pays the remuneration;

4) Whether the holder of the office performs his function for the Government; and

5) Whether the Government exercises any control over the performance of those functions.

It was pointed out by their Lordships that all these features need not co-exist in a given case for showing subordination of office to the Government and further, whether the stress would be laid on one factor in preference to the other, will depend upon the facts of each case. The ordinary dictionary meaning of the term "under" *inter alia* is "to be in a subject or subordinate condition" (Webster New International Dictionary Vol. II page 2434). The term "control" is used in a very wide sense and covers a number of institutions and methods used by the legislature for ensuring observance of the law made by it. As a result of the Rajasthan Panchayat Samitis and Zila Parishads Act democratic decentralised administration at the Block and District level was brought about. The Rajasthan Panchayat Act which existed on the Statute Book was also amended in the light of provisions of the Rajasthan Panchayat Samitis & Zila Parishad Act, 1959. Reading the two together it appears that a three-tier system of district administration in the sphere of Local Self Government was ushered in. At the bottom was the Gram Panchayat which covered a village or a group of villages. Certain functions were assigned to the Gram Panchayat which was the smallest cell of democracy. Above the Gram Panchayat were the Panchayat Samitis at the Block level and the constituent territorial units were the Panchayats. Sarpanchas were *ex officio* members of Panchayat Samitis and there were certain other members in the Panchayat Samitis. Then, at the District level was the Zila Parishad and the pattern of its composition was, in several respects, akin to that of the Panchayat Samiti in that the Pradhans of the Panchayat Samitis were made the members of the Zila Parishads together with some other persons. The Pramukhs were elected by an electoral college and could be removed by a vote of no confidence by the members of the Zila Parishad. They were to be remunerated by a honorarium to be paid out of the Zila Parishad funds. Zila Parishads were corporate bodies capable of holding properties and of suing and being sued in their own name and their succession was perpetual. Holder of such an office, therefore, does not fulfil the first three tests laid down in *Guru Gobinda's* case, AIR 1964 SC 254.

171. The next question is whether the holder of the office performs any functions for the Government. The functions

that a Pramukh has to perform are laid down by the Statute itself (viz. sec. 57) and they are obviously for the purposes of the Zila Parishad and not for the Government.

172. In the circumstances, learned counsel for the petitioner stressed the last and the fifth test. He referred to a number of sections in the Act for showing that the Governmental control was so thorough and complete that there was full subordination of the Pramukh and consequently, he has to be taken to be a holder of an office under the Government. I am afraid, such a far-reaching conclusion is not warranted.

My learned brother has referred to in detail the various sections. These were also referred by Jagat Narayan J. in Ramal's case, AIR 1968 Raj. 249. What is remarkable is that the control, if any, is institutional and not personal. The legislators had created the autonomous body, namely Zila Parishad for discharging certain functions and for ensuring that it did not overstep the boundaries of its authority—the legislature has provided a supervisory or a controlling authority which would ensure that the autonomous body, created by the statute does not overstep its boundaries and within the area assigned to it conducts itself according to law. It is further remarkable that while the Government might remove a Sarpanch of a Gram Panchayat or the Panchas thereof, no disciplinary powers similar to that have been conferred on the Government regarding a Pramukh. In other words, the power of removal of a Pramukh has not been vested in the Government though under the stated conditions such a power is exercisable in respect of Sarpancha or any of the Panchas of the Gram Panchayat. I am showing this only by way of comparison but not with a view to entering into the question whether Sarpanchas or Panchas are holders of office of profit under the Government. Whatever powers are exercisable by the Government regarding the Zila Parishad are, to my mind on institutional basis. From the Act it cannot be spelt out that the Government have the powers to dictate how a Pramukh should exercise his functions. The main functions of the Pramukh, besides being the executive head of the Zila Parishad, is to co-ordinate the various activities of the Panchayat Samitis in the District. Regarding this, the Government have not been assigned any role.

172A. Learned counsel also stressed that the funds for the Zila Parishad are provided by the Government. This is only partially correct. There are two sources of finances provided for the Zila Parishads. One is by Government grants and the second is by donations by the Panchayat Samitis (vide section 63 of the Panchayat Samitis and Zila Parishad Act). The Government have no hand whatsoever regarding the second source. Apart from this, when the funds are vested in the Zila Parishad

they cease to be part of the consolidated fund of the State after the grant and, therefore, it cannot be predicated that the Pramukh is paid either out of Government funds or the Government exercises any control over a Pramukh personally. All other aspects of the matter have been fully dealt with by my learned brother and as I have already observed, I cannot shed any extra light on the consideration of the question. I therefore, agree with my learned brother that the decision of the issue has to be against the petitioner.

173. While the evidence was being read to us my mind came to be exercised over three incidents and, therefore, I would like to concentrate on certain features of those incidents. The first was the function arranged for the foundation laying ceremony of Jawasia Bandh on 21-12-66. The second was relating to the foundation ceremony of the Spinning Mill at Gulabpura on 30th January, 1967, and the third was about Shri Nahar's writing a number of letters for allotment of funds in connection with famine relief works while he was touring his constituency in connection with his election campaign. Before dealing with these various features, however, I would like to refer to the two recent decisions of the Supreme Court in which the conceptual difference between what is corrupt practice and what is evil practice has been pointed out. Their Lordships also pointed out as to when an evil practice could be regarded as a corrupt practice for an election. The first case is AIR 1968 SC 1191. In that case the election petitioner challenged the election of the returned candidate who was a Minister for Irrigation and Power in Haryana till the result of the election. The election was challenged on the grounds of certain corrupt practices and the gravamen of the charge was that certain discretionary funds were placed at his disposal to bribe the voters and he used his position to favour some villages with a view to securing support for his candidature. It appears that by a Government resolution certain sums of money were placed at the disposal of the Ministers for distribution as discretionary grants and the money was required to be spent in three months' time. These discretionary grants were part of the general scheme to better community development projects and to remove the immediate grievances of the public. There was evidence to show that the respondent had promised certain discretionary grants to Gram Panchayats and public at large for community development in his own constituency and had actually distributed the money not among the voters directly but had given it to the Panchayats concerned. There was, however no evidence to prove that the returned candidate had bargained directly or indirectly for votes. Their Lordships examined a number of cases and held—

1. That the law requires that a corrupt practice involving bribery must be fully

established. The evidence must show clearly that the promise or gift directly or indirectly was made to an elector to vote or refrain from voting at an election.

2. The position of a Minister is difficult. It is obvious that he cannot cease to function when his election is due. He must, of necessity, attend to the grievances, otherwise he must fail. He must improve the image of his administration before the public. If every one of his official acts done bona fide is to be construed against him and an ulterior motive is spelt out of them, the administration must necessarily come to a standstill."

Having held this, their Lordships made very weighty observations in the following words:

"Election is something which must be conducted fairly. To arrange to spend money on the eve of elections in different constituencies, although for general public good, is when all is said and done an evil practice, even if it may not be corrupt practice. The dividing line between an evil practice and a corrupt practice is a very thin one. It should be understood that energy to do public good should be used not on the eve of elections but much earlier and that even a slightest evidence might change this evil practice into corrupt practice. Payments from discretionary grants on the eve of elections should be avoided."

The position was reiterated in *Mrs. Om Prabha Jain v. Abnash Chand*, AIR 1968 SC 1083.

174-187. It is in the light of what their Lordships were pleased to lay down that I may proceed to deal with the incidents in question.

(His Lordship discussed the evidence and concluded).

188. In the result I hold that the election petition is fit to be dismissed as already indicated at the outset with costs.

BY THE COURT

189. In the result, the election petition is dismissed with costs to respondent No. 1. Other respondents will bear their own costs.

190. The Election Commission and the Speaker Rajasthan Legislative Assembly shall be informed of the result of this election petition forthwith, and authenticated copies of the judgment shall be forwarded to them as soon as they are ready.

Petition dismissed.

AIR 1970 RAJASTHAN 145 (V 57 C 33)

B. P. BERI, J.

Girdharilal and others, Petitioners v. Lalchand and others, Non Petitioners.

Criminal Revn. Appln. No. 113 of 1969, D/- 29-4-1969.

KM/BN/F463/69/RSK/D

(A) Criminal P. C. (1898), S. 197 — Sanction to prosecute — Court cannot even take cognizance of case without previous sanction : AIR 1948 PC 82 and AIR 1966 SC 220, Rel. on; AIR 1967 All 519, Dis-sent. from. (Para 8)

(B) Criminal P. C. (1898), S. 197 — Plea of want of sanction — It can be raised at any stage of case — Its decision would depend on availability of adequate material on record enabling court to effectively adjudicate it. AIR 1967 All 519 and AIR 1956 SC 44 Rel. on. (Para 8)

(C) Criminal P. C. (1898), S. 197 — "Acting or purporting to act in discharge of official duty" — Meaning of — Even if action is somewhat beyond scope of official duty, it can be protected if it is done under colour of office — Municipal Administrator and Municipal Commissioner ordering collection of refuse but omitting to cause its removal from road — Held both acts were directly related to duties of concerned officers and they could not be prosecuted without sanction under S. 197. AIR 1965 Punj 192 Rel. on. (Para 14)

(D) Penal Code (1860), S. 11 — Municipal Corporation — It can be prosecuted for offences which are only punishable with fine, for imprisonment of Municipal Council is out of question. (Para 16)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 752 (V 54) =
1967 Cri LJ 656, Bakhshish Singh v. State of Punjab 4, 11
(1967) AIR 1967 SC 776 (V 54) =
1967, Cri LJ 665, Arulswami v. State of Madras 4, 11
(1967) AIR 1967 All 519 (V 54) =
ILR (1967) 2 All 11, Ram Nath v. Salig Ram 4, 8
(1966) AIR 1966 SC 220 (V 53) =
1966 Cri LJ 179, Baijnath v. State of Madhya Pradesh 4, 8, 11
(1965) AIR 1965 Punj 192 (V 52) =
1965 (1) Cri LJ 585, Giani Ajmer Singh v. Ranjit Singh 4, 12
(1964) AIR 1964 SC 269 (V 51) =
1964 (1) Cri LJ 161, Nagraj v. State of Mysore 4
(1964) 1964 (1) Cri LJ 126 = 1963 Raj LW 293, Laduram v. State 4, 13
(1962) AIR 1962 Bom 198 (V 49) =
1962 (2) Cri LJ 320, Capt. Shankarrao v. Burjor D. Engineer 4, 12
(1962) 1962 (1) Cri LJ 192 = 1962 Raj LW 148, Beharilal v. Moola 4, 13
(1957) AIR 1957 SC 453 (V 44) =
1957 Cri LJ 575, Om Prakash v. State of U. P. 4, 11
(1956) AIR 1956 SC 44 (V 43) =
1956 Cri LJ 140, Matajog Dobey v. H. C. Bhari 3, 8
(1955) AIR 1955 SC 287 (V 42) =
1955 SCR 1177, Ramayya v. State of Bombay 3, 11
(1951) AIR 1951 SC 204 (V 38) =
52 Cri LJ 763, Hariprasada Rao v. The State 3

- (1948) AIR 1948 PC 82 (V 35) =
 49 Cri LJ 261, Gokulchand
 Dwarkadas v. The King 8
 (1947) AIR 1947 PC 135 (V 34) =
 ILR 26 Pat 460, Srinivas Mall v.
 Emperor 3, 15
 (1927) AIR 1927 Mad 566 (V 14) =
 ILR 50 Mad 754 = 28 Cri LJ
 539, Kamisetty Raja Rao v. T. Rama-
 swamy 4, 13
 (1893) Criminal Revn No. 507 of
 1893 16

M. M. Singhvi, for Petitioners; Ganpat Singh, for Non-Petitioner No. 1 and H. N. Kalla, for the State.

ORDER: This is an application under sections 439 and 561A of the Code of Criminal Procedure directed against the order of the Additional Munsiff-Magistrate No. 2, Jodhpur dated the 25th of July, 1963 and upheld by the learned Sessions Judge, Jodhpur by his order of the 15th March, 1969.

2. Lalchand instituted a complaint against Cirdharilal Mahajan, Administrator, Municipal Council, Jodhpur, Ramchander Mathur, Commissioner, Municipal Council, Jodhpur, Maghraj Agrawal, Health Officer, Municipal Council, Jodhpur, Laxman Singh Panwar, Sanitary Inspector, Hansraj, Jamaradar and the Municipal Council, Jodhpur, under Sections 268, 278 and 290 of the Indian Penal Code before the Additional Munsiff-Magistrate No. 2, Jodhpur. The complainant alleged that he runs a shop in Manak Chowk, Jodhpur. On the other side of the road abutting his shop there is Moti Bai's temple. The Municipal Council, Jodhpur gets refuse collected in front of the shop of the complainant and thereby obstructs more than half the road and renders the atmosphere noxious to the health of the public and the residents of the locality. The heaps so collected emit offensive odour to the annoyance of the public. Because it blocks the passage on the road it causes common injury, danger and annoyance to the people in general and those who dwell or occupy properties in the neighbourhood in particular. The refuse is being collected every day in the hours between 7 and 8 A.M. and is left lying there upto 4 P.M. and some times even for 2 or 3 days consecutively. This public nuisance, alleges the complainant, is created by the acts of the petitioners before me and notwithstanding the fact that they were asked to remove it they had neglected to do so and, therefore, the complaint before a criminal court had to be instituted. The learned Magistrate registered a case and issued processes for the attendance of the accused persons. The accused persons did not appear before the Magistrate but moved an application by way of revision before the learned Sessions Judge, Jodhpur, who has expressed the opinion that the question whether the prosecution of the petitioners Nos. 1 and 2 required sanction under section 197 of the Code

of Criminal Procedure could only be decided after some evidence on behalf of the complainant had been recorded. For, added the learned Sessions Judge, it was not a part of the duty of the Municipal council to create nuisance, in fact its obligation was to the contrary. He dismissed the revision application. The petitioners are still dissatisfied and they have come up before me.

3. Mr. Singhvi appearing for the petitioners argued that the petitioners Nos. 1 and 2 are only removable by the State Government and they cannot be prosecuted for what is alleged to be their official duty without the permission of the State Government as envisaged by section 197 of the Code of Criminal Procedure. He placed reliance on *Ramayya v. State of Bombay*, AIR 1955 SC 267 and *Matajog Dobey v. H. C. Bhari*, AIR 1958 SC 44. The second submission of the learned counsel is that the petitioners Nos. 3, 4 and 5 cannot be prosecuted because on the complainant's own showing they are being accused of what is clearly a vicarious liability, which is not possible unless the statute itself so authorises. Reliance has been placed on *Srinivas Mall v. Emperor*, AIR 1947 PC 135, and *Hariprasada Rao v. The State*, AIR 1951 SC 204.

4. Mr. Ganpat Singh appearing on behalf of the complainant contended that the creation of a nuisance has no relation to the public duties discharged by the officers Nos. 1 and 2 and therefore no sanction under section 197, Cr. P. C. is necessary. He placed reliance on *Ram Nath v. Saligram*, AIR 1967 All 519; *Nagraj v. State of Mysore*, AIR 1964 SC 269; *Om Prakash v. State of U.P.*, AIR 1957 SC 458; *Bajinath v. State of M.P.*, AIR 1966 SC 220; *Bakshish Singh v. State of Punjab*, AIR 1967 SC 752; *Arulswami v. State of Madras*, AIR 1967 SC 776; *Capt. Shankarrao v. Burjor D. Engineer*, AIR 1962 Bom 196; *Giani Ajmer Singh v. Ranjit Singh*, AIR 1965 Punj 192; *Kamisetty Raja Rao v. T. Ramaswamy*, ILR 50 Mad 754 = (AIR 1927 Mad 566); *Ladhuram v. State*, 1963 Raj LW 293 = (1964 (1) Cri LJ 126); *Beharilal v. Moola*, 1962 Raj LW 148 = (1962 (1) Cri LJ 192). He drew my pointed attention to section 93 (c), (d) and (g) of the Rajasthan Municipalities Act emphasising the importance of the duties of the Municipal Council and therefore the creation of a nuisance as alleged in the complaint has no relation to the acts and omissions complained by the complainant and no sanction was necessary. The petitioners Nos. 3, 4 and 5 are answerable as abettors because they aided in bringing about a public nuisance by neglecting to do their obvious duty.

5. Learned Government counsel Mr. Kalla submitted that a Municipal Council and not officers are answerable for a criminal charge and he placed reliance on *Weir's Law of Offences and Criminal Pro-*

cedure," page 243—Criminal Revision Case No. 507 of 1893.

6. All the learned counsel appearing before me are agreed that at this stage of the case it is on the assumption that the contents of the complaint are correct that the questions aforesaid have to be answered.

7. The first question which calls for determination is: Whether it is the proper stage, in the circumstances of this case, for the accused to raise an objection regarding lack of sanction under section 197 of the Code of Criminal Procedure?

8. The learned Sessions Judge while rejecting the application of the accused persons observed that it was no stage on which the question of want of sanction could be decided. Supporting this conclusion Mr. Ganpat Singh argued that after the accused have appeared before the Magistrate and the evidence has been led and if it transpired therefrom that the purported act or omission on the part of the accused persons is related to the discharge of their public duty then alone the question of sanction could arise. He particularly relied on AIR 1967 All 519. The learned Judge in the Allahabad case observed that the argument advocated by the State Government before him that the Magistrate had no jurisdiction to entertain the complaint against the Opposite Party without a formal sanction of the State Government under S. 197 of the Code of Criminal Procedure is unfounded. Relying on AIR 1956 SC 44, the learned Judge held that the necessity for a sanction may reveal itself in the course of the progress of the case. This decision seems to lay down two propositions. The first is that the Magistrate is competent to entertain a complaint even without a sanction; and the second is that if in the course of the proceedings it is revealed that a sanction was necessary the question could be examined. I have no difficulty in agreeing with the latter part of the proposition. In fact, that is also the view of the Supreme Court in Matajog Dobey's case, AIR 1956 SC 44. So far as the first proposition is concerned, with respect, I am unable to subscribe to it without qualifications. Section 197 of the Code of Criminal Procedure provides that "no Court shall take cognizance of such an offence except with the previous sanction," of the authorities indicated therein if any of the officers mentioned in the section is accused of an offence "alleged to have been committed by him while acting or purporting to act in the discharge of his official duty". If the alleged acts are of the nature indicated in the section no Court can even take cognizance of the alleged offence on the plain language of the section. In this context, on the subject of sanction, I could recall the decision of the Privy Council in Gokulehand Dwarkadas Morarka v. The King, AIR 1948 PC 82, wherein their Lordships of the Privy Council expressed the opinion:

"The sanction to prosecute is an important matter; it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction." Their Lordships of the Supreme Court in AIR 1966 SC 220 have observed in para 4 of the Judgment:

"It is clear from the language of S. 197 that the sanction has to be taken before cognizance has been taken."

When even at the time of taking cognizance lack of sanction has to be considered, it is open to an accused person when he has been notified of the fact that cognizance has been taken to raise the plea of lack of sanction. It is correct that there may be cases wherein at initial stages such a question may not admit of a clear answer. It may be remembered that it is not merely the suggestion of the accused that is enough, as pointed out by their Lordships. In my opinion, therefore, while it is open to an accused person to raise the plea of want of a sanction at any stage of the case but its decision would be dependent on the availability of adequate material on record enabling a Court to effectively adjudicate it.

9. The next question which arises for my consideration is whether the case before me is one in which the objection could be answered, without waiting for evidence, on the assumption that the allegations of the complaint are correct. Para 9 of the complaint says that a public nuisance comes into being because the Municipal Council and its officers collect the refuse and neglect to remove it from a public highway. It causes obstruction and annoyance on that account and also because it emits injurious and abnoxious odours. It makes a two-pronged attack of commission and omission.

10. Then the question immediately emerges for answer is: Whether such acts or omissions require a sanction before the Court could take cognizance of the offence against the accused Nos. 2 and 6, namely, Girdharilal Mahajan and Ramchander are prosecuted? It is not disputed that the Administrator and the Commissioner, who are accused Nos. 2 and 6, have been appointed by the State Government and are consequently removable by the State Government and the provisions of Section 197, Cr. P. C. apply to them. All that remains to be examined is whether the acts and/or omissions attributed to these two persons fall within the circumference of the expression "while acting or purporting to act in the discharge of his official duty".

11. Before I answer this question it will be perhaps profitable to examine the long line of decisions cited before me to ascertain the principles so far crystallised on this point. In AIR 1955 SC 257, their Lordships of the Supreme Court have observed:

"Now an offence seldom consists of a single act. It is usually composed of several

elements and, as a rule, a whole series of acts must be proved before it can be established....

Therefore, the act complained of, namely, the disposal, could not have been done in any other way."

Laying emphasis on the distinction between acting or purporting to act in the discharge of his official duty their Lordships of the Supreme Court have said that these two expressions only indicate the line of demarcation between two kinds of intentions. The act nevertheless remains the same and their Lordships have added:

"Now it is obvious that if S. 197, Cr. P.C. if construed too narrowly it can never be applied, for of course it is no part of an official's duty to commit an offence and never can be."

In AIR 1957 SC 458 their Lordships of the Supreme Court have observed that "no sanction is necessary to prosecute the public servant as he does not normally act in his capacity as a public servant when committing criminal breach of trust". Their Lordships of the Supreme Court in Baijnath's case, AIR 1968 SC 220, have quoted Lord Simmonds wherein is observed:

"The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office."

AIR 1967 SC 752 is a case of false claim of work executed, which was not carried out. It was observed that the accused was not a public servant nor did he abet in the discharge of his public duty. In AIR 1967 SC 776, it was observed that sanction under Section 197 is not necessary to prosecute public servant, if act complained against him is one which is entirely unconnected with his official duty.

12. I might now notice a few of the High Court judgments cited before me. In AIR 1962 Bom 193, a decision of the Bombay High Court, it is held that an act includes an illegal omission. This case arose out of the tragic floods in the City of Poona due to the bursting of Panshet and Khadakwasla Dams. The Commissioner, Collector and District Magistrate, District Superintendent of Police, etc., came to be prosecuted as they failed to protect the life and property of the populace. It was held that a sanction for their prosecution was necessary for their alleged illegal omissions. In AIR 1965 Punj 192, the learned Judges of the Punjab High Court relying on the Supreme Court cases have observed:

"To fall within the purview of the protection afforded by S. 197, the act must bear such reasonable connection with the discharge of the official duty that the public servant charged could by a reasonable but not a pretended or fanciful justification, claim that he did the act in the course of the performance of his duty. Since the question of the necessity of sanction has to be decided judicially by the Court, it has

to proceed on the material properly and lawfully placed before it by applying its judicial mind. If the allegations made in the complaint do not attract the protection of S. 197 or S. 132, Cr. P. C., then the Court cannot throw out the complaint for want of sanction...."

13. Mr. Ganpat Singh cited before me the decision of the Madras High Court in ILR 50 Mad 754 = (AIR 1927 Mad 566), which laid down that an act arising out of abuse of official position calls for no sanction under Section 197 of the Code of Criminal Procedure. In 1963 Raj LW 293 = (1964 (1) Cri LJ 126), Bhargava, J., divided the action of receiving the money and not depositing as two independent parts and as the dishonest misappropriation was no part of the duty, no sanction therefore was necessary. In 1962 Raj LW 148 = (1962 (1) Cri LJ 192), Sarjoo Prosad, C.J., observed that if in the discharge of official duty the persons responsible have done something which had little or no connection whatsoever with the duties which he was officially required to perform and which he could as well do as a private individual no sanction was necessary. The mere fact that an occasion was provided for the commission of the offence on account of his performance of some official duty will not entitle him to any such protection.

14. For the purposes of the case before me all that I have to decide is whether the act or omission alleged against accused Nos. 2 and 6, namely, Girdharilal Mahajan and Ramchander is reasonably related to the discharge of their duty or omission of the discharge of their duty. I agree with the observations of the Punjab High Court that it is not a pretended or fanciful justification that should be taken into account but a connection close enough to bring the act or omission within the ambit of the official act done or purported to be done. The Legislature has advisably used two expressions "acting" or "purporting to act", the latter expression means that even if the action may be somewhat beyond the scope of official duty, but was done under the colour of office, the protection can in a given case be considered. Having regard to these principles, in my opinion, the accused Nos. 2 and 6, namely, Girdharilal Mahajan and Ramchander, are alleged to have ordered the collection of refuse and omitted to cause its removal from the road and they have thereby committed the public nuisance. Both these are directly related to their duties as Municipal Administrator and the Municipal Commissioner and they cannot in my opinion be prosecuted without the sanction under Section 197, Cr. P. C. and, therefore, the case against them cannot be proceeded with.

15. The next argument of the learned counsel is that the accused Nos. 3, 4 and 5 are being prosecuted for their vicarious liability. The contention is that unless the statute authorises a person to be vicariously

responsible for the criminal act or omission no person can be prosecuted therefor. Reliance is placed on Srinivas Mall's case, AIR 1947 PC 135 of the Privy Council. The proposition is well settled. But Mr. Ganpat Singh's argument is that the act or omission on the part of these three persons is directly concerned in the creation of the nuisance and its non-removal and, therefore, they are aiding and assisting in the commission of the offence of public nuisance and are abettors. This indeed is a matter which will have to be examined whether they have neglected, or if so, intentionally and thereby created an obstruction and caused discomfort to the people living in that locality or not? In my opinion, therefore, it is premature to express any opinion on this aspect of the matter.

16. Then remains the interesting question whether the Municipal Council, a corporate body, can be prosecuted as an accused for doing or omitting to do something? Mr. Kalla, learned Government counsel, drew my attention to Weir's "Law of Offences and Criminal Procedure", Vol. I, 4th Edn., p. 243 — Criminal Revn. Case No. 507, of 1893 — where it was decided that the Chairman, being a public servant, was not liable to prosecution without the sanction of Government under Section 197 of the Code of Criminal Procedure, and if any prosecution was to be instituted, it should be against the Municipal Corporation. Russell on Crime, Vol. I, 12th Edn., p. 96, summarises the position thus:

"At common law a corporation aggregate has been regarded as in the nature of things incapable of treason, felonies or misdemeanours involving personal violence, such as riots or assaults, or of perjury, or it would seem offences for which the only penalty is imprisonment or corporal punishment.

It would seem that the common law rule affords a good guide as to the intention of a statute. The modern tendency of the Courts, however, has been towards widening the scope within which criminal proceedings can be brought against institutions which have become so prominent a feature of every-day affairs, and the point is being reached where what is called for is a comprehensive statement of principles formulated to meet the needs of modern life in granting the fullest possible protection of a criminal law to persons exposed to the action of the many powerful associations which surrounded them. At common law, corporations are now indictable for nuisance and breaches of public duty, whether existing by the common law or created by statute, and whether the breach of duty is by misfeasance or non-feasance. Corporations are often indicted for non-repair or illegal obstruction of highways, and it would seem that a corporation aggregate is indictable for defamatory libel."

On this principle *prima facie* it seems that the Municipal Corporation can be prosecuted

for offences which are only punishable with fine, for, in the very nature of things, imprisonment of a Municipal Council is out of question.

17. With these observations the revision succeeds in part. Accused Nos. 2 and 6, namely, Girdharilal Mahajan and Ramchander stand protected under Section 197, Cr. P. C., and proceedings against them without sanction of the State Government are hereby quashed. The complaint will otherwise proceed against the rest of the accused.

Revision partly allowed.

AIR 1970 RAJASTHAN 149 (V 57 C 34)
D. M. BHANDARI AND V. P. TYAGI, JJ.

Kalusingh and others, Appellants v. Transport Appellate Tribunal and others, Respondents.

Civil Writ Petns. Nos. 465, 378, 492 and Special Appeal No. 21 of 1967, D/-9-10-1968.

(A) Motor Vehicles Act (1939), Sections 57 (8), 48 (3) (ii) — Variation of conditions — Application for increasing number of services — No maximum number of daily services mentioned in applicant's permit — Application could not be treated as one for varying conditions of permit so as to attract S. 57 (8). AIR 1967 Raj 269, Reversed.

Section 57 of the Motor Vehicles Act, 1939, will not be attracted unless in the permit a condition has been attached laying down the maximum number of services proposed to be provided in relation to the route. The Legislature has chosen to treat an application to vary the condition of any permit only when it is either for the inclusion of a new route or it is for increasing the number of services above the specified maximum. In the case of a new route, the permit-holder is seeking to include in his route another length of route which was not included in his permit. Obviously, there is good reason to treat such an application as an application for the grant of a new permit. But the application for increase in the number of services cannot be deemed to be an application for varying the conditions of permits by increasing the number of services above the specified maximum when no maximum number of daily services is mentioned in the applicant's permit. (Paras 12, 13)

This view is fortified by S. 48 (3) (ii) of the Act. The word "specified" appearing in that section cannot be ignored which means that there must be a specific mention in the permit of the maximum number of services. AIR 1967, Raj 269, Reversed.

(Para 13)

(B) Motor Vehicles Act (1939), S. 57 (8) — New permit — Application for allowing few more trips by same vehicle — Condi-

tion laying down maximum number of services in relation to route not attached to applicant's permit — Application cannot be treated as one for new permit.

(Para 14)

(C) Motor Vehicles Act (1939), S. 48 (as amended by Act 199 of 1956)—Fixation of time-table — Regional Transport Authority is not acting in quasi-judicial manner. AIR 1952 Mad 276 and AIR 1962 Madh Pra 7, Dissent. from — (Constitution of India, Art. 226).

The words "approved time-table" appearing in S. 48 (3)(iv) of the Motor Vehicles Act, 1939, signify that time-table is to be approved by the Regional Transport Authority. But neither these words nor any other provision in the Act or the Rules lay down the procedure for drawing up a time-table. In the matter of fixation of time-table, the Regional Transport Authority is not acting in a quasi-judicial manner for the following reasons:

Firstly, the main determining test for ascertaining whether an act authorised by statute is quasi-judicial or administrative act is whether the statute has expressly or impliedly imposed on the statutory body to act judicially. In the matter of drawing up the time-table no statutory duty has been cast on the Regional Transport Authority to act judicially. AIR 1959 SC 107, Rel. on.

Secondly, the provisions of the Motor Vehicle Act show that in the matter of approving a time-table, the Regional Transport Authority is merely regulating the running of the vehicles on a particular route. As against this, the only circumstance which has some relevance in taking the other view is that financial interests of some of the existing operators are likely to be affected to some extent. This by itself is no ground to take the view that the Regional Transport Authority in fixing the time-table should act in a quasi-judicial manner. AIR 1964 SC 1573, Ref.; AIR 1952 Mad 276 and AIR 1962 Madh Pra 7, Dissent. from.

(Paras 16, 29)

Therefore, the Regional Transport Authority is not bound to fix the time-table after giving opportunity of hearing to all the concerned operators. But this does not mean that the Regional Transport Authority will draw up the time-table without taking into account the views of the various operators plying on the route. Even when an authority is passing an administrative order, such authority exercises its discretion after taking into account all the relevant circumstances. The Regional Transport Authority may first pass a provisional order fixing the time-table and then it may hear the operators concerned and make such alterations in the time-table as may appear to it to be desirable. In doing all this, the Regional Transport Authority, though acting in administrative capacity, would only be doing its duty in a manner which will give satisfaction to all concerned and it is expected even of an ad-

ministrative authority that, while passing an administrative order it will not act in an arbitrary manner but in a manner which will take the interest of the public and those affected by that order. (Para 30)

The only object to fix a provisional time-table by the Regional Transport Authority is to allow timings for those vehicles which are likely to be kept idle if provisionally they are not given any timings by the Regional Transport Authority and such time-table is always subject to revision. There is nothing contrary to law in doing this. Where the number of persons affected by a particular decision is so great as to make it practically impossible for them all to be given an opportunity of hearing, the State Government may provide for a rule that a provisional time-table may be fixed by the Regional Transport Authority or by any person to whom the power is delegated by the Regional Transport Authority and then a hearing may be granted to all the operators who are likely to be affected by the time-table and final time-table may, thereafter, be drawn up. "Judicial Review of Administrative Action" by Smith, Referred with approval." (Para 31)

(D) Motor Vehicles Act (1939), S. 48 — Fixation of provisional time-table—Regional Transport Authority can fix such time-table. (Para 31)

(E) Motor Vehicles Act (1939), Ss. 64, 48 (as amended by Act 199 of 1956) — Right of appeal on ground of variation of condition — Variation in time-table is not variation of condition and as such no appeal lies on that ground. AIR 1962 Mys 215 and AIR 1962 Mys 161 and AIR 1960 Ker 111 and AIR 1959 Andh Pra 429 and AIR 1961 Madh Pra 367, Dissent. from.

Merely because a fixed time-table is mentioned in a permit, it cannot be said that by variation of the time-table, there is a variation in the condition of the permit because it is the exhibition part and punctuality aspect of the conditions which must be deemed to be the essential parts of these conditions and unless there is variation in these essential parts there is no variation in the eye of law. The condition is to be gathered from the entire language inserted in the permit. If a permit contains conditions in terms of S. 43 (3) (iii) or S. 48 (3) (iv) of the Motor Vehicles Act, then such language will be applicable to any time-table that may be fixed from time to time, and variation in the time-table will not be a variation in condition of permit and as such no appeal lies under S. 64 (b) of the Act on that ground. AIR 1957 Raj 312 (FB), Foll.; AIR 1952 Mad 515 and AIR 1958 Ker 339 and AIR 1953 Ker 341 and AIR 1960 Ker 359 and AIR 1966 Ker 137 and AIR 1959 Pat 580 and AIR 1956 Vin Pra 44. Rel. on; AIR 1962 Mys 215 and AIR 1962 Mys 161 and AIR 1960 Ker 111 and AIR 1959 Andh Pra 429 and AIR 1961 Madh Pra 367, Dissent. from.

(Paras 36, 38, 39 and 40)

Cases	Referred:	Chronological	Paras	
(1968) AIR 1968 SC 410 (V 55) =				
(1968) 1 SCR 635, Lakshmi Narain v. State Transport Authority, U. P. (Raj.), Hazarilal Radhey Shyam v. Regional Transport Authority, Udaipur			32	(1957) AIR 1957 Raj 312 (V 44) = ILR (1957) 7 Raj 806 (FB), Jairamdas v. Regional Transport Authority, Jodhpur 33
(1966) AIR 1966 Ker 137 (V 53) = 1965 Ker LT 1186, Karthikeyan v. R. T. A., Trichur			28	(1956) AIR 1956 Raj 142 (V 43) = ILR (1956) 6 Raj 751 (FB), Malikram v. Regional Transport Authority, Jaipur 19
(1964) AIR 1964 SC 1573 (V 51) = (1964) 7 SCR 1, Rajagopala Naidu v. State Transport Appellate Tribunal, Madras			38	(1956) AIR 1956 Vin Pra 44 (V 43), Anandram v. Damodardas 39
(1963) Civil Writ Petn. No. 267 of 1963. (Raj.), Jhalawar Transport Co. v. R. T. A.			22	(1952) AIR 1952 SC 192 (V 39) = 1952 SCR 583, Veerappa Pillai v. Raman and Raman Ltd. 11A
(1962) AIR 1962 Madh Pra 7 (V 49) = ILR (1959) Madh Pra 719, Kishorilal v. Secy., Regional Transport Authority, Rewa			27	(1952) AIR 1952 Mad 276 (V 39) = 1952 Cri LJ 616, A. Vedachala Mudaliar v. State of Madras 15, 26
(1962) AIR 1962 Mys 161 (V 49) = ILR (1962) Mys 60, K. Siddalingappa v. Revenue Appellate Tribunal			46	(1952) AIR 1952 Mad 545 (V 39) = ILR (1952) Mad 595, Kali Mudaliar v. Vedachala 37
(1962) AIR 1962 Mys 215 (V 49) = ILR (1962) Mys 74, N. Thimmiah v. Mysore Revenue Appellate Tribunal, Bangalore			26	D. P. Gupta and B. L. Maheshwari, for Petitioner in W. P. No. 465 of 1967; J. G. Chhangani, for Respondents Nos. 3 to 14; M. M. Tiwari, for Petitioner in W. P. No. 378 of 1967; A. L. Mehta, for Non-Petitioners Nos. 2 to 7; M. M. Tiwari, for Petitioner in W. P. No. 492 of 1967; Ramraj Vyas, for Non-Petitioners Nos. 4 to 9; B. L. Maheshwari, for Petitioner in Special Appeal No. 21 of 1967; J. G. Chhangani, for Respondents.
(1961) AIR 1961 Madh Pra 367 (V 48) = ILR (1961) Madh Pra 247, N. J. Transport (P.) Ltd. v. S. T. A. Authority			38	BHANDARI, J.: These four cases raise similar questions of law in one form or the other and, therefore, they are decided by one single judgment. The first three cases are the writ applications under Article 226 of the Constitution and the fourth case is a special appeal under Section 18 of the Rajasthan High Court Ordinance from the judgment of a Single Judge.
(1960) AIR 1960 Ker 111 (V 47) = ILR (1960) Ker 172, K. V. Thomas v. State Transport Authority Kerala			39	2. We first take up Civil Writ Petn. No. 465 of 1967 viz. Kalu Singh v. Transport Appellate Tribunal Rajasthan and others. Briefly stated the facts of this case are that the petitioner is an operator on Bikaner-Nokha-Salasar route — 128 miles in length. His contention is that there are twelve non-temporary stage carriage permits granted to various operators including the petitioner on the aforesaid route who run four return services per day according to the time-table approved by the Regional Transport Authority, Bikaner. The non-petitioners Nos. 3 to 22 are the operators of Bikaner-Nokha route of 40 miles in length and is completely overlapped by Bikaner-Nokha-Salasar route. There are 20 buses performing 12 daily return services on this route in accordance with the time-table approved by the Regional Transport Authority Bikaner. The petitioner has also mentioned that there are other three routes, namely (1) Bikaner-Jaipur route, (2) Nokha-Sujangarh route, and (3) Salasar-Sujangarh route on which buses are plying by several permit holders. Bikaner-Jaipur route completely overlaps the Bikaner-Salasar route and the other two routes are completely overlapped by Bikaner-Nokha-Salasar route. The petitioner's case is that Bikaner-Nokha-
(1960) AIR 1960 Ker 359 (V 47) = ILR (1960) Ker 1239, Ninan v. Secy., State Transport Authority, Trivandrum			38, 38	
(1959) AIR 1959 SC 107 (V 46) = 1959 SCR 1440, Radheshyam Khare v. State of Madhya Pradesh			29	
(1959) AIR 1959 SC 694 (V 46) = (1959) Supp (2) SCR 227, M/s. Raman and Raman Ltd. v. State of Madras			22	
(1959) AIR 1959 SC 896 (V 46), R. Abdulla Rowther v. State Transport Appellate Tribunal, Madras			22	
(1959) AIR 1959 Andh Pra 429 (V 46), P. Satyanarayana v. State of Andhra Pradesh			38, 39	
(1959) AIR 1959 Pat 580 (V 46) = 1959 BLJR 353, Sukhdeo Kumar v. State of Bihar			39	
(1958) AIR 1958 Ker 339 (V 45) = 1958 Ker LT 110, P. C. Oommen v. Road Traffic Board Kottayam			37	
(1958) AIR 1958 Ker 341 (V 45) = 1958 Ker LT 410, N. Gopalan v. Central Road Traffic Board, Trivandrum			37	
(1957) AIR 1957 SC 232 (V 44) = 1957 SCR 98, New Prakash Transport Co., Ltd. v. New Suwarna Transport Co. Ltd.			22	

Salasar route is overcrowded particularly upto Nokha inasmuch as considerable number of buses are plying on the said route every day, there being 21 vehicles leaving Bikaner for Nokha every day and vice versa. The time-lag between the timings fixed for the departure of any two vehicles is comparatively very narrow as compared to the other two routes. The petitioner has further alleged that non-petitioners Nos. 3 to 22 submitted a joint application before the Regional Transport Authority, Bikaner, for grant of three more timings to them and for the change of the existing timings. The Regional Transport Authority published the substance of the aforesaid application in the Rajasthan Gazette dated 7th July, 1966 in accordance with the provisions of Section 57 (8) of the Motor Vehicles Act (hereinafter called the Act) inviting objections in respect thereof within a period of 30 days of the publication. The petitioner submitted objections against the aforesaid application. The Regional Transport Authority, Bikaner, without giving notice of hearing to the petitioner and behind his back passed an order by circulation on 19th September, 1966 increasing the number of services on the Bikaner-Nokha route from 12 to 15 and also altering the timings of the existing services — the result of which was that one of the existing services was closed, while four new services were created. This caused great inconvenience and hardship to the petitioner and the other operators of the Bikaner-Nokha-Salasar route. The new timings came in conflict with the timings of the buses plying on Bikaner-Nokha-Salasar route. The petitioner, when he came to know of the resolution of the Regional Transport Authority, filed an appeal before the Transport Appellate Tribunal against that resolution. This appeal was dismissed by the Transport Appellate Tribunal on the 1st August, 1967 on the ground that no appeal lay against the order of Regional Transport Authority altering the timings of services. The petitioner has contended in this writ petition that in dismissing the appeal of the petitioner, the Transport Appellate Tribunal had refused to exercise jurisdiction vested in it and has prayed that the order of the Transport Appellate Tribunal be quashed and it be directed to hear the appeal and decide it according to law. In the alternative, it is urged that by a writ of certiorari or any other writ or direction, the order of the Regional Transport Authority Bikaner dated 19th September, 1966 be quashed as that authority passed that order without affording the petitioner an opportunity of hearing as required under Section 57 of the Act.

3. Notice of this writ petition was given to the opposite parties. A reply has been filed by non-petitioners Nos. 3 to 22. They have stated that no objection was filed by the petitioner before the Regional Transport Authority Bikaner in respect of the ap-

plication filed by the answering non-petitioners, the substance of which had been published in the Rajasthan Gazette. It is contended that the Regional Transport Authority, Bikaner, was perfectly justified in law in deciding by circulation whether the application of the non-petitioners should be allowed or not. It is also contended that the petitioners had no right of appeal to the Transport Appellate Tribunal as there was no variation of the conditions of the permit granted to opposite parties Nos. 3 to 22 and as such the Transport Appellate Tribunal was justified in rejecting the appeal of the petitioner on the preliminary point.

4. In essence, the following two questions arise for our consideration in this writ petition:

(1) Whether the Regional Transport Authority Bikaner was bound to act in a quasi judicial manner in deciding the application for the grant of three more timings of non-petitioners Nos. 3 to 22.

(2) Whether the order of the Regional Transport Authority, dated the 19th September, 1966 which is Annexure 3 amounted to a variation of the conditions of permits of non-petitioners Nos. 3 to 22 and as such an appeal lay to the Transport Appellate Tribunal.

5. The petitioner filed an appeal against that order to the Transport Appellate Tribunal under Section 64 (b) of the Act.

6. We first take up the first question. Chapter IV of the Act provides for control of transport vehicles. Under Section 44 of the Act, the Regional Transport Authority Bikaner was constituted and it was to exercise and discharge the powers and functions conferred by or under Chapter IV of the Act. Section 46 lays down that an application for a permit in respect of a service of stage carriage or to use a particular motor vehicle as a stage carriage shall, as far as may be, contain the following particulars, namely—

(a) the route or routes or the area or areas to which the application relates;

(b) the number of vehicles it is proposed to operate in relation to each route or area and the type and seating capacity of each vehicle;

(c) the minimum and maximum number of daily services proposed to be provided in relation to each route or area and the time table of the normal services;

(d) the number of vehicles intended to be kept in reserve to maintain the service and to provide for special occasions;

(e) the arrangements intended to be made for the housing and repair of the vehicles, for the comfort and convenience of passengers and for the storage and safe custody of luggage;

(f) such other matters as may be prescribed.

7. Section 47 envisages that an application may be made for one permit in res-

pect of a service of a number of stage carriages or it may be made for a permit in respect of one particular motor vehicle. Rule 83 of the Rajasthan Motor Vehicles Rules (hereinafter called the Rules) provides for the form of application for such permits. It has been provided that the application for a permit in respect of a particular stage carriage will be in the form P. St. P. A., and in respect of a service of stage carriages in form P. St. S. A. The forms of permits as provided under Rule 84 provide two different forms. When the application is for a permit in respect of the service of stage carriage, the maximum number of services which the applicant is to ply at any one time under the terms of the permit and also the maximum number of vehicles and the minimum number of daily vehicle trips are to be mentioned in the application. Reference in this connection may be made to items 5 and 6 of Form P. St. S. A. But these particulars are not to be mentioned in respect of an application for a permit in respect of a particular stage carriage. Reference may be made to Form P. St. P. A. This distinction is also there in the two kinds of permits to be issued. The form of permit in respect of a particular stage carriage is form P. St. P., while the form of permit in respect of service of stage carriages is Form P. St. S. In the latter, the type or types of vehicles to be used on the service is given in the permit, one permit being sufficient for a number of vehicles. Rule 84 provides that one copy of Part B of the permit shall be issued in respect of every vehicle authorised by the permit and where the permit relates to more than one vehicle each such copy shall carry, in addition to the number of the permit, a separate serial number contained in brackets after the number of the permit.

8. Section 48 provides for grant of stage carriage permit. The relevant part of this section runs as follows:

"48. Grant of stage carriage permits.

(1) Subject to the provisions of Sec. 47, a Regional Transport Authority may, on an application made to it under Section 46, grant a stage carriage permit in accordance with the application or with such modifications as it deems fit or refuse to grant such a permit:

Provided that no such permit shall be granted in respect of any route or area not specified in the application.

(2) Every stage carriage permit shall be expressed to be valid only for a specified route or for a specified area.

(3) The Regional Transport Authority, if it decides to grant a stage carriage permit, may grant the permit for a service of stage carriages of a specified description or for one or more particular stage carriages, and may, subject to any rules that may be made under this Act, attach to the permit any one or more of the following conditions, namely:

(i) that the service or any specified part thereof shall be commenced with effect from a specified date;

(ii) the minimum and maximum number of daily services to be maintained in relation to any route or area generally or on specified days and occasions;

(iii) that copies of the time-table of the service or of particular stage carriages approved by the Regional Transport Authority shall be exhibited on the vehicles and at specified stands and halts on the route or within the area;

(iv) that the service shall be operated within such margins of deviation from the approved time-table as the Regional Transport Authority may from time to time specify;

.....
(xii) that fares shall be charged in accordance with the approved fare table;

(xiii) that a copy of, extract from, the fare table approved by the Regional Transport Authority and particulars of any special fares or rates of fares so approved for particular occasions shall be exhibited on every stage carriage and at specified stands and halts;

.....
(xx) that the conditions of the permit shall not be departed from save with the approval of the Regional Transport Authority;

(xxi) that the Regional Transport Authority may, after giving notice of not less than one month,—

(a) vary the conditions of the permit;
(b) attach to the permit further conditions;

.....
(xxiii) any other conditions which may be prescribed."

9. Section 57 provides for the procedure in applying for and granting permits. The relevant parts of this section are as follows:

Section 57,

"(2) An application for a stage carriage permit or a public carrier's permit shall be made not less than six weeks before the date on which it is desired that the permit shall take effect, or, if the Regional Transport Authority appoints dates for the receipt of such applications, on such dates.

(8) An application to vary the conditions of any permit, other than a temporary permit, by the inclusion of a new route or routes or a new area or, in the case of a stage carriage permit, by increasing the number of services above the specified maximum, or in the case of a contract carriage permit or a public carrier's permit, by increasing the number of vehicles covered by the permit, shall be treated as an application for the grant of a new permit.

Provided that it shall not be necessary so to treat an application made by the holder

of a stage carriage permit who provides the only service on any route or in any area to increase the frequency of the service so provided, without any increase in the number of vehicles."

10. Rules 78 provides for the manner in which the business of the Transport Authorities is to be conducted. The relevant provision of this rule is Rule 78 (c):

Rule 78 (c)

"Save in the case of the hearing of an objection to the grant of a stage carriage permit or of a public carrier's permit and in the case of the hearing of a representation under sub-section (6) of Section 57 of the Act, the State or a Regional Transport Authority, as the case may be, may decide any matter without holding a meeting by the majority of the votes of members recorded in writing and send to the Secretary."

11. After setting out the relevant provisions, we now proceed to consider the first question. The question is whether a Regional Transport Authority is to act in a quasi judicial manner in approving a timetable. It may, however, be said at once that the Regional Transport Authority has two kinds of functions to perform. It has certain functions which it must perform in a quasi judicial manner and the other functions it can perform altogether in an administrative manner.

11-A. In *Veerappa Pillai v. Raman and Raman Ltd.*, AIR 1952 SC 192 (196), the Supreme Court has observed:

"The Motor Vehicles Act is a statute which creates new rights and liabilities and prescribes an elaborate procedure for their regulation. No one is entitled to a permit as of right even if he satisfies all the prescribed conditions. The grant of a permit is entirely within the discretion of the transport authorities and naturally depends on several circumstances which have to be taken into account. The Regional Transport Authority and the Provincial Transport Authority are entrusted under Sec. 42 with this power. They may be described as administrative bodies exercising quasi judicial functions in the matter of the grant of permits. Under Rule 3 of the Madras Motor Vehicles Rules, the Regional Transport Authority is called the Road Traffic Board and the Provincial Transport Authority is called the Central Road Traffic Board. These bodies or authorities are constituted by the Provincial Government.

The matters which are to be taken into account in granting or refusing a stage carriage permit are specified in Section 47. By delegation under Rule 134-A, the Secretary of the Road Traffic Board may exercise certain powers as regards the grant or refusal of stage carriage permits and under Rule 136, there is an appeal to the Board from these orders. Similar powers of delegation are vested in the Secretary to the Central Board and an appeal lies to the Central Board under Rule 143 (1). From

an original order of the Road Traffic Board there is an appeal to the Central Board and from the original orders of the Central Board to the Government, vide Rules 147 and 148. An amendment introduced by the Madras Act XX of 1948 and found as Section 64-A in the Act vests a power of revision in the Provincial Government.

Besides this specific provision, there is a general provision in S. 43A, that the Provincial Government may issue such orders and directions of a general character as it may consider necessary to the Provincial Transport Authority or a Regional Transport Authority in respect of any matter relating to road transport; and such transport authority shall give effect to all such orders and directions. There is, therefore, the regular hierarchy of administrative bodies established to deal with the regulation of Transport by means of motor vehicles.

Thus we have before us a complete and precise scheme for regulating the issue of permits, providing what matters are to be taken into consideration as relevant, and prescribing appeals and revisions from subordinate bodies to higher authorities. The remedies for the redress of grievances or the correction of errors are found in the statute itself and it is to these remedies that resort must generally be had. As observed already, the issue or refusal of permits is solely within the discretion of the transport authorities and is not a matter of right."

12. It is contended before us that an application to vary the time-table is to vary the conditions of a permit, and as such, it must be treated as an application for grant of a new permit and in deciding such an application, it is incumbent on the Regional Transport Authority concerned to follow the entire procedure laid down in Sec. 57 and to decide the application in a quasi-judicial manner after hearing the parties. We may, however, point out that Sec. 57 (3) is attracted only when an application is to vary the conditions of permit by inclusion of a new route or a new area or in the case of a stage carriage permit by increasing the number of services above the specified maximum. The application of non-petitioners Nos. 3 to 22 was not for inclusion of a new route or new area. It has to be examined whether it could be treated as an application to vary the conditions of a permit by increasing the number of services above the specified maximum. In this case, each of the non-petitioners Nos. 3 to 22 held a permit to use a particular motor vehicle as a stage carriage and none of them had a permit in respect of a service of stage carriages. In none of the permits of petitioners Nos. 3 to 22 was there any condition relating to the minimum or maximum number of services to be provided in relation to Bikaner-Nokha route. In our opinion, the application of non-petitioners Nos. 3 to 22 for increase in the number of trips cannot be deemed to be an

application for varying the conditions of their permits by increasing the number of services above the specified maximum. No maximum number of daily services was mentioned in any of their permits and this part of clause (8) of Section 57 is attracted only when the permit holder seeks to increase the number of services above the maximum number of services and not otherwise. In *Moolaram v. Regional Transport Authority Bikaner* reported in AIR 1967 SC 269, from which the special appeal is before us, it was contended on behalf of the petitioner before the Single Judge that when the number of services is to be increased by the Regional Transport Authority, the procedure prescribed under Section 57 of the Act is to be followed and reliance was placed on Section 57 (8). The learned single Judge overruled the contention raised in reply that Section 57 (8) will be attracted only when the Regional Transport Authority fixed the maximum number of services on the route by observing as follows:

"As I have observed above where only the time-table is fixed by the Regional Transport Authority and no option is given to run fewer services as envisaged in the time-table it is implicit that the minimum as well as the maximum number of services permitted is the number of services provided under the time-table. If this number is to be increased, Section 57 (8) will be attracted and the procedure prescribed under S. 57 has to be followed."

13. With great respect, we are of the view that Section 57 (8) of the Act will not be attracted unless in the permit a condition has been attached laying down the maximum number of services proposed to be provided in relation to the route. The Legislature has chosen to treat an application to vary the condition of any permit only when it is either for the inclusion of a new route or it is for increasing the number of services above the specified maximum. In the case of a new route, the permit holder is seeking to include in his route another length of route which was not included in his permit. Obviously there is good reason to treat such an application as an application for the grant of a new permit. This Court had even before the amendment of Section 57 (8) held that an application for inclusion of a new route must be deemed an application for a fresh permit. The other case to justify such treatment is in which it is prayed that the applicant be permitted to increase the number of services above the specified maximum. We have already examined Sec. 47 and the relevant rules for the form of application for permit and the form of the permit. It is only in the case of a stage carriage permit in which the maximum number of services to be performed have to be specified that the question of application of Section 57 (8) may arise and not to any other case. Ordinarily such a condi-

tion may be found in the permit for a service of stage carriages. There may be an exceptional case when there is an application for a permit to use a particular vehicle as a stage carriage and the undertaking is given that that vehicle will perform the minimum and maximum number of daily services. But unless the maximum number of services is specified in the permit, there is no occasion to apply provision of Section 57 (8). The reason is that in such a case the permit-holder must be deemed to have exhausted his permit if he was already performing services upto certain maximum number of services and if he wants to run more services, his application must be treated for the grant of a new permit. The observation of the learned Single Judge is that when by the time-table fixed number of services are to be run and no option is given to run more services, it must be taken that the maximum number of services permitted is the number of services provided under the time-table. This view, with great respect, is not acceptable to us specially when we find that under Sec. 48 (3) (ii) there is a specific reference that a condition in the following terms may be imposed:

"The maximum and minimum number of daily services will be maintained in relation to any route or area generally or on specified days and occasions."

We cannot ignore the word "specified" which definitely means that there must be a specific mention in the permit of the maximum number of services. In our opinion, Section 57 (8) will not be attracted unless in a permit the condition is attached laying down the maximum number of services in relation to a route.

14. It is next contended before us on behalf of the petitioner that the result of granting three more trips to non-petitioners Nos. 3 to 22 was as if they were granted three new permits on the Bikaner-Nokha route and, therefore, the application of the non-petitioners for granting more trips must be treated as if they had applied for the grant of three more new permits. This argument is obviously untenable, as such a request by the existing permit holder cannot be treated as a fresh application for the grant of a new permit unless the provisions of Section 57 (8) are attracted to it. In our opinion, this provision of the statute can be invoked only when a condition is attached to a permit laying down the maximum number of services in relation to a route. If such a condition is not there in the permit then application for allowing few more trips by the same vehicle or vehicles cannot be taken to be an application for fresh permit.

15. Learned counsel for the petitioner urged that even if the case of the petitioner is not covered by Section 57, still in the matter of drawing up or approving the time-table, the Regional Transport Autho-

city must act in a quasi-judicial manner, as, sometimes the time-table has very drastic effect on the rights of the existing permit-holders especially of the other routes which overlap the route in question and serious consequences may ensue therefrom by keeping one or few permit holders in an advantageous position by fixing their trip at a time when there is great rush of passengers, while the others may be ruined by giving them such timings when the passenger traffic is at its lowest. Learned counsel argued that such hardships can be obviated only when the Regional Transport Authority acts in a quasi-judicial manner and fixes the time-table after hearing the objectors. In this connection he pointedly drew our attention to the following observations of Subba Rao J. (as he then was) in *A. Vedachala Mudaliar v. State of Madras*, AIR 1952 Mad 276.

"But they contended that the Regional Transport Authority or other tribunals in the hierarchy are not exercising the function as quasi-judicial bodies in regulating timings in respect of the buses. They argued that the said authority in fixing the timings or modifying them later on is only performing an administrative act. I regret my inability to agree with their contentions. I have already pointed out that the change of timings though superficially appear to be innocuous may lead to the results which may affect the parties financially to a substantial degree. There cannot therefore be any distinction in principle why the Legislature should have made a distinction in regard to the character of the enquiry between the issue of a permit and the change of timings. Indeed one of the important particulars to be mentioned in the application is the time-table if any of the service to be provided. When that application containing that particular is given notice of to the persons interested or other authorities mentioned in Section 47 they are entitled to make their representations in respect of that time-table. Section 47 (2) empowers the Regional Transport Authority to reject a permit if it is satisfied that the time-table furnished may affect the speed limit prescribed by the provisions of the Act. But before it could do so it has to give an opportunity to the applicant to amend the time-table. After hearing the representations made and considering the matters contained in Sec. 47, the Regional Transport Authority can regulate the timings under Section 48. It could also make it a condition to the permit issued to any person that the time-table should be exhibited on his bus and its terms observed. Presumably in this case the observation of the time-table must have been made a condition of the permit. If fixing the time-table in the first instance could be made only by adopting judicial procedure, it is unreasonable to hold that under Rule 269 the Regional Transport Authority could modify the time-table in an admini-

strative capacity for if that be so the safeguards provided by the Legislature would be defeated."

16. We may at this stage point out that neither in the Act nor in the Rules any specific provision has been made how and in what manner a time-table is to be drawn up. Section 48 before its amendment by Act No. 100 of 1956 contained four sub-clauses. Clause (c) expressly provided that the Regional Transport Authority may regulate timings of stage carriage. Thus under the old law it was merely a regulatory duty cast on the Regional Transport Authority. It can be nothing more under the new amended Act. Neither under the new law nor under the old law, any specific provision was made as to how this duty was to be performed. At least, there is nothing to show that this duty is to be performed in a quasi-judicial manner. Under Section 48 we find reference to the time-table. Under Section 48 (3) (iii) it has been stated that the time-table must have been approved by the Regional Transport Authority. In sub-section (3) clause (iv), the words used are "approved time-table." These words no doubt signify that time-table is to be approved by the Regional Transport Authority. But neither these words nor any other provision in the Act or the Rules lay down the procedure for drawing up a time-table. Thus there is no statutory requirement that in drawing up a time-table, the Regional Transport Authority must act in a quasi-judicial manner.

17. We have to examine whether there are other circumstances from which it can be inferred that the Regional Transport Authority must act in a quasi-judicial manner in drawing up a time-table. This may be considered from different aspects such as (1) the nature of the duty performed, (2) the body by which this duty is to be performed and (3) its effect on the interests of permit-holders.

18. Coming to the nature of the duty to be performed by the Regional Transport Authority in drawing up a time-table, it may be pointed that for very justifiable grounds, the time-table approved by the R. T. A. at the time of the grant of a permit may have to be changed from time to time during the life of a permit and such a change may be justified from the point of view of the public convenience as well as the interest of the permit-holder. For example, if on a route some new permits are granted, then the old time-table of the existing permit-holders is likely to be changed. Then again, it may be required that new stoppages may be introduced on the route and this will also affect a change in the time-table. Even change in the weather in the year may affect the timings. A time-table of a permit-holder, when a permit is issued, is thus liable to change several times during the period for which his permit is valid which period is normally

three to five years. Under certain changed circumstances the timings given in the permits may lose all the significance and change in the existing time-table may become imperative. Thus the duty cast on the Regional Transport Authority to fix the time-table may have to be performed by it several times during the period of the validity of a particular permit. Then again at the time when there is either a Mela or a festival, it becomes the duty of the Regional Transport Authority to make arrangement for the passengers on such unusual occasions by providing more trips to the existing buses for the convenience and in the interest of the public. Sometimes to cope with the passenger traffic, even temporary permits are required to be granted by it. Thus we see that neither the R. T. A. nor the permit-holders in such unusual conditions can treat the time-table fixed by the R. T. A. as sacrosanct and if the traffic needs demand a departure from the existing time-table, the R. T. A. should not hesitate to discharge its duties towards the travelling public by sticking to the existing time-table.

19. There is yet another important aspect of this matter and it is that in most cases in this State, stage carriages are run not according to any fixed time-table granted to each permit-holder but according to the rotation in which his turn comes. Usually there are a number of permit-holders on a particular route and time-table is drawn up not with reference to the permits of particular vehicles but with reference to the number of services to be provided on that route and each vehicle performs the trip in rotation with the other. This method of performance of trips in rotation has been approved by this Court in the Full Bench in *Malikram v. Regional Transport Authority*, AIR 1956 Raj 142 (FB). It was not held to be in contravention of Rule 90.

20. All these considerations only go to show that the purpose of drawing up of time-table has to be taken very often during the period of validity of permit of stage carriage and in the case where rotation system is working, the only time-table that can be attached to the permit of permit-holder is that he would operate the service in rotation within such margin of deviation from the time-table as may be drawn up from time to time by the Regional Transport Authority for the route. For the application for grant of permit, it is sufficient if the applicant mentions that he will operate his service according to the time-table fixed by the Regional Transport Authority from time to time. In our opinion, there is nothing wrong in this. Rather it is much more realistic. An applicant when he makes an application, usually does not know full well, unless of course he is a lone man on the route, the timings for his trips at the time when he makes an application. When the permit is granted, it

may not be possible to give him any fixed time-table for his vehicle. He may have no vehicle at the time permit is granted and time may be granted for procuring a vehicle. A permit may be granted with the condition attached to it that he will operate the vehicle according to the time-table fixed by the Regional Transport Authority from time to time. In fact, this is what is being done in so many cases. For illustration we may refer to two permits granted to the permit-holders in *Sardar Gyansingh v. Regional Transport Authority*, D. B. Civil Writ Petn. No. 492 of 1967, wherein it has been mentioned that "the time-table to be observed punctually as fixed by the R. T. A." In the conditions attached with the stage carriage permit, it was mentioned as condition No. 1 that the permit-holder shall ply regularly the stage carriage on the fixed timings in the manner required by the Regional Transport Authority, Udaipur. The applicant *Gurbachansingh Kripalsingh* in their application also did not give any time-table for the grant of permit and had only mentioned that they will operate according to the time-table as fixed by the Regional Transport Authority. Similarly in writ petition No. 378/67 *Jankilal v. Regional Transport Authority Udaipur*, the permit granted mentioned "the time-table to be observed punctually as fixed by the R. T. A." The applicant *Jankilal* merely mentioned in the application that time-table was as per rules.

21. As we have pointed out, it may be not possible for the Regional Transport Authority to give a time-table just at the time when the application for permit is granted or even at the time when the permit is issued. The timings being liable to change from time to time, the course that is usually adopted by the R. T. A. is that it is inserted in the permit that the time-table as approved from time to time shall be observed. If we examine Section 48 (3) (xii), we find that the same is true with regard to fares and it has been pointed out that the condition that may be attached to a permit may be that the fare shall be charged in accordance with the approved fare table. This approved fare table will be liable to change from time to time. The same method may be adopted with respect to the time-table. There is nothing illegal in it.

22. Now we consider the matter from the stand point of the authority which has been charged with the duty of approving the time-table under the Act. The Regional Transport Authority exercises both administrative and quasi judicial powers. In this connection, we may refer to the following observations in *B. Rajagopala Naidu v. State Transport Appellate Tribunal, Madras*, AIR 1964 SC 1573 = 1964-7 SCR 1:

"This scheme shows that the hierarchy of transport authorities contemplated by

the relevant provisions of the Act is clothed both with administrative and quasi-judicial functions and powers. It is well settled that Sections 47, 48, 57, 60, 64 and 64-A deal with quasi-judicial powers and functions. In other words, when applications are made for permits under the relevant provisions of the Act and they are considered on the merits, particularly in the light of evaluation of the claim of the respective parties, the transport authorities are exercising quasi-judicial powers and are discharging those functions, and so, orders passed by them in exercise of those powers and in discharging those functions are quasi-judicial orders which are subject to the jurisdiction of the High Court under Article 226, vide *New Prakash Transport Co., Ltd. v. New Suwama Transport Co., Ltd.*, 1957 SCR 98 at p. 118 = (AIR 1957 SC 232 at p. 241), and *M/s. Raman and Raman Ltd. v. State of Madras*, (1959) Supp (2) SCR 227 = (AIR 1959 SC 694), and *R. Abdulla Rowther v. State Transport Appellate Tribunal, Madras*, AIR 1959 SC 896.

23. It has been further observed that the field covered by Sections 42, 43 and 44 is administrative and does not include the area which is the subject-matter of the exercise of quasi judicial authority by the relevant Tribunals.

24. The power of drawing up a time-table is to be gathered under Chapter IV of the Act. Section 48 (3) (iii) speaks of the exhibition of the time-table at specified stands and halts on the route within the area. It may be gathered that it is the Regional Transport Authority which is to fix the stands and halts, but in specifying stands and halts, the Regional Transport Authority will be exercising administrative and not quasi-judicial powers. Similarly, the word "specified" has been used in Section 48 (3) (ii), (ix), (x), (xiv), (xviii), (xix) in connection with many other things. All these things are to be specified by the R. T. A. in the exercise of its administrative powers and not quasi judicial powers. Since the Act has not specifically laid any procedure to be followed by the R. T. A. while drawing up the time-table and this power of fixing the timings is spelled out from Section 48 (3) (iii) of the Act on the parity of reasoning we can safely conclude that the power of fixing the time-table is the exercise of administrative power vested in the R. T. A. under Section 48 of the Act.

25. Next we proceed to consider in what manner the interests of the existing operators are affected if by drawing a new time-table by which the Regional Transport Authority has permitted more trips to some of the permit-holders. We may at the outset mention that, generally speaking, the interests of an existing operator are more or less likely to be affected if any new entrant comes in and to safeguard his interest, provision has been made under

Section 57 of the Act to hear him. When such a new entrant has come in and if on a particular route the permit-holders are operating by rotation, financial interest of any operator is not affected by variation in the time-table if the number of services is increased. Rather on the increase of number of services, every permit-holder plying vehicle on that route is financially put in a better position. It is only in a case when on a particular road there are various routes overlapping each other and it may be that number of trips are increased with regard to the operators on a particular route. The operators on the other route may be affected to some extent. But is it by itself a sufficient justification for holding that the Regional Transport Authority must exercise its powers after giving opportunity to all the operators concerned to have their say. Such operators cannot claim as a matter of right that the number of trips of the other operators cannot be increased. Their rights are not affected, though their monetary interests might be affected to some extent.

26. Let us now examine the case law on the subject. We have already mentioned that in AIR 1952 Mad 276, Subba Rao J. had taken the view that in fixing the timings, the Regional Transport Authority is performing a quasi judicial function. This case went in appeal to a Division Bench and the Division Bench of Rajamanar and Venkatarama Ayyar JJ., delivered the judgment on other points but left the question about the nature of the order of a Regional Transport Authority in fixing or regulating timings open.

27. The Madhya Pradesh High Court in *Kishorilal v. Secy. Regional Transport Authority Rewa*, AIR 1962 Madh Pra 7, has taken the view that under Section 48 (3) (iii) of the Motor Vehicles Act, fixing of time-table is a quasi-judicial act which should not be delegated by the Regional Transport Authority to their Secretary. In our humble opinion, this view does not appeal to us because there is nothing in Section 48 (3) (iii) showing that fixing of time-table is a quasi judicial act. This case was cited before a Division Bench of this Court in an unreported case *Civil Writ Petn. No. 267 of 1963 (Raj)*, *Jhalawar Transport Co. v. R.T.A.*, but the actual decision in that case is based on the ground that Secretary to the Regional Transport Authority in that case had no authority under the provisions of the Act to fix the time-table. It cannot be taken that the Division Bench approved of the view taken in *Kishorilal's* case, AIR 1962 Madh Pra 7, that the Regional Transport Authority must act in a quasi judicial manner in fixing the time-table.

28. There is yet another unreported case of this Court *Civil Writ No. 107 of 1967 (Raj)*, *Hazarilal Radhey Shyam v. Regional Transport Authority, Udaipur* in

which it has been observed that proceedings for variation of the time-table are quasi-judicial proceedings but there is no discussion on the point.

29. We have examined the matter carefully and for reasons which are summarised below, we are of the view that in the matter of fixation of time-table, the Regional Transport Authority cannot be said to be acting in a quasi-judicial manner.

(1) The main determining test for ascertaining whether an act authorised by statute is quasi-judicial or administrative act is whether the statute has expressly or impliedly imposed on the statutory body to act judicially (See Radhey Shyam Khare v. State of Madhya Pradesh, AIR 1959 SC 107). We have already pointed out that in the matter of drawing up the time-table no statutory duty has been cast on the Regional Transport Authority to act judicially. The main test for holding that the Regional Transport Authority should act in a quasi-judicial manner in drawing up a time-table is not satisfied.

(2) The duty of fixing a time-table has to be performed from time to time and sometimes in an expeditious manner and such a duty cannot be expected to be performed in a quasi-judicial manner. Sometimes it is not possible to give a fixed time-table at the time when permit is granted or refused. At other times, no time-table is fixed for a particular stage carriage as in the case of a route in which the permit-holders are permitted to ply in rotation. The time-table is fixed not with reference to any particular stage carriage but with reference to the public needs and the various permit-holders are to ply their vehicles in rotation without reference to any fixed time-table with regard to each stage carriage.

(3) The provisions of the Motor Vehicles Act show that in the matter of approving a time-table, the Regional Transport Authority is merely regulating the running of the vehicles on a particular route. As against this, the only circumstance which has some relevance in taking the other view is that financial interests of some of the existing operators are likely to be affected to some extent. This by itself is no ground to take the view that the Regional Transport Authority in fixing the time-table should act in a quasi-judicial manner.

30. We, therefore, hold that the Regional Transport Authority is not bound to fix the time-table after giving opportunity of hearing to all the concerned operators. By this we do not mean to say that the Regional Transport Authority will draw up the time-table without taking into account the views of the various operators plying on the route. Even when an authority is passing an administrative order, such authority exercises its discretion after taking into account all the relevant circumstances. The Regional Transport Authority may first pass a provisional order fixing the time-table and then

it may hear the operators concerned and make such alterations in the time-table as may appear to it to be desirable. In doing all this, the Regional Transport Authority concerned, though acting in administrative capacity, would only be doing its duty in a manner which will give satisfaction to all concerned and it is expected even of an administrative authority that while passing an administrative order, it will not act in an arbitrary manner but in a manner which will take the interest of the public and those affected by that order.

31. It has been contended before us that there is no power in the R. T. A. to fix a provisional time-table. The only object to fix a provisional time-table by the Regional Transport Authority is to allow timings for those vehicles which are likely to be kept idle if provisionally they are not given any timings by the Regional Transport Authority and such time-table is always subject to revision. In our opinion, there is nothing contrary to law in doing this. Smith in his treatise "Judicial Review of Administrative Action" while discussing the cases where the rule of audi alteram partem may be excluded has concluded by saying thus:

"The catalogue of exceptions is not exhaustive. Thus, it can hardly be doubted that the rule will be held to be impliedly excluded in a situation where the number of persons affected by a particular act or class of decision is so great as to make it manifestly impracticable for them all to be given an opportunity to be heard by the competent authority before the decision takes effect. The appropriate safeguard in such a case is to provide by statute an opportunity for persons who consider themselves especially aggrieved to be heard either before an administrative body or before one of the ordinary Courts after the decision has taken effect. A prior hearing is better than a subsequent hearing, but a subsequent hearing is better than no hearing at all."

If this safeguard as suggested by the learned author is adopted, the State Government may provide for a rule that a provisional time-table may be fixed by the Regional Transport Authority or by any person to whom the power is delegated by the Regional Transport Authority and then a hearing may be granted to all the operators who are likely to be affected by the time-table and final time-table may thereafter be drawn up.

32. We may also mention that there is a remedy provided in the Act itself whereby the persons who are adversely affected by a time-table approved by the Regional Transport Authority and that remedy is by a revision petition before the State Transport Authority under Section 61-A of the Act. The Supreme Court has recently interpreted Section 61-A in *Lakshmi Narain v. State Transport Authority*, U. P., AIR 1963

SC 410, and has taken the view that the word "order" in Section 64-A is very wide in terms and that the only condition necessary for filing a revision is that it should be against an order made by the Regional Transport Authority and against which no appeal lies.

33. Now we take into consideration the second question raised before us and it is whether variation in the time-table is a variation in the condition of service. If we hold that variation of time-table is a variation in the condition of permit, then the petitioner who is aggrieved against such variation shall have the right of appeal as laid down by this Court in *Jairamdas v. Regional Transport Authority, Jodhpur*, ILR (1957) 7 Raj 808 = (AIR 1957 Raj 312 F.B.) under Section 64 (b) of the Act. Some High Courts have not taken this view about the interpretation of Section 64 (b), but we are bound by our decision.

34. The argument that the fixation of time-table must be taken to be a condition of permit is based on Section 48 (3) which lays down that the Regional Transport Authority may grant a permit and may, subject to any rule that may be made under the Act, attach to the permit any one or more of the following conditions, namely:—

(iii) that copies of the time-table of the service or of particular stage carriages approved by the Regional Transport Authority shall be exhibited on the vehicles and at specified stands and halts on the route or within the area;

(iv) that the service shall be operated within such margins of deviation from the approved time-table as the Regional Transport Authority may from time to time specify;

35. In the instant case, we do not know what were the conditions attached to the permits of non-petitioners Nos. 3 to 22 as copies of their permits have not been placed before us. It has been urged that it may be presumed that the conditions that the copy of the time-table is to be exhibited in the manner provided in Section 48 (3) (iii) and that the service is to be operated within such margins of deviation from the approved time-table as the Regional Transport Authority may from time to time specify as laid down in Section 48 (3) (iv) were attached to their permits. Granting that this is so, the entire thing mentioned in Section 48 (3) (iii) is the condition of service and so also about the thing mentioned in Section 48 (3) (iv) and approval of a time-table by a Regional Transport Authority may be an act antecedent or even subsequent to the act of granting permit. Drawing up of a time-table or approval of such a time-table does not by itself become a condition of a permit. Further, there is nothing wrong when in the permit it is mentioned as a condition that the copies of the time-table of a particular stage carriage as the Regional Transport Authority may from time to time fix shall be

exhibited on the vehicle and at the specified stands and halts within the area. Similarly, there will be nothing wrong in attaching the condition to a permit that the service shall be operated within particular margins of deviation from the time-table approved from time to time. As a matter of practical necessity, conditions, if attached in the above form, would be much more convenient to the smooth working of the entire system of passenger transport on the road. If this is done, it cannot be said that if the time-table is varied, a condition of the permit is in any way varied, because the emphasis in the first condition is with regard to the exhibition and the emphasis of the second condition is with regard to punctuality. We have already drawn attention to condition 12 which provides for fares and that condition is to be put in the form "that fare shall be charged in accordance with the approved fare-table" and it may be presumed that approved fare-table means fare-table approved from time to time. In the case of fares, after granting a permit, fare may be increased or decreased, still it cannot be said that condition of the permit is in any way varied. What is required to confer a right of appeal on an aggrieved person under Section 64 (a) is that he must be aggrieved by any variation of the condition. Thus, unless there is variation of the condition, there can be no right of appeal. It may be that there may be reference to a time-table in the condition attached to the permit, but variation of the time-table may not amount to variation of condition of permit as discussed above.

36. We may go so far as to hold that merely because a fixed time-table is mentioned in a permit, it cannot be said that by variation of the time-table, there is a variation in the condition of the permit because it is the exhibition part and punctuality aspect of the conditions which must be deemed to be the essential parts of these conditions and unless there is variation in these essential parts there is no variation in the eye of law.

37. The Division Bench of the Madras High Court in *Kali Mudaliar v. Vedachala*, AIR 1952 Mad 545, has observed as follows:

"In our opinion, the time fixed by the Regional Transport Authority at the time of the grant of the permit is not one of the conditions of the permit. The sections above referred to clearly indicate what is meant by a condition attached to a stage carriage permit. Section 59 (3) mentions the conditions which should be attached to every permit and Section 48 (3) gives power to the Regional Transport Authority to attach to a permit any one or more of the conditions mentioned in sub-clauses (i) to (vi) of Section 48 (d). There may be also other conditions, but they should be in 'pari materia' with the conditions mention-

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